Legitimizing resistance?
International refugee law and the
protection of individuals resisting oppression

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Table of Contents

Abstract

This is an article-based doctoral thesis which examines the intersection between international refugee law and resistance. In particular, it studies how courts and tribunals, within various States that are party to the 1951 *Convention Relating to the Status of Refugees* and/or the 1967 *Protocol Relating to the Status of Refugees*, have responded to the asylum claims of resisters. This thesis shall show that three types of resisters have been granted refugee status: (1) armed resisters; (2) military personnel deserting on the basis of a selective conscientious objection; and (3) individuals challenging corruption and economic oppression. The thesis is divided into two parts.

The first part of the thesis posits that these decisions illustrate how individuals can act as agents advancing norms and principles founded in international law. Furthermore, it demonstrates how courts and tribunals through their decisions have legitimized the resisters' actions. It then proceeds to articulate how such decisions help to transform the dominant image of the refugee as a victim of persecution to something more complex and dynamic – someone who embodies both the attributes of victimhood and agency. The second part of thesis then examines and critiques a number of discrete issues that have arisen which effectively bar certain classes of resisters from obtaining asylum and in effect undermine the phenomenon discussed in the first part. It then proceeds to make suggestions about how to address these issues.

Résumé

Il s'agit d'une thèse de doctorat basée sur des articles qui examine l'intersection entre le droit international des réfugiés et la résistance de ces derniers. En particulier, elle étudie la façon dont les cours et tribunaux, dans les différents *É*tats qui sont parties à la *Convention de 1951 relative au statut des réfugiés et/ou au Protocole de 1967 relative au statut des réfugiés*, ont répondu aux demandes d'asile des résistants. Cette thèse démontrera que trois types de résistants ont obtenu le statut de réfugié: (1) les résistants armés, (2) les personnels militaire ayant déserté au motif d'une objection de conscience sélective, et (3) les personnes contestant la corruption et l'oppression économique. La thèse s'articule en deux parties.

La première partie de la thèse postule que ces décisions illustrent la façon dont les individus peuvent agir comme agents de promotion des normes et de principes fondés sur le droit international. En outre, elle démontre comment les cours et tribunaux à travers leurs décisions ont légitimé les actions des résistants. Elle procède ensuite pour expliquer comment ces décisions contribuent à transformer l'image dominante du réfugié comme une victime de persécution en quelque chose de plus complexe et dynamique - quelqu'un qui incarne à la fois les attributs d`une victime et d`un agent. La deuxième partie de la thèse examine ensuite et critique un certain nombre de questions difficultés qui sont apparues et qui empêchent certaines catégories de résistants d'obtenir l'asile et, au final sapent le phénomène discuté dans la première partie. La thèse propose dans un dernier temps des suggestions afin de résoudre les problèmes identifiés.

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Introduction

This thesis examines the intersections between international refugee law and resistance. Throughout history, individuals, groups and/or communities have engaged in various forms of resistance to challenge oppression by the state, its actors, as well as non-state actors. Resistance assumes many forms and is often waged for many different purposes. The consequences of engaging in resistance vary. For many, their efforts may result in persecution or a fear of persecution leading to a necessity to escape their own country. When resisters seek asylum under the 1951 *Convention Relating to the Status of Refugees* and/or the 1967 *Protocol Relating to the Status of Refugees*, and claim that they have a well-founded fear of persecution, have states been willing to grant it? If resisters have been granted refugee status, upon what basis has this taken place? Furthermore, what modes of resistance will qualify or disqualify someone for refugee status? For example, can an individual who adopts the use of force obtain asylum or are they barred? This thesis shall endeavour to answer these and other related questions.

While I shall set out the arguments in greater detail below, I shall state the main positions of this thesis now. First, this thesis shall demonstrate that states interpreting the *Refugee Convention* and/or *Protocol* have recognized that specific classes of resisters qualify or have qualified for refugee status. Second, in so doing, the decisions help to demonstrate the ability of resisters to act as agents in advancing international norms, principles and/or values. This is particularly the case with respect to human rights, humanitarian law, as well as norms against

corruption. Third, in recognizing that particular types of resisters may qualify for refugee status, courts and tribunals have conferred a certain degree of legitimacy to such resistance. Fourth, this phenomenon of protecting resisters helps to challenge a dominant stereotype of refugees as being passive and hapless victims of persecution. Fifth, a number of developments have been underway to undermine this phenomenon of qualifying resisters as eligible for refugee status. This thesis will tackle each of these developments and outline them further below in this introduction.

In this introduction, I shall do the following. I first define resistance so as to help frame some of the arguments that will be discussed later in this thesis. I then discuss the structure of this thesis, the principal arguments of each chapter and the methodologies employed. I follow this by situating this study within the context of current law and resistance literature.

I. Defining Resistance

As a starting point, I shall first define what constitutes resistance for the purposes of this thesis. I define resistance as constituting individual and/or collective acts that challenge the dominant or hegemonic power and authority of another individual, group and/or entity – regardless of whether such authority is rooted in or affiliated with state power.[1] While the notion of power (as well as the word "political) may be most strongly associated with state power, as I discuss

[1] Hegemonic power may be understood as the maintenance of dominant power exercised "not through the use of force but through having [the] worldview [of the dominant power] accepted as natural by those over whom domination is exercised." BS Chimni, *Third World Approaches to International Law: A Manifesto* (2006) 8 Int'l Community L Rev 3 at 15.

later in this thesis, I argue that significant power is also exercised in society by individuals and groups that are not connected to the state. When resistance is waged against non-state power, such opposition should be considered as "political" in its own right.

In this thesis, I focus on instances where resistance is waged against oppressive manifestations[2] of such dominant or hegemonic power.[3] Such resistive acts constitute, in and of themselves, forms of "resisting power" waged against other more dominant sources of power.[4] Resistive acts can embrace the open articulation of personal thoughts, beliefs and/or attitudes expressed through written, spoken and/or otherwise largely non-verbal means. As such, they capture

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[2] Oppression is characterized by unfair, arbitrary, discriminatory and/or otherwise harsh treatment imposed by an oppressor (individual, community, civil society, entity and/or state) onto an oppressed being(s) (individual, community, civil society, entity and/or state) that limits the rights, freedoms, privileges and abilities of such oppressed to engage in lawful activities to further their well-being. In the case of oppression meted by states, the oppression may be launched through legislative means and/or executive initiative and legitimized by judicial sanction. Oppression waged not only those who are targets of the oppression but those individuals who are tasked with the duty of carrying them out and will likely face oppression for refusing to do so.

[3] Resistance is not always associated with actions seeking to oppose oppression but may seek to install or resurrect a type of oppression on another group or particular minority or minorities. The efforts of the Ku Klux Klan and White Citizens' Councils in the southern United States during the 1950s and 1960s emblemize these efforts and entailed various forms of violence (in the case of the Klan) as well as economic pressure on those who supported or were suspect of supporting civil rights for African-Americans. See Neil McMillen, *The Citizens' Council: Organized Resistance To the Second Reconstruction, 1954-64* (Urbana, Il: University of Illinois Press, 1994).

[4] See Joanne P Sharp et al, "Entanglements of Power: Geographies of domination/resistance" in Joanne P Sharp et al, eds, *Entanglements of Power: Geographies of Domination/Resistance* (London: Routledge, 2000) (explaining 'resisting power' as "that power which attempts to set up situations, groupings and actions which resist the impositions of dominating power. It can involve very small, subtle and some might say trivial moments, such as breaking wind when the king goes by, but it can also involve more developed moments when discontent translates into a form of social organisation which actively co-ordinates people, materials and practices in pursuit of specifiable transformative goals. Social movements of various sorts can be mentioned here, many of which co-ordinate everyday forms of resistance that still fall short of open confrontation, but some situations may eventually lead to violent actions. In order for all of these resistances to occur, power has to be exercised and realised, both by the leaders (in a form that can become dominating in its own right) but also in a more 'grassroots' fashion by everyday people finding that they have the power to do and to change things" at 3).

a wide variety of conduct including, *inter alia*, armed resistance, the refusal to carry out unlawful or even morally questionable behavior or directives, and calling attention to the wrongful acts of those with power.

I adopt this definition notwithstanding certain problems attributed to the theorization and defining of resistance. For instance Professor Paul Routledge has observed that "[the] complex, contradictory, and lived nature of resistance is frequently erased, or at best generalized, in theoretical approaches."[5] Routledge asserts that: "attempts to theorize resistance have been fraught with an intellectual taming that transforms the poetry and intensity of resistance into the dull prose of rationality."[6] Notwithstanding the legitimate concerns about taming the dynamic power of resistance through a potentially restrictive definition and theorization, it nevertheless becomes important to define resistance in order to understand what is meant by the term within a specific study, and particularly in relationship to when resistance encounters and often infringes upon legal norms.[7]

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[5] Paul Routledge, "A Spatiality of Resistances: Theory and Practice in Nepal's Revolution of 1990" in Steve Pile & Michael Keith, eds, *Geographies Of Resistance* (London: Routledge,1997) at 68-69

[6] *Ibid* at 69. Routledge identifies two forms of intellectual taming. The first, a teleological taming whereby resistance is confined to "a temporal dimension, determining in advance the path that resistance must take in order to realize certain universal principles such as Reason and Freedom. Hence we might assess resistance according to its progress along consensus approved trajectories, or precalculated curves of history." *Ibid.* The second intellectual taming that Routledge identifies is a "macropolitical taming whereby resistances are located within various empirical unities such as class struggle and economic contradictions in order to be considered progressive." *Ibid.* Such tamings "negate the local/particular and the heterogeneity within resistance in order to search for generalized explanations." *Ibid.* Accordingly such studies tend to discount or de-contextualize resistance from its spatio-cultural specificity. Given the diversity of resistance it might be useful to think of resistance as resistances. *Ibid*.

[7] *Ibid* (defining resistance for the purposes of the book chapter).

II. Overview of the Thesis and Methodology

This is an article-based thesis which is divided into two major parts. The first part is comprised of three chapters that were previously published in a single article.[8] These chapters have been revised and refined to include newer reflections and discussion of additional cases not discussed in the article. The second part of the thesis contains four separate chapters that are as yet unpublished.

With respect to the methodology employed throughout most of this thesis, I engage in a legal analysis of numerous court and tribunal decisions in several common law jurisdictions predominantly in the Global North where a substantial body of case law has developed with respect to refugee status determinations. This thesis includes analysis of such decisions from Australia, Canada, New Zealand, the United Kingdom and the United States. My legal analysis shall also include textual interpretation of legislation, international law, and other official documentation. Where applicable, the thesis also undertakes an analysis of relevant scholarly and other literature such as in this introduction, as well as chapters one and three. The focus of the analysis however is substantially on the primary source material mentioned above. I now set out the main arguments of each chapter.

The first part of this thesis shall demonstrate that courts and refugee tribunals interpreting the *Refugee Convention* and/or *Protocol* as implemented through national legislation have either granted refugee status or have deemed such persons to qualify for such status. They have done so on the basis that these

[8] Amar Khoday, "Protecting Those Who Go Beyond The Law: Contemplating Refugee Status for Individuals Who Challenge Oppression Through Resistance" (2011) 25 Geo Immig LJ 571.

resisters have a well-founded fear of persecution for reasons of an express or imputed "political opinion" as manifested through their conduct. Through an examination of the prevailing case law in several states party to either or both the *Refugee Convention* or *Protocol*, three discernible categories of resisters have qualified or have been granted refugee status – (1) resisters who use violence to confront authoritarian regimes; (2) military personnel who have refused to be associated in actions that violate basic international legal norms; and (3) individuals who have challenged state-based corruption and economic oppression.

In the first chapter, I draw from "resistance and law" literature as well as critical legal pluralism scholarship to argue that the decisions illustrate the capacity of individuals to act as agents in interpreting and enforcing international legal norms and/or principles. As some of this literature contends, while the acts of resisters may be unlawful vis-à-vis the domestic legal norms that are violated, such actions are nevertheless predicated on legal bases. Resisters act in accordance with an alternative idea of legal normativity and advance it through their conduct. This is particularly relevant when resistance pursuant to such alternative perspectives are undertaken to advance human rights, the laws of armed conflict and/or norms against corruption. These can be vital since states, which are the primary legal subjects of international law, can for a number of reasons act rather slowly in addressing violations of international norms (even assuming that some of the state responses may in fact be beneficial). Individual resisters, by contrast may be better placed to respond given the rapidity in which

violations can take place. The examples discussed in chapter one will help to illustrate this.

As part of my exposition on demonstrating the agency of resisters to interpret and enforce the norms in principles in question, I situate each case within their factual background so as to provide sufficient context for why their resistance was justified. I also draw on cases where judges and tribunals have reproduced transcripts of testimony or passages of written submissions to recover some of the voices of these resisters and the reasons for why they engaged in actions they did. These are important for they demonstrate that the conduct of such resisters are not random acts engaged in for merely personal gain that just happen to be beneficial to the advancement of international law, but are intended to advance its norms and principles in some fashion.

While the focus of the first chapter is on the individual resisters as legal agents, chapter two is focused on how the courts and tribunals view such resistance. I argue they have legitimized the actions of these resisters by granting or qualifying them as eligible for status. I contend that evidence of such legitimization comes through in particular ways. First, it can be evidenced through a broad interpretation of what constitutes a "political opinion" which extends beyond just mere verbal articulations of a political opinion to acts of resistance which manifest such political opinions. However, it is important to emphasize, particularly with respect to armed resistance and desertion, these would normally be characterized as criminal, and in some cases treasonous acts. Nevertheless, courts and tribunals have recognized that despite their possible characterizations

as such, they are still actions that may be mitigated or even excused under the circumstances and thoroughly political in nature. Courts and tribunals have recognized that with respect to armed resisters and military deserters, any punishment or prosecution would amount to persecution and an improper exercise of state sovereignty. This is distinguishable from cases where courts and tribunals may determine that a particular punishment may be excessive and disproportionate to the crime committed. In such cases, there is not necessarily any legitimization of the resistance in question so much as disapproval of the excessive punishment.

Second, the legitimization is further demonstrated by the ways in which courts or tribunals justify and articulate their decisions. As I shall demonstrate, the jurists conduct in-depth contextual analyses that provide a juxtaposition of the resisters' conduct and motives against the oppressions they are challenging. But more illustrative is that in the process of doing so, there is at times a discernible tone and use of language that hints at praise and connotes approval of the resistance in question.

In chapter three, I examine how the phenomenon of these resister-refugee cases can play an important role in reshaping the dominant construction of refugees as being largely hapless victims of persecution to embodying both attributes of victimhood and agency. In the first part of the chapter, I demonstrate how legal and scholarly discourse has tended to construct refugees as victims and that victimhood more broadly is attributed with passivity and the absence of agency. Drawing from some scholarly critiques that challenge this simplistic

vision of victimhood, I then argue that the refugee-resister cases offer a chance to disrupt and re-envision refugees as a complex amalgam drawing from both attributes of victimhood and agency. Through this, we may begin to view asylum-seekers who seek refugee status as potentially victimized resisters or as agentive victims.

In the second part of the thesis, chapters four to seven (inclusive) proceed to examine certain discrete issues that have emerged which demonstrate that the protections extended to resisters through international refugee law are not without qualification or limitation. Furthermore, I argue that while some limitations or qualifications may be justified, what has been adopted unduly restricts the ability of resisters to obtain the necessary protections offered by international refugee protection regimes.

Chapter four examines the impact of legislative developments in Australia, Canada and the United States and their impact on armed resisters seeking asylum. Through textual analysis of these statutory provisions, in addition to illustrations drawn from case law, I argue that such legislation targets for inadmissibility or exclusion all those who have essentially engaged in violent actions regardless of the political objectives, the military nature of the targets or the proportionate use of violence necessary to achieve their objectives. As will be demonstrated, the nature of the language used in the types of legislation mentioned deprives judges and tribunals from being able to distinguish between legitimate political crimes and serious non-political crimes or any other types of crime that target civilians and/or disproportionately use more violence than what is necessary to accomplish

a valid political objective. The consequence is that those who engage in violent actions against an indisputably authoritarian regime, and in so doing target only military personnel and employ only the sufficient amount of violence necessary to achieve their political goals are to be excluded or deemed inadmissible.

Rather than enact such broad statutory provisions, I argue that the *Refugee Convention* provides sufficient means to exclude those who engage in "serious non-political crimes". Article 1F(b) of the *Refugee Convention* excludes individuals about whom there are serious reasons to consider have committed "serious non-political crimes". By implication, those who commit "political crimes" were not to be excluded. Through an examination of the jurisprudence interpreting the concept of "political crimes", it becomes evident that courts and tribunals have been adept at screening out those who have targeted civilians and/or have used disproportionate violence. Indeed in the relatively few decisions where crimes have been designated as "political crimes", courts have engaged in detailed and reasoned explanations as to why the acts of the individuals in question have qualified as such. Because the concept of "political crimes" was first established in extradition law and continued to be developed throughout the twentieth century and has been referred to by courts and tribunals interpreting Article 1F(b), my analysis will also include discussion of numerous extradition cases.

In chapter five, I undertake an examination of how the term "political" within the framework of the *Refugee Convention* and *Protocol* is defined in a manner which effectively excludes resistance to non-state actors who have no ties

with the state. I argue that throughout much of the jurisprudence, the concept of the "political" within the framework of interpreting "political opinions" and/or "political crimes" has largely been limited to opinions or crimes against the state. To the extent that non-state actors are implicated in this definition, it is limited to those who have some tangible connection to the state or its agents. The consequence is that individuals or groups who exercise substantial and oppressive power in a given society, but who do not have ties to the government or are not attempting to compete for state-based political power are not considered political agents. This has an impact on asylum claims when the agents of persecution are such individuals or entities.

In justifying the articulation of a broader definition or understanding of the "political", I draw on formulations articulated by the United Nations High Commissioner for Refugees as well as other sources. As justification for an expanded approach, I turn to the example of certain non-state groups such as drug cartels and organized youth gangs situated in Central America. They provide a vivid illustration of how non-state entities that do not necessarily have ties to the state can exercise substantial power in a persecutory manner against those who challenge their authority.

Chapter six analyzes recent Canadian case law which has restricted the ability of United States soldiers who have deserted and have sought refugee status in Canada.[9] Specifically, Canadian courts have affirmed the presumption that the United States provides adequate state protection through the provision of

[9] While specifically situated in the Canadian context, the case law may have relevance to other countries where soldiers from democratic states seek asylum.

procedural safeguards within the military court martial system. I shall argue that such a presumption is problematic as the act of desertion from a state military organization, and particularly for the purpose of avoiding association with conduct violates international law, should be seen as a "pure political crime." As I shall discuss, the concept of political crimes was created, in part, as recognition that individuals who faced prosecution for such offences could not receive a fair trial. Those who have deserted to avoid association with military actions taking place in Iraq clearly engage in a political crime.

In the seventh and final chapter, I examine the potential impact of Article 1F(a) of the *Refugee Convention* with respect to deserting soldiers who, prior to desertion may have been forced to commit war crimes or crimes against humanity. Article 1F(a) provides that individuals about whom there are serious reasons to consider have committed crimes against peace, war crimes or crimes against humanity are excluded from being considered a refugee. As I shall argue, this presents a harsh standard where by once it is determined that an individual has committed such a crime, even as a result of threats to their life, the consequence is exclusion and deportation despite that the excluded individual may have a well-founded fear of persecution.

The chapter contends that the only real way to address the problem is through a revision to the *Convention* via the creation of another *Protocol* modifying the language of Article 1F(a). I argue that this is justified on various grounds. First, the history surrounding Article 1F(a) suggests that it was primarily intended to exclude Nazis and other World War Two criminals. This is based as

well on the fact that the *Convention* was not intended to apply to circumstances taking place as of January 1, 1951 or after. Second, a mandatory exclusion undermines the goals of international humanitarian law for it sends the message to soldiers who want to desert to avoid committing crimes that they will be barred from obtaining asylum. This leaves little incentive for them to desert. Third, and drawing from Professor James Hathaway, there is a utilitarian purpose for allowing other options apart from exclusion. Such applicants are able to give important information about crimes that have been committed, the details about which may not be readily available to the international community. Such information may be useful for governments, international institutions and other non-governmental groups in formulating responses. Fourth, deportation has been recognized by courts as a harsh consequence and this too in the absence of a determination that there is a well-founded fear of persecution. Where a person may have a well-founded fear of persecution, the already harsh consequences of deportation are heightened. Article 1F(a) does not permit tribunals or courts to consider concepts such as proportionality, exclusion followed by deportation are the consequences. Last, I argue that allowing for a balanced and contextual approach once it is determined that an asylum-seeker had committed a prohibited offence of the kind listed under Article 1F(a), courts or tribunals may then consider mitigating circumstances such as the existence of duress and arrive at a just conclusion other than exclusion.

III. Situating This Work

This thesis is situated amongst several works of scholarly literature relating to law and resistance. Some writings focus on the linkages between international law and resistance, while others examine the interplay between resistance and criminal law, and in particularly criminal law defences. There is also a body of literature that discusses aspects of resistance in the context of international refugee law. As an initial observation and this shall be demonstrated below, there is a clear emphasis on the value of resistance amongst many writers in challenging oppressive political and legal orders and furthermore that law has a role in legitimizing acts of resistance. As can be discerned from what has been stated thus far, this thesis falls within that line of thought.

For several writers, resistance can play a crucial role in strengthening international legal norms[10] and can be justified when societies, including democratic ones fail to live by their legal and political commitments.[11] Scholars such as Professor Frédéric Mégret stress that resistance perpetrated by individual non-state actors and civil society can prove to be an important and vital way to legitimize and practically enforce international legal norms locally.[12] Furthermore the role of individual resistance can help to alleviate international law's crisis of

[10] See e.g. Matthew Lippman, "Civil Resistance: Revitalizing International Law In The Nuclear Age" (1992) 13 Whittier L Rev 17.

[11] See Richard Falk, "Citizenship and the Modern State: The Spirit of Thoreau in the Age of Trident" (1985) 9 Austl J Legal Phil 254 ("[a]cts of resistance must be understood, then, both as a reflection of the current failure of democratic governance and as a creative effort designed to promote the revitalization of democracy" at 262-265).

[12] Frédéric Mégret, "Civil Disobedience and International Law: Sketch for a Theoretical Argument" (2010) 46 Can YB Int'l Law 143.

compliance and legitimacy while simultaneously providing civil disobeyers with a legal foundation and context premised on positive law.[13] Furthermore, Anne Orford, writing in the context of a critique on humanitarian interventions, suggests that more attention needs to be focused on the ways that individuals and groups may act as agents in their own survival and in defence of others.[14] What may be left out of these discussions are the possible consequences that may take place as a result of such resistance, including persecution. Some attention needs to be paid to the ramifications of engaging in resistance. Indeed if international law benefits from individuals taking actions that advance it, certainly, an examination of the ways in which international refugee law as a subset of international law can and has been mobilized to protect resisters should be accounted for.[15]

Because resistance may often involve the intentional violations of state norms, some literature focuses on the intersection of criminal defences in assisting resisters facing trial.[16] One of the principal expositors of this is Francis A. Boyle,

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[13] *Ibid*. See also Frédéric Mégret, "Not "Lambs to the Slaughter": A Program for Resistance to Genocidal Law" in Rene Provost & Payam Akhavan eds, *Confronting Genocide* (New York: Springer, 2011) at 195.

[14] Ann Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (New York: Cambridge University Press, 2003); Frédéric Mégret, "Beyond the 'Salvation' Paradigm: Responsibility to Protect (Others) v the Power of Protecting Oneself" (2009) 40 Security Dialogue 575.

[15] In many ways, the granting of asylum to individuals fleeing persecution could amount to a more practical application of the "Responsibility to Protect" doctrine, which entails a number of actions including but not limited to military intervention. See Brian Barbour & Brian Gorlick, "Embracing the 'Responsibility to Protect': A Repertoire of Measures Including Asylum for Potential Victims" (2008) 20 Int'l J Refugee L 533.

[16] Francis A Boyle, *Protesting Power: War, Resistance, and Law* (Toronto: Rowman & Littlefield Publishers, Inc, 2008). See also William P Quigley, "The Necessity Defense In Civil Disobedience Cases: Bring In The Jury" (2003) 38 New Eng L Rev 3; John Alan Cohan, "Civil Disobedience And The Necessity Defense" (2007) 6 Pierce L Rev 111; Bill Quigley, "The St Patrick's Four: Jury Votes 9-3 To Acquit Peace Activists Despite Admission They Poured Blood In Military Recruiting Center" (2004) 61 Guild Prac 111.

who while expounding persuasively on the notion of a right to engage in civil resistance, delves largely in a discussion of the elements of mounting a strong criminal legal defence, including a range of measures targeted toward increasing the chances of obtaining an acquittal.[17] Such writing provides useful strategies to resisters confronting criminal prosecution (particularly in the United States), but they have their limitations. Such strategies are not necessarily practical in all countries where in some cases the punishments that could be imposed may be disproportionately harsh and can be characterized as persecution. This is where the need to examine where international refugee law may be valuable in providing assistance to resisters.

The connection between international refugee law and the protection of resisters has certainly emerged in scholarly literature. There have been some significant and important contributions with respect to refugee status for selective conscientious objectors[18] as well as others in connection with armed resistance.[19]

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[17] This includes steps such as: (1) selecting a lawyer who believes in the resister's cause; (2) contacting an expert in international law who will testify as to the illegality of the state's actions and the reasons why the resister's action become justified if not necessary; (3) preserving the right to a jury trial thus relying upon lay jurors who may more freely ignore the application of the criminal law to the individual resister in the particular case. Boyle, *supra* note 16 at 35-71.

[18] Cecilia M Bailliet, Assessing *Jus Ad Bellum* And *Jus In Bello* Within The Refugee Status Determination Process: Contemplations On Conscientious Objectors Seeking Asylum" (2005) 20 Geo Immig LJ 337; Patrick J Glen, "Judicial Judgment Of The Iraq War: United States Armed Forces Deserters And The Issue Of Refugee Status" (2008) 26 Wis Int'l LJ 965; Martin Jones, "The Refusal to Bear Arms as Grounds for Refugee Protection in the Canadian Jurisprudence" (2008) 20 Int'l J Refugee L 123; Kevin J Kuzas, "Asylum For Unrecognized Conscientious Objectors To Military Service: Is There A Right Not To Fight?" (1991) 31 Va J Int'l L 447; Karen Musalo, "Conscientious Objection As A Basis For Refugee Status: Protection For The Fundamental Right Of Freedom Of Thought, Conscience And Religion" (2007) 26 Refugee Surv Q 69; Karen Musalo, "Swords into Ploughshares: Why the United States Should Provide Refuge to Young Men Who Refuse to Bear Arms for Reasons of Conscience" (1989) 26 San Diego L Rev 849.

[19] Walter Kälin & Jörg Künzli, "Article 1F(b): Freedom Fighters, Terrorists, and the Notion of Serious Non-Political Crimes" (2000) 12 Int'l J Refugee L (Supp) 46; Mark R Von Sternberg,

However, given the focused nature of journal articles, many are focused on specific developments, with many being additionally focused on jurisdiction-centric developments. Most if not all do not or have not taken a broader approach to looking at how international refugee law has intersected with resistance more broadly. For example, there appears to be little scholarly attention paid to the phenomenon of individuals resisting state corruption as a subject matter.

Perhaps the most striking limitation of this scholarship is the overwhelming focus on the position of courts and tribunals and the need to recognize an individual's right to conscientiously object to military action. This is of course not unimportant. However, they do not necessarily look at the individuals in question as agents interpreting and enforcing law through their refusal to participate in unlawful conduct. Absent in any substantial sense are the voices of those seeking asylum and the reasons for their objection.

Few articles on refugee law touch upon its legitimizing role with respect to forms of resistance that employ violence as a means to challenge tyrannical and oppressive power. One particularly notable article by Professors Walter Kälin and Jörg Künzli chart a normative argument about the legal permissibility of violent resistance under the *Refugee Convention* and the applicability of its exclusion clause relating the non-political offences to such resistance.[20] They ground their arguments largely on the notion of a natural right to resistance that has been recognized across numerous jurisdictions and temporal spaces, and in some more

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"Political Asylum and the Law of Internal Armed Conflict: Refugee Status, Human Rights and Humanitarian Law Concerns" (1993) 5 Int'l J Refugee L. 153.

[20] Kälin & Künzli, *supra* note 19.

recent instances, codifications in national law. They argue that in certain limited circumstances, such as opposition to those seeking to overthrow a constitutional order based on democracy, defence of one's own country against occupation and foreign rule, or for those fighting in an international armed conflict or in a war of national liberation, certain acts of violence must not be treated as crimes that would exclude an individual from benefiting from refugee protection. Furthermore, they contend that it is necessary to distinguish between the common criminal and the individual who uses justified and proportional violence against persons ordering the commission of a war crime or crime against humanity or who use proportionate violence in self-defence or in assistance to those against those responsible for committing.

Kälin and Künzli stake out a rather bold and important position – that individuals have a right to engage in violent but proportionate resistance in order to uphold and defend important international legal norms.[21] It is equally striking however that while individual agency is promoted, it is done for the most part in reference to various positive international legal norms that justify or permit, either explicitly or implicitly, such resistance. Identifying such norms is an important first step. However, absent in large part in Kälin and Künzli's article is any substantial discussion of the narratives of those who have engaged in such conduct and jurisprudence that might support their arguments, or for that matter

[21] This is of course not to suggest that conscientious objectors or scholars writing on them within the context of asylum law are obsolete. If anything it suggests perhaps that the individual resister who engages in violence is in many ways considered a taboo subject within refugee literature that seeks to present the refugee as victims or reserved for those who have not committed crimes, whatever the reason. Within this context, conscientious objectors may have broken some laws but are of a more palatable nature than those who have engaged in violence.

what factual circumstances of armed resistance will not disqualify an individual for protection. Kälin and Künzli construct the individual resister as a seemingly abstract figure that emerges but not one that is given detail or sufficient subjectivity. In this thesis, I shall seek to fill in this gap.

I now turn to the first chapter and examine the role of individual resisters as agents in advancing international law. The chapter begins with a dramatic example of how an individual can act as agent to intervene in prospective violations of international law.

Chapter One – Individual Agency and International Law

I. Introduction: Resistance as Prologue

ZH ("Z") was a young Bangladeshi military cadet assigned to patrol the Chittagong Hill Tracts ("CHT") in search of the Shanti Bahini ("The Peace Brigade").[22] The Bahini represented the armed wing of a political movement of indigenous communities living in the CHT that were seeking greater autonomy from the government of Bangladesh.[23] During the course of the unit's patrol, Z's commanding officer, a lieutenant, ordered the unit (comprised of other cadets) to fire upon a group of indigenous persons cutting wood in the forests. Z observed that the targets were neither armed nor posing any danger to the unit. He decided when given the order to fire his weapon into the ground. Nevertheless, his colleagues followed their orders. Roughly nine unarmed non-combatants were massacred. Over the next two days, the lieutenant expressed his desire to commit more atrocities. During this two-day period, Z came to realize that two of his colleagues shared his beliefs about the inhumanity and illegality of what had taken place and what the lieutenant sought to continue doing. When the patrol

[22] Refugee Appeal No 2248/94, *Re ZH* (NZ Refugee Status App Auth 1995).

[23] The Chittagong Hill Tracts are located in the southeastern area of Bangladesh. The area was traditionally the home of numerous indigenous and/or tribal peoples. After Bangladesh achieved independence, the government continued the policies of its predecessors, which included undermining the demographic superiority of the indigenous population by offering land to Bengalis who were not indigenous to the CHT. This created a backlash amongst groups such as the Bahini. In retaliation and as part of an overall counter-insurgency movement, the state deployed numerous soldiers to suppress the insurgency. This included the intentional killing of numerous indigenous peoples who were not engaged in the insurgency. Amnesty International, *Bangladesh: Human Rights in the Chittagong Hill Tracts* (13 January 2000) online: Refworld <http://www.unhcr.org/refworld/docid/3b83b6db9.html>; Mark Levene, "The Chittagong Hill Tracts: A Case Study in the Political Economy of 'Creeping' Genocide" (1999) 20 Third World Q 339 at 340-47; Bhumitra Chakma, "Structural Roots of Violence in the Chittagong Hill Tracts" (2010) 45 Econ & Pol'y Wkly 19.

came across a village of indigenous persons and non-combatants, the lieutenant ordered his unit to prepare to attack. Z and his two colleagues confronted the lieutenant about the orders. The lieutenant un-holstered his pistol and aimed it at Z. In response, Z's two colleagues then aimed their weapons at the lieutenant. Before long Z and his two colleagues were in an armed standoff with ten of their fellow cadets and their commanding officer. Through Z's persuasion, both sides backed away from each other. Once there were enough trees and bushes separating the two factions, Z and his colleagues fled the area, realizing that they would be punished for their actions, including, *inter alia,* desertion, pointing a weapon at a superior officer and disobedience.

Z escaped from Bangladesh and eventually sought asylum in New Zealand. The New Zealand Refugee Status Appeals Authority granted Z refugee status under the 1951 *United Nations Convention Relating to the Status of Refugees*.[24] The Authority determined that Z had a well-founded fear of persecution for reasons of his political opinion which he manifested through his actions and efforts to stop an impending massacre and violation of international law. The granting of refugee status for acts of desertion and other violations of military discipline is atypical for it is accepted that prosecution for breaches of neutral laws of general application is a legitimate exercise of state power. The exception to this, as will be demonstrated in this thesis, is where desertion is connected to a refusal to be associated with military conduct that is internationally condemned as being contrary to the basic rules of human conduct.

[24] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150 [*Refugee Convention*]; *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

Z's actions, however, were not merely an expression of his political (and inherently legal) opinion about the legality and ethics of the commands he was ordered to implement; they were also fundamentally important examples of the ways that individuals can contribute to the interpretation and enforcement of fundamental legal norms, including norms of international law and human rights law. In this case, the mass slaughter of an entire village consisting of unarmed non-combatants would have amounted to multiple fundamental breaches of human rights norms, such as the right to life,[25] as well as protections for non-combatants even in the context of an internal armed conflict.[26] Furthermore, given the state's noted efforts to undermine and attack the movement for autonomy,[27] the intended attack on the village might be seen as an example of a widespread campaign of persecution against the indigenous peoples in the region, and thus a crime against humanity.[28]

The decision to grant Z asylum also represents an important recognition for the need to protect individuals who engage in acts of resistance that challenge

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[25] *International Covenant on Civil and Political Rights*, 16 Dec 1966, 999 UNTS 171 [*ICCPR*] ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life" at art 6).

[26] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) ("The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited" at art 13(2)).

[27] See *supra* note 23.

[28] *Refugee Convention*, *supra* note 6, art 1F (provides that an individual will be excluded from being recognized as a refugee when there are serious reasons to consider that they have committed a crime against peace, a war crime, or a crime against humanity, a serious non-political crime or has been guilty of acts contrary to the purposes and principles of the United Nations. The Tribunal determined that Z was not excludable under article 1F because he fired his weapon into the ground during the first killings and confronted his lieutenant before the cadets could attack the village).

the established order and the authority of the sovereign.[29] Furthermore, Z does not fit the typical image of what a refugee is often considered to be – a hapless and passive victim of persecution.[30] Yet, does *ZH* represent a unique or anomalous decision? Is there something unique about a refugee tribunal granting asylum to an individual who has a well-founded fear of persecution for reasons that are directly related to his/her resistance? Similarly, is it exceptional for appellate courts to recognize a resister's actions as the foundation for his or her well-founded fear of persecution being grounded within a political opinion or some other enumerated ground? As I shall demonstrate in this thesis, the granting of asylum to those who have engaged in resistance to state (as well as to non-state) authority, in addition to recognizing that such individuals are eligible as a matter of law to such protection, represents a discrete but important development in the jurisprudence of international refugee law and international law more broadly.

[29] Acts of resistance that require individuals to stand out and challenge authority that perpetrates wrongdoing can be daunting and seemingly rare. During a laboratory study conducted by Stanley Milgram in 1974, volunteer test subjects were paired with a second individual (who unbeknownst to the test subjects was part of the testing team) where the latter was strapped to a machine that ostensibly delivered electric shocks. The second person would be asked a question and whenever they answered a question incorrectly, the volunteer test subject sitting in another room was directed to press a button that would administer the shock starting at a lower voltage, which would be increased incrementally with each incorrect response. The study, amongst other things was calculated to test the extent to which individuals would remain obedient to instructions to deliver such shocks while being able to hear the second person scream or adversely react from the other room after being administered the shock. A number of individuals continued to administer these shocks notwithstanding their belief that the shocks were real. Yet, in a second series of alternate tests, test subjects demonstrated a willingness to disobey instructions to administer shocks when they believed their decision was justified by similar refusals of other participants. In this variation, a volunteer test subject was paired with two others individuals, who were pre-instructed to disobey after administering a varying number and degree of shocks. Once the two other individuals refused to continue delivering shocks, it was then left to the volunteer subject to continue or stop. Amongst only a minority of volunteers was the test continued, while most elected to disobey and refuse to administer shocks. Thus, when given support or affirmation by individuals at the same rank or station, some may be inclined to refuse to obey questionable orders. See Herbert C Kelman & V Lee Hamilton, *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility* (New Haven: Yale University Press, 1989) at 148-66.

[30] This is a topic to which I shall address more substantially in chapter three of this thesis.

The modes of resistance in question include not only desertion and selective conscientious objection, but also, albeit rarely, instances of armed resistance, as well as challenges to state actors engaged in corruption in defiance of the rule of law.

In this chapter, I shall demonstrate through an examination of court and refugee tribunal decisions that individuals have the proven ability to resist oppression as well as articulate a vision of law or justice that furthers international law and principles. In leading up to this examination, I first analyze the international legal framework in which individuals exist, at best, as limited legal subjects. Despite the limited legal status that individuals hold, they may, I argue contribute more to the enforcement of international legal norms than states do or are willing to do in a number of circumstances. I then discuss some of the theoretical underpinnings which justify support for the use of resistance to advance norms and principles of international law. Lastly, I then proceed to examine the actual jurisprudence to argue that, as in *ZH* above, resisters have demonstrated an important ability to serve as substantial agents as well as *de facto* legal subjects in their own right articulating a vision of justice to the norm violations and systems of oppression to which they are challenging. In the cases discussed below, individuals were either granted refugee status or on appellate review they were deemed to qualify for refugee status on the basis that they had a well-founded fear of persecution for reasons of their political opinion.

II. Individuals and the Advancement of International Law

International and domestic legal systems provide a number of vital protections for individuals while placing limits on state and private power.[31] However, whether through individual, group or through institutional conduct, laws require human agency to make them relevant. Laws that are unenforced or ignored may have little practical meaning otherwise.[32] Although individuals are today considered legal subjects under international law under very limited circumstances, their role as actual agents in interpreting, enforcing and/or advocating for the observance of international legal norms can be invaluable. Agency may be manifested in a number of ways. It is reflected in individual observation of international norms, the refusal to follow orders or directions prescribed under domestic law that contravene international law, calling public attention to illegal activity, or directly confronting those engaged in violations of international law through non-violent or (where justifiable) violent resistance.

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[31] See e.g. *ICCPR*, *supra* note 25. *See also International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 108 Stat 382, 1465 UNTS 85 (entered into force 26 June 1987); *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, GA Res 2106 A (XX), 660 UNTS 195 (entered into force 4 January 1969) [*ICERD*].

[32] For instance, when the United States Supreme Court ruled in favor of desegregating public educational institutions, it required the orders of the (albeit initially reluctant) Eisenhower administration sending in the United States military to enforce the order against southern states who sought to resist the Supreme Court's rulings. See Tony A Freyer, "Enforcing Brown in the Little Rock Crisis" (2004) 6 J App Prac & Process 67 at 69; Azza Salama Layton, "International Pressure and the US Government's Response to Little Rock" (1997) 56 Ark Hist Q 257. Individual non-state actors also act as agents when filing actions asserting human rights violations against other non-state actors (including corporations) or governments that discriminate against them. The commencement of legal actions are acts of legal agency for human rights litigation and the determination of liability and assessment of damages would not happen without such human conduct.

The role of individuals as agents advancing international law and principles may seem odd given international law's traditional and still limited view of individuals and those too from the Global South.[33] International law emphasizes the primary role of states (as well as international organizations) as creators, interpreters and enforcers of international legal norms.[34] It is intended to govern the conduct of states and state actors, as well as relationships between and among states. As Antonio Cassese suggested, under traditional international law, individuals are like "puny Davids" confronted by the "Goliaths" and "real" subjects of international law, states.[35] Within the international legal system,

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[33] Indeed, as numerous scholars have stressed, international law was created and employed to structure and legitimize relationships of domination and subordination between colonial powers and the populations they subjugated. Furthermore, such scholars contend that this relationship of domination persists within the international legal system between states in the Global North and postcolonial states and civil societies in the Global South. See Peter Fitzpatrick, "Law's Infamy" in Peter Fitzpatrick, *Law as Resistance: Modernism, Imperialism, Legalism* (Burlington, VT: Ashgate Publishing Co, 2008) at 41; Antony Anghie, *Imperialism, Sovereignty and The Making of International Law* (New York: Cambridge University Press, 2004) at 3; Frédéric Mégret, "From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other'" in Anne Orford, ed, *International Law and Its Others* (New York: Cambridge University Press, 2006) at 265; BS Chimni, "Third World Approaches to International Law: A Manifesto" (2006) 8 Int'l Community L Rev 3; Sundhya Pahuja, "The Postcoloniality of International Law" (2005) 46 Harv Int'l LJ 459. This is, however, not to suggest that resistance by movements in the Global South have not played any role in the development of international law. See Balakrishnan Rajagopal, *International Law From Below: Development, Social Movements and Third World Resistance* (New York: Cambridge University Press, 2003) at 1. Rajagopal argues that international institutions have evolved in "ambivalent relationship with resistance" and that "human rights discourse has been fundamentally shaped – and limited – by the forms of Third World Resistance to development." *Ibid.*

[34] Even international declarations that give some space to the role of individuals to promote and respect international legal norms still emphasize and highlight the primary role of states in enforcing these norms. See *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, GA Res 53/144, UN Doc A/RES/53/144 (8 March 1999) ("Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice" at art 2).

[35] Antonio Cassese, *International Law* (New York: Oxford University Press, 2001) at 3-4; Thomas M Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (New York:

individuals are in large measure perceived as mere objects that do not have the legal power or capacity to create, interpret (or reinterpret) and/or enforce international legal norms.[36] This may be contrasted with domestic legal systems whereby individuals (both real and legally constructed) are legal subjects whose conduct and relationships law is intended to govern and regulate.

Challenging this notion of the limited role of individuals are historical and indeed legal precedents demonstrating the capacity of individual and civil society actors to act as legal agents and subjects.[37] International law has also evolved such that it recognizes non-governmental organizations as having a role in the development of international law.[38] International law has also developed with respect to viewing individual non-state actors as having a very limited *locus standi* in international law. Cassese noted that international law imposes obligations upon individuals, particularly in the context of armed conflicts, not to

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Cambridge University Press, 2002) at 183. The overwhelming presence and focus on the formation of states as well as the operations and institutions of states, and not to mention the emphasis placed on official sources, also form the center of gravity for academics and scholars within disciplines like history. See Gyanendra Pandey, *Routine Violence: Nations, Fragments, Histories* (Delhi: Permanent Black, 2006) at 42.

[36] However, see Cassese, *supra* note 35 at 79-85.

[37] Judge AA Cançado Trindade of the Inter-American Court of Human Rights has argued that states "are not, and have never been, the sole and exclusive subjects of international law." Trindade made his remarks as part of a decision recognizing the communal property rights of a particular indigenous community in Suriname. *Moiwana Community v Suriname, Preliminary Objections, Merits, Reparations and Costs*, Inter-Am Ct HR (ser C) No 124 at ¶ 6 (Separate Opinion of Judge AA Cançado Trindade) (15 June, 2005). See also Frédéric Mégret, "Not "Lambs to the Slaughter": A Program For Resistance to Genocidal Law" in René Provost & Payam Akhavan eds, *Confronting Genocide* (New York: Springer, 2010) at 195. Mégret discusses individual efforts in confronting genocidal violence through resistance. *Ibid* at 211-21. He asserts that resistance "puts human agency rather than structures (domestic or international) at the heart of what prevention [of genocide] should be about." *Ibid* at 196.

[38] Karsten Nowrot, "Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law" (1999) 6 Ind J Global Legal Stud 579.

engage in certain actions that violate international legal norms. Individuals, however, do not have the power to enforce these obligations and must turn to state authorities or, for example the International Criminal Court prosecutor, where applicable.[39]

Despite the vaunted role of states and international organizations as the primary subjects of international law, these subjects have not had the greatest success in preventing or responding to blatant violations of international norms, particularly with respect to micro-level incidents such as what took place in *ZH*. There are a number of possible reasons why states have failed to respond to blatant violations of international law. At its most callous perhaps is the lack of interest in or recognition of the intrinsic value and loss of the (specific) human lives that are being extinguished or, in the case of survivors, irrevocably altered.[40] This might arise out of disdain for the individuals targeted, the lack of any geopolitical interests, and/or out of political considerations that value the economic, political and diplomatic relationship with the persecutors to the detriment of those persecuted. History provides a long list of people who have been deemed to be at one time or another unworthy of protection – e.g. the Jewish population in Europe targeted for persecution and eventually extermination during World War Two who were turned away by American and Canadian officials

[39] Cassese, *supra* note 35 at 79-85.

[40] See e.g. Judith Butler's discussion on hierarchies of grief. Butler contends that there are certain people or groups of people whose loss (of life) does not trigger our collective sympathy because they are deemed to be inhuman or standing outside the pale. Judith Butler, "Violence, Mourning, Politics" (2003) 4 Stud in Gender & Sexuality 9 at 19-24.

(amongst others) when seeking asylum.[41] There have also been failures by states in the North to more aggressively respond to the plight of Tutsis massacred by Hutus in Rwanda in 1994[42] or Bangladeshi nationalists slaughtered by the Pakistani military during their effort to seek independence during the early 1970s.[43] This short sampling is of course far from exhaustive.

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[41] Although the exclusion was not total, highly restrictive immigration policies barred access to countless Jewish refugees seeking asylum into these two North American nations, amongst other states around the world. One of the most infamous cases of Jewish refugees being turned away included the roughly 937 passengers of the S.S. *St. Louis* who unsuccessfully sought asylum first in Cuba, and who were then eventually rejected by the United States and Canada. Many of these asylum-seekers were forced to return to Europe, where they were captured and subsequently murdered in Nazi concentration camps. See Irving Abella & Harold Troper, *None is Too Many: Canada and the Jews of Europe, 1933-1948*, 3d ed (Toronto: Key Porter, 2000) at 63-64; Saul Friedman, *No Haven For The Oppressed: United States Policy Toward Jewish Refugees, 1938-1945* (Detroit: Wayne State University, 1973) at 263-64; Esther Rosenfeld, "Fatal Lessons: United States Immigration Law During the Holocaust" (1995) 1 UC Davis J Int'l L & Pol'y 249. Amongst those who were admitted, some were placed into internments camps themselves. Kevin Bissett, "Internment Camp For Jews In Second World War A Little-known Piece of New Brunswick History" *The Toronto Star* (5 August 2013) online: The Star <http://www.thestar.com>.

[42] See Romeo Dallaire, *Shake Hands With The Devil: The Failure of Humanity in Rwanda* (Toronto: Vintage Canada, 2004) at 6. Dallaire, who served as the head of the United Nations peacekeeping mission in Rwanda, explains that the root of the failure to properly intervene and stop the mass slaughter of Tutsis in Rwanda stemmed from "the indifference of the world community to the plight of seven to eight million black Africans in a tiny country that had no strategic or resource value to any power." *Ibid*.

[43] At the time of the atrocities committed upon the population of what was then "East Pakistan," the Pakistani military was engaged in a widespread campaign of brutality against the civilian population. Such actions have been characterized as war crimes, crimes against humanity, and in the case of some scholars and observers, as genocide. At the time of these atrocities, the United States government was strongly allied to the government of Pakistan and did little to intervene in the Pakistani government's unlawful conduct in East Pakistan. A number of United States Foreign Service officers registered their dissent with the Nixon administration's failure to intervene through the "Blood Telegram" written by Archer Blood, a senior diplomat stationed in Dhaka. Following India's military intervention on behalf of the civilian population and the political forces seeking independence and the formation of the state of Bangladesh, the Nixon administration deployed its aircraft carrier, the USS Enterprise into the Bay of Bengal as a show of force against the Indian naval blockade. See Joe Holley, "Archer K Blood; Dissenting Diplomat" *The Washington Post* (23 September 2004) at B04, online: The Washington Post <http://www.washingtonpost.com>; US Consulate (Dacca) Cable, *Dissent from U.S. Policy Toward East Pakistan* (6 April 1971) online: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB79/BEBB8.pdf>; US Consulate (Dacca) Cable, *Selective genocide* (27 March 1971) online: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB79/BEBB1.pdf>; Niall MacDermott, "Crimes Against Humanity in Bangladesh" (1973) 7 Int'l L 476; Frank Chalk & Kurt Jonassohn,

But even where there is or might be some interest by states in assisting populations being targeted for atrocity or some other form of oppression that is clearly in contravention of international legal norms, there are also practical reasons why this might be challenging. Atrocities can take place rather swiftly, leaving interested states that would otherwise be willing to assist with little time to respond. Even where there might be sufficient warning, there is the reality that deployment and mobilization may still take considerable time. Furthermore, although genuine interest may exist to help vulnerable populations, states might be reluctant to send military assistance and directly intervene for a relatively small incident (although the victims would hardly see it as such) or even a series of single atrocities. Even in an era where the "Responsibility to Protect" doctrine has gained greater support in certain quarters,[44] the military intervention component of the doctrine is usually limited to instances where there is an impending humanitarian disaster of epic proportions and the use of military force is justified only as a last resort.[45] Therefore, it would seem that non-epic and/or microscopic

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The History and Sociology of Genocide: Analyses and Case Studies (New Haven: Yale University Press, 1990) at 394.

[44] The UN's 2004 report by the High Level Panel on Threats, Challenges and Change endorsed "the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent." UN High Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, UN Doc A/59/565 at ¶ 203 (2 December 2004). This was endorsed the following year by Secretary-General Kofi Annan, who asserted his belief that the international community "must embrace the responsibility to protect, and, when necessary… must act on it." UN Secretary-General, *Report of the Secretary-General of the United Nations for Decision by Heads of State and Government in September 2005*, UN Doc A/59/2005 at ¶ 135 (21 March 2005).

[45] *The Responsibility To Protect*: *Report Of The International Commission On Intervention And State Sovereignty* (Ottawa: International Development Research Centre, 2001).

moments of oppression (not rising to the level of a mass atrocity) do not warrant much international intervention.[46] This leaves individuals targeted by such oppression and those tasked with carrying it out seemingly few desirable options. They may openly resist the oppression with the possibility of severe punishment, including death; feign submission while carrying out clandestine acts of resistance; or entirely submit to the norms, allowing the oppressions to occur with the hope that the circumstances will change through some intervention of a third party.

III. Resistance and the Advancement of International Law

My argument in support of individuals bearing a *de facto* capacity to (re)create, (re)interpret, and (re)enforce international law stems from two streams of thought within scholarly literature. One looks to studies of resistance by individuals and states within the framework of international law and their role in interpreting and enforcing law through such resistance while the other examines the agency of individuals within the framework of law more generally. Within the first stream, Professor Frédéric Mégret, as mentioned in the introduction, stresses that resistance can prove to be an important way to legitimize and practically enforce international legal norms.[47] Furthermore, where civil disobeyers base their resistance on international legal principles, such bases may provide them with a

[46] See Hilary Charlesworth, "International Law: A Discipline of Crisis" (2002) 65 Mod L Rev 377.

[47] Frédéric Mégret, "Civil Disobedience and International Law: Sketch for a Theoretical Argument" (2008) 46 Can YB Int'l L 143 at 162-164. Oscar Schachter and others have made similar observations about the failure or weakness of enforcement being a general problem of the international legal system. See Oscar Schachter, *International Law in Theory and Practice* (Boston: Martinus Nijhoff Publishers, 1991) at 184; Franck, *supra* note 35 at 111.

more concrete legal foundation and context premised on recognized positive international law.[48] Furthermore, in addition to non-state actors taking part in resistance, there is also a critical role for individual state actors, whether as a low-ranking subaltern or by those holding a higher rank, to step in and exercise their resistive power against orders issued from above. Z's narrative and those of others discussed below illustrate this point.

The international legal system is no stranger to the potential of norm violation to occasionally challenge and even regenerate it, but in a very different context. Scholars have observed that certain state violations of international law, particularly those that violate the *UN Charter*'s prohibitions on the use of force falling outside of Security Council authorization or acts taken in self-defense, have nevertheless been justified and seen as legitimate by segments of the international community when committed in particular contexts.[49] Such contexts may include instances where the UN system has failed to address egregious wrongs recognized as such under international law, including, *inter alia*,

[48] Mégret, *supra* note 47 at 167-72. Mégret's arguments in support of resistance, however, are not limited to circumstances of non-violent civil disobedience, but may include justifiable uses of force as well. This is particularly so in the context of halting or preventing genocide. See Mégret, *supra* note 37 at 220-21. I would hasten to add however that the use of force should be considered an exceedingly exceptional measure necessitated by a compelling need and tempered by a number of factors. These include the objectives that the armed resisters are seeking to achieve, the overall of context of oppression that is being challenged, a consideration as to whether lawful and non-violent means are available, and whether the violence used is proportionate and tailored to accomplish the objectives.

[49] Franck, *supra* note 35. Franck observes that the use of force in self-help, "while prohibited by the [UN] Charter text, may be justified by the evident legitimacy of the cause in which self-help is deployed; and a widespread perception of that legitimacy is likely to mitigate, if not actually exculpate, the resort to force." *Ibid* at 132. See also Nathaniel Berman, "Legitimacy Through Defiance: From Goa to Iraq" (2005) 23 Wis Int'l LJ 93.

colonialism, the denial of self-determination and/or the commission of genocide.[50] One example of self-help was India's use of force to wrest control from Portugal of the latter's colonies in the Indian subcontinent that were geographically contiguous to Indian territories. India's justification for self-help was Portugal's continued practice of colonization in South Asia and the denial of self-determination of the colonized population or their ability to join the Indian union.[51]

Drawing from India's actions in Goa, Nathaniel Berman advances the argument that such violations of international law can be explained as examples of: (1) legal innovation through violations of legal norms; (2) legitimation through competing normative coherence; and/or (3) an act of legitimacy through defiance.[52] As I shall draw to some degree from Berman's examples in my discussions below, albeit in modified form so as to apply to resistance by non-state actors, I shall first discuss what each example entails.

In the first example – legal innovation through violations of legal norms – a state violates international law in order to execute small or large-scale change within the international legal system, as it exists at the time of the violation. Berman explains that while such actions violate (customary) international law in one sense, "they are very much pro-law actions 'in another sense' – attempts to

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[50] Franck, *supra* note 35 at 112.

[51] Berman, *supra* note 49*;* see also Franck, *supra* note 35 at 114-17. The former colonies held by Portugal in South Asia were ethnically South Asian in large part and geographically contiguous to Indian territory. It should be noted that while many Goans sought decolonization and the ability to join the Republic of India, many did not. Some even left Goa for Pakistan following India's annexation.

[52] Berman, *supra* note 49.

participate in the system by engaging in law reform, through inviting other states to adopt a new rule."[53]

Berman's second example – legitimation through competing normative coherence – looks to how resistive state actions, while constituting a violation of a particular international norm, generally coheres to a broader set of norms and principles under international law, thus rendering the putative violation mitigated or excused. Thus, for example, India's ouster of Portugal's control of territories in South Asia, instead of being interpreted as a violation of article 2(4) of the *UN Charter's* prohibition on the use of force, might be viewed in light of the overall goals espoused under the *Charter*. This would include the espoused goals of de-colonization and self-determination. Thus, a coherent view of the *Charter* accounting for the many values espoused therein might suggest in fact no such illegality in India's conduct.

Lastly, in his third explanation – an act of legitimacy through defiance – Berman argues that state conduct that violates international law may not be an attempt at reforming the legal system, but a bid for legitimacy through defiance of prevailing norms. This may come at the risk of severely undermining or perhaps destroying the international legal system or, more specifically, the *UN Charter*.[54]

Drawing from Berman's explanations, as I shall below, one can argue that similar processes can apply in modified form to the conduct of individual resisters

[53] *Ibid* at 98.

[54] Berman of course observes correctly that diplomats justifying the putative unlawful actions normally incorporate both strands of reform and open defiance in explaining or justifying their actions. Even in the case of defiance, without the intended goal of reform, states may not necessarily want the destruction of the entire international legal system for they will want some system to exist when normalcy is restored.

seeking to uphold various international (and domestic) legal norms through violations of legal norms.[55] There are instances where individuals acting within their local, regional or national jurisdictions must engage in resistance due to the failure of authorities or non-state actors to observe relevant norms, including any international laws that may apply. In some cases, individual resistance through norm violation may give rise to a change in legal norms through legislative or judicial means.[56]Applying Berman's second explanation to the conduct of individual resistance, such actions may be justified or seen as legitimate where the conduct coheres with other significant norms and values espoused within the international legal system and applicable in the national or local system that has jurisdiction over the individual or where the individual's breach took place.[57] At one level, and in certain circumstances, international law may be seen as part of

[55] There are a host of examples discussed by Franck. One of the more key examples in modern times was the NATO intervention in Kosovo to prevent ethnic cleansing of Kosovar Albanians by the Milosevic regime. While technically illegal, the NATO operation was considered legitimate in light of the purpose it was intended to serve: the prevention of mass killing. See Franck, *supra* note 35 at 163-70.

[56] A typical example of this through judicial means is where a resister violates a state law that prohibits a particular means of protest, e.g. flag burning. In challenging the constitutionality of such a prohibition and winning the case before an appellate court, the resister in question is able to transform the legal framework where any such prohibition is no longer permissible as it violates freedom of expression. See *Texas v Johnson*, 491 US 397, 109 S Ct 2533 (1988). However, as Peter Fitzpatrick has observed, implementing the objectives of resistance through law can be precarious and subject to subsequent maneuvers by state authorities and elites to limit an earlier or initial success. Peter Fitzpatrick, "Law as Resistance" in Fitzpatrick, *supra* note 33 at 35-39.

[57] *The Paquette Habana*, 175 US 677, 20 S Ct 290 (1900) ("[I]nternational law is part of our law . . . ." at 700). Further to this principle, Francis Boyle, a law professor and expert in defending civil resisters in the United States, argues that amongst other things, principles of international law should be incorporated and related to each element of common law and statutory defenses when defending resisters in United States courts. Furthermore, Boyle has argued that defense counsel in civil resistance cases ought to have evidence presented that the defendant(s) lacked the specific intent to commit the specific-intent crimes in question if the individual was seeking to prevent the government from committing crimes under federal law or international law. Francis A. Boyle, *Protesting Power: War, Resistance, and Law* (Toronto: Rowman & Littlefield, 2008) at 47-49, 51-53.

the domestic legal system of the resister, and as such, the resister's action may be seen as cohering with fundamental international legal norms that are seen as part of the domestic legal system.[58] However, even where an international legal norm is not binding on a state, an individual's resistance may be an attempt to offer an alternative vision of legal normativity and advance the norm's applicability.

Berman's third explanation similarly has applicability to individual resistance that seeks to destroy or severely undermine a legal and political system altogether. This can take place where a state operates as a largely criminal enterprise, engaged in widespread human rights abuses, and/or is a kleptocracy.[59] Individual resistance may be seen as clearly defying the existing normative order entirely, such as it exists, with the hope of achieving its demise. Having destroyed or irrevocably altered the former system, resisters may seek to institute a new legal system that is consistent with international legal standards.

The second stream of scholarly thought that I draw upon is the theoretical propositions of critical legal pluralism as elaborated by Professor Roderick A. Macdonald. Legal pluralist scholarship posits the multiplicity of legal orders that exists in every society and social field. Legal pluralists acknowledge that the state has norm-generative, interpretive and enforcement capacities but do not concede

[58] This is particularly so when we are dealing with norms of customary international law.

[59] As I shall discuss below, resistance is not only waged against state actors or a criminal state, but also non-state actors or entities that hold significant power and wealth sufficient to exercise control *de facto* legal authority in a given area. This power may be exercised in collusion with the state or in defiance of the state and its norms. Nevertheless, the operation of such informal legal systems and the imposition of punishments for defiance of their rules carry significant ramifications. Those who resist seek to destroy such legal systems. It is also worth noting of course that where the state opposes the existence of such criminal-based legal systems, it might be also argued that resistance to criminal oppression is in coherence with the legal norms of the state.

that the state holds a monopoly with respect to these capacities. Instead, legal pluralists assert that, "different legal regimes are in constant interaction, mutually influencing the emergence of each other's rules, processes and institutions. The structures and trajectories of interaction as between these multiple legal orders are varied and unpredictable."[60] Furthermore, to better understand the role of state law in a particular social space, "it is necessary to understand the character and operation of multiple regimes of unofficial law in the same field."[61]

While recognizing the multiplicity of various legal regimes that operate on individuals within a particular social space, legal pluralist scholarship tends to replicate some of the essential modalities of traditional monist-oriented legal scholarship.[62] That is, instead of the state or international institutions promulgating rules that are intended to regulate and govern individual or state conduct, legal pluralists in essence examine how other types of legal regimes not based in the state (or international institutions created by states) impact the individual.[63] In either case, however, the individual is simply the object upon whom law is imposed. In observing this, Roderick Macdonald and Martha-Marie Kleinhans have articulated the idea of a critical legal pluralism, which aims to

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[60] Roderick A Macdonald, "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism" (1998) 15 Ariz J Int'l & Comp L 69 at 77.

[61] *Ibid*. For instance if one focuses on the norms that regulate the conduct of military forces, particularly with respect to diminishing the occurrence of atrocities, one would look to the norms created at the domestic level, international law, as well as informal codes that are or may be subscribed to by the soldiers themselves. See Mark J Osiel, *Obeying Orders*: *Atrocity, Military Discipline & the Law of War* (London: Transaction Publishers, 1999) at 161-72, 247-61.

[62] That is, traditional legal scholarship, which focuses solely on the norms of the state or international bodies comprised of states.

[63] Martha-Marie Kleinhans and Roderick A Macdonald, "What is a Critical Legal Pluralism" (1997) 12 CJLS 25 at 29.

consider the individual as a legal subject – the irreducible site where multiple legal regimes interact (and sometimes clash).[64] Under a critical legal pluralism framework, individuals may be perceived in this formulation as agents capable of engaging in forms of law production, interpretation and enforcement. Kleinhans and Macdonald assert that a

> *critical* legal pluralism focuses upon the citizen-subjects of these hypothesized orders, and calls attention to the role of these subjects in generating normativity. It gives legal subjects access to and responsibility toward law. Legal subjects are "law inventing" and not merely "law abiding.[65]

This has particular relevance to an act of resistance that is waged against oppression. Such resistance may not necessarily be just a reaction to tyranny, but also the demonstration of legal subjectivity and thought. As Macdonald has expressed, "non-conforming behaviour in any particular [legal] regime is not simply a failure of enforcement or civil disobedience. It may be the reflexion of an alternative conception of legal normativity."[66] Mégret also observes that while resistance may involve law breaking, which may appear to be "a-legal," resistance is hardly a non-normative activity.[67] He posits that resistance is "often inspired by

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[64] *Ibid* at 46.

[65] *Ibid* at 38-39. To this I would add that individual legal subjects are also "law interpreting" and "law enforcing." A legal subject's actions may be in furtherance of a popularly accepted interpretation of a given norm as applied in a particular circumstance – an interpretation to which the legal subject may wholly subscribe to. However, where an interpretation of a given norm does not squarely apply to new circumstances, the legal subject may then interpret the existing norm(s) in such an innovative and radical way as to effectively invent new law. In the alternative, an individual may after interpreting and reflecting on an existing norm, decide to create a new and free-standing norm, separate from what already exists.

[66] Macdonald, *supra* note 60 at 79.

[67] Mégret, *supra* note 37 at 212.

an alternative vision of what law is or should be."[68] As I examine below, resisters who have confronted state or non-state oppression have done so on the basis of their own conceptions of legal (and political) normativity. Understanding what motivates these actions can play a crucial role in determining whether an unlawful or otherwise defiant act against oppression is justified or merely unlawful behaviour.

If resistance (as a quintessential form of non-conforming behaviour) reflects an alternate vision of legal normativity (contrasted against the vision(s) of those being resisted), how does one proceed to retrieve a resister's vision(s) of legal normativity? Recovering such visions and perhaps even the voices (that articulate the vision) of resisters is not a simple task.[69] As with most judgments in the refugee law (and wider legal) context, the immediate voices being conveyed are largely those of the judge(s) or tribunal official(s). In some cases however decisions include the voices and ideas of refugee claimants. Below, I examine how in several refugee law decisions, by courts and tribunals, we are given an opportunity to become acquainted with the resisters' visions of legal normativity and in some cases hear their voices. Their actual voices may emerge from testimony (selectively) quoted by the courts or tribunals in support of their decision. In other circumstances, a resister's voice and vision may surface from

[68] *Ibid*. Mégret further asserts that in the context of resisting genocide or genocidal activity, "there is a sense in which genocide resistance and prevention is a norm inspired activity, either because it targets laws directly or, more generally, because it posits itself as a challenge and alternative to that law." *Ibid*.

[69] As historian Gyanendra Pandey observes, "[subaltern] classes and disadvantaged and marginal groups do not leave behind accounts of their endeavors. They appear in the institutional archive only as traces, fragments, the suggestion of a voice – an echo." Pandey, *supra* note at 59.

quoted passages in the submissions to the courts or tribunals. In such cases, unless the asylum applicant is unrepresented by counsel and the text of their submissions has not been subject to feedback by other third parties, the resister's voice and visions of law will not be unmediated. However the mediating, intervening, and interlocutory function of legal counsel does not mean that the voice and articulation of a vision of a resister will necessarily be expunged. Furthermore, as subaltern historians have long discussed, the voices of marginalized communities have to be recovered through alternative methods using elite and dominant sources.[70]

In examining select resisters' vision of normativity within the refugee context, I situate and contextualize their articulations within a discussion of their specific narratives and the types of resistance they have waged. As shall be demonstrated at various points in this thesis, context plays an important role in understanding why a resister engages in resistance. As Justice Shore of the Federal Court of Canada explains, "recognition and acknowledgement of the details of an individual or individuals' background, especially in an immigration

[70] As historian Ranajit Guha has explained, similar methodological strategies have to be employed when dealing with histories of peasants and subaltern insurgencies in earlier centuries. Much of the available historical primary source evidence emerges from the writings of colonial officials who were interested in squelching peasant insurgency and their attitudes were reflected in these documents. Still, these documents could not exist but for the insurgents and it is possible in Guha's view "to read the presence of rebel consciousness as a necessary and pervasive element within that body of evidence." One of the ways in which this is done is through the reporting of rebel utterances originally used to serve the aims of counterinsurgency (through legal enactments, judicial proceedings and other actions by the state), which can for the historian years later also reflect and provide evidence of the agency and subjectivity of insurgents. Ranajit Guha, *Elementary Aspects of Peasant Insurgency in Colonial India* (Delhi: Oxford University Press, 1983) at 13-16. See also Pandey, *supra* note 35 at 59.

or refugee case, are essential."[71] Without the benefit of context, acts of resistance can be too easily dismissed as criminal acts rendering the asylum applicant ineligible or excluded for refugee status. Overlooking the circumstances and events within a narrative may lead to a travesty of justice leading to a rejection of an otherwise worthy application for refugee status.[72]

a. Armed Resistance and Authoritarian Regimes

There are a host of reasons why individuals engage in resistance to the policies and actions of authoritarian regimes. This includes the inability to participate in governance or elect officials to represent them and the deprivation of fundamental human rights, including legal, political, civil and economic rights. The impetus behind the actions of many anti-authoritarian resisters is a vision or (intersecting and mutually reinforcing) visions of law that includes the (re)establishment of democracy and the rights and legal mechanisms that are believed to accompany such governance. The rebellious outbreaks in Northern Africa and the Middle East that began in the early months of 2011 are but the most recent instantiations of defiance to authoritarian regimes.

Over the past half-century, various states and their populations have made the shift towards democratic governance and have had to do so at great sacrifice. In some, like Bangladesh, the move towards democratic governance in the early 1970s (from the dictatorial rule based in what was then West Pakistan) carried a

[71] *Junusmin v Canada (Minister of Citizenship and Immigration)*, 2009 FC 673, 81 Imm LR (3d) 97, 2009 CarswellNat 1915 (WL Can).

[72] *Ibid* ("The circumstances, situations and events within a narrative must not be overlooked, otherwise, a travesty to justice could be the consequence" at para 1).

rather heavy toll – leading to substantial losses of life and migrations, with many seeking protection in neighboring India.[73] With the military assistance of India, a new state was created in the subcontinent.[74] Given these sacrifices, it was with great dismay to many freedom fighters when a military regime overthrew the civilian administration in 1975.[75] Although a civilian administration was returned to power within a year under the aegis of the Bangladesh Nationalist Party, a military dictatorship was once again established in 1982 under General Hussain Ershad.[76] This gave rise to an armed resistance movement that challenged Ershad's regime in an attempt to restore a democratic regime.

For many freedom fighters of the 1971 war of liberation, this new military dictatorship betrayed the principles for which so many fought and lost their lives. Saad Uddin Ahmed was one such freedom fighter who also challenged the military dictatorship after 1982.[77] Ahmed became a member of the Bangladesh Nationalist Party ("BNP") and was a leader at the local level. When General Ershad banned all political activity, Ahmed and his fellow BNP party workers carried on their efforts in secret. This included armed resistance against the military regime that incorporated localized military strikes and ambushes. Ahmed observed: "With the military, we couldn't have just sweet conversation. They

[73] Some have even characterized these atrocities as genocide. See e.g. Chalk & Jonassohn, *supra* note 43 at 394.

[74] Sugata Bose & Ayesha Jalal, *Modern South Asia: History, Culture, Political Economy* (New York: Routledge, 1998) at 219. See also Franck, *supra* note 35 at 139-43.

[75] Bose & Jalal, *supra* note 74 at 236.

[76] *Ibid* at 237.

[77] *Ahmed v Canada (Minister of Employment and Immigration)*, 5 Imm LR (2d) 219, 1988 CarswellNat 42 (Imm App Bd, 1988) (WL Can).

wouldn't give us the democracy. So we thought of the other extreme in case we can get -- snatch our democracy back with fighting with the military [sic]."[78]

In addition to challenging the outlawing of political participation and elimination of democracy, part of Ahmed's motivation to fight against military rule (and the reason he eventually fled and sought asylum outside his country) was the harsh form of justice that occurs under martial law. It was a legal system that was rife with arbitrariness and devoid of concepts of natural justice and procedural fairness. In Ahmed's words,

> One thing in martial law is that even if you are not guilty, they can just come, get hold of you, say you are guilty, and they can punish you. In the military courts, if I go -- I am a poor man. I don't have any money to spend. I wouldn't get the justice. Some of these people, my opponent, if they have lots of money they will go [sic].[79]

Despite Ahmed's efforts at clandestine resistance, he was apprehended by the Bangladeshi military. He was tortured and seriously injured.[80] Ahmed was able to flee and seek refuge in the Chittagong Hill Tracts to hide amongst the guerrilla movements that Z's unit was trying to hunt down some years later.[81] Ahmed spent two years in the CHT convalescing and providing support to anti-government outfits while monitoring the political situation in the country. Ahmed eventually fled and sought asylum in Canada, which was granted in August

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[78] *Ibid* at para 5.

[79] *Ibid* at para 22.

[80] *Ibid*.

[81] *Ibid*.

1988.[82]

Ahmed's narrative of resistance illustrates a compelling vision of legal normativity and political justice. It emphasizes the importance and value of democratic governance and the rights attendant with such a polity, where individuals and political parties would be able to engage in political discourse openly and free from government censorship and physical harm.[83] The language that Ahmed deployed, however, suggested something more personal than democracy as an abstract notion. Democracy, in Ahmed's testimony, represented to him a type of property or entitlement interest, one that was fought for and earned in 1971, and which once experienced, was worth fighting to regain at serious risk. Furthermore, his reflections also suggest a vision that emphasizes the importance and value of legal institutions that do not engage in arbitrary abuse and summary executions of individuals.[84] While his conduct clearly violated the norms of the military government, drawing from Berman, it can be said that

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[82] *Ibid*.

[83] It is worth emphasizing that the High Court division of the Supreme Court of Bangladesh recently legitimized Ahmed's assertions against General Ershad's regime. In a decision issued by the High Court division on August 26, 2010, the court held unconstitutional the 7th Amendment to the Constitution of Bangladesh which ratified General Ershad's proclamation of martial law and regulations, orders and instructions issued by him. The Court stated: "The proclamation of martial law and its regulations and orders and all actions under this law shall remain illegal until Qayamat (the Judgment Day) [and]. . . was beyond the mandate of the constitution and will be invalid for eternity." The court further noted that "we cannot be oblivious to the fact [that] a usurper is a usurper . . . General Ershad also acted as a usurper to grab the state power. He cannot avoid responsibility of a usurper." Julfikar Ali Manik & Ashutosh Sarkar, "Ershad's Takeover Also Illegal" *The Daily Star* (27 August, 2010), online: The Daily Star <http://www.thedailystar.net>. See also Muhammad Yeasin, "High Court Declares 7th Amendment Illegal" *The Independent* (27 August 2010), online: The Independent <http://theindependentbd.com>; Haroon Habib, "Two Epoch-Making Verdicts" *The Hindu* (9 September 2010), online: The Hindu <http://www.thehindu.com>.

[84] Similar motivations animated the actions of the asylum applicant in *Dwomoh v Savah*, 696 F Supp 970 (SDNY 1988).

Ahmed's actions cohered with a broader framework of legal norms and spoke to the advancement of a number of enshrined rights in international law, particularly with respect to legal and political rights.[85] Once again drawing from Berman's example, Ahmed's resistance against military rule was not to reform Ershad's authoritarian legal system while retaining certain basic facets, but a wholesale defiance that sought to undermine it entirely.

b. Desertion and Selective Conscientious Refusal

Armed conflicts pose a number of legal and moral concerns for soldiers and officers expected to implement the orders of superiors. In addition, soldiers may be put in situations where they are expected to take part in unlawful actions initiated by fellow soldiers that are tacitly approved by superiors who fail to take remedial action or impose punishments for such conduct. Consequently, a number of court and tribunal decisions concern soldiers of various ranks who have engaged in desertion or other acts of resistance, as a result of their objection to being associated with a type of military action that is "internationally condemned as contrary to the basic rules of human conduct."[86] As I shall discuss below, these instances of resistance emerge out of a number of different contexts involving military engagements and implicate a variety of legal norms and considerations

[85] *ICCPR*, *supra* note 31 at art 25. The importance of civil and political rights should not be viewed in isolation from social and economic rights. Authoritarian states may engage in policies that have a deleterious impact on the social and economic interests and rights of their population. The ability to participate in governance and hold the state accountable may force governments to account for such social and economic rights. See Amartya Sen, *Development as Freedom* (New York: Anchor Books, 2000) at 146-59.

[86] United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/IP/Eng/Rev at para 171 (1992) [*UNHCR Handbook*].

rooted in international law governing these situations. Some involve soldiers who were ordered to carry out questionable or patently unlawful orders and refused to do so.[87] In other circumstances, individuals have refused deployment or re-deployment in a military conflict not sanctioned under international law or where the conduct of their military forces involved widespread abuse and violations under international law. Whatever the varying circumstances, the refusals in question demonstrate the ability of resisting soldiers and officers to consider and interpret relevant norms governing the facts before them and apply their reflections to these circumstances.

i. *Advancing the Jus Ad Bellum*

For numerous soldiers and civilians, the proper role of the military in modern times is to serve as an institution of defense (even if historically the opposite has also been the reality) and to be used solely as an instrument to stop unlawful aggression against one's own country[88] or an allied state.[89] Such beliefs

[87] The failure to refuse may also have legal ramifications in that a soldier may be prosecuted for their complicity or direct participation for serious international crimes such as genocide and crimes against humanity. Under international law, the defence of superior orders is not a defence with respect to manifestly unlawful orders. See *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90, art 33 (entered into force 1 July 2002). Even where obedience to orders does not lead to prosecution, a soldier may be excluded from obtaining refugee status for committing a crime against humanity or war crime. *Refugee Convention*, *supra* note 24, art 1F(a).

[88] There are a number of instances where soldiers have refused to partake in military operations based on the theory that the military is or ought to be an institution that meets the security needs of the state and civil society. For instance, in 2002, fifty-two Israeli soldiers declared their intention not to serve in the occupied Palestinian territories in a quarter page letter that appeared in the Israeli news daily, *The Ha'aretz*. In this letter, the soldiers asserted: "We, combat officers and soldiers who have served the State of Israel for long weeks every year, in spite of the dear cost to our personal lives, have been on reserve duty throughout the occupied territories and were issued commands and directives that had nothing to do with the security of our country, and that had the sole purpose of perpetuating our control over the Palestinian people." Ronit Chacham, *Breaking Ranks: Refusing to Serve in the West Bank and Gaza Strip* (New York: Other Press) at 2.

draw from the regime in the United Nations Charter.[90] Mohammed Al-Maisri's asylum case provides us with one such example of an individual who refused to participate in an unlawful international armed conflict initiated in violation of the U.N. Charter and where a well-founded fear of persecution based on such refusal entitled him to refugee status under Canadian refugee law.[91] The Court of Appeal made a formal declaration recognizing him as a refugee.[92]

Al-Maisri was a Yemeni citizen and member of his country's military reserve that was being clandestinely deployed to support Iraq following the latter's invasion of Kuwait in 1990.[93] Although the government of Yemen formally denounced Iraq's invasion of Kuwait, it objected to the United States-led military actions against Iraq and the Saudi Arabia's agreement to have foreign soldiers from Western states stationed in Saudi Arabia to protect it against a potential threat from Iraq.[94] As a non-Permanent Member of the Security Council

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[89] Through regional defense treaties, state collectives have agreed that an armed attack on any Party state to the treaty shall be deemed an attack on all of them. See *North Atlantic Treaty*, 4 April 1949, 63 Stat 2241, 34 UNTS 243 at art 5 (entered into force 24 August 1949) For other soldiers, it may be justifiable to be deployed to stop some major injustice transpiring in a third party state, even where there is no threat to their own security.

[90] *Charter of the United Nations*, 26 June 1945, 59 Stat 1031, TS 993, art 2, para 4 (entered into force 24 October 1945).

[91] *Al-Maisri v Canada (Minister of Employment and Immigration)*, 183 NR 234, 1995 CarswellNat 133 (WL Can) (FCA). See also *Re Le*, 1994 CarswellNat 2901 (WL Can) (Imm & Ref Bd (Ref Div)).

[92] *Al-Maisri*, *supra* note 91 at para 7.

[93] According to Al-Maisri's account, Yemen chose to send its soldiers to Iraq to provide support. Indicative of the clandestine nature of this deployment, Al-Maisri asserts that Yemeni soldiers were to hand over their identification before deployment into Iraq so that they would not be recognized as Yemeni soldiers. They were also instructed not to inform the media of their national origins. *Ibid* at para 2.

[94] Mark N Katz, "Yemeni Unity and Saudi Security" (1992) 1 Middle E Pol'y 117 at 124.

at the time, Yemen furthermore voted against or abstained with respect to any resolutions directed against Iraq in connection with Iraq's invasion of Kuwait.[95] Al-Maisri viewed this as a disastrous political decision as it led to a breakdown in Yemen's relationship with Saudi Arabia and the United States.[96] This also led to a policy shift by the Saudi government leading to a suspension of economic assistance to Yemen and the expulsion of an estimated one million Yemeni nationals employed in its country.[97]

In his asylum application, Al-Maisri asserted that his government's clandestine military support for Iraq was wrong, particularly in light of so many Yemeni citizens working in Kuwait, a country which also supported various public projects in Yemen.[98] Furthermore, Al-Maisri observed that Yemen's positions were also contrary to the interests and position of Saudi Arabia, which would in turn further isolate Yemen in the region.[99] Yet his reluctance to participate in his country's efforts to support Iraq extended well beyond political considerations and matters related to Yemen's economic security. He argued that while he was willing to defend his country from a threat of foreign aggression, he was unwilling to fight in defense of Iraq,[100] an act which only served to legitimize

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[95] *Ibid*.

[96] *Ibid*.

[97] Gwenn Okruhlik & Patrick Conge, "National Autonomy, Labour Migration and Political Crisis: Yemen and Saudi Arabia" (1997) 51 The Middle E J 554 at 559-60; Katz, *supra* note 94 at 124.

[98] *Al-Maisri*, *supra* note 91 at para 2.

[99] *Ibid*. As Okruhlik and Conge argue, the expulsion of so many Yemeni nationals from Saudi Arabia and the suspension of economic aid to Yemen had a serious impact on Yemen's economy. Okruhlik & Conge, *supra* note 97 at 560.

[100] *Ibid*.

Iraq's unlawful act of aggression in Kuwait. Like many others, Al-Maisri's desertion was not motivated by one single factor – namely the issue of Yemen supporting Iraq in an illegal action and thus contributing and being complicit in that illegality, but a confluence of legitimate political and economic factors. Still, it was his desertion respecting deployment in Iraq which was signaled as the basis for his claim for persecution. Although Al-Maisri's desertion violated Yemeni state norms respecting the duty of soldiers to obey orders, his desertion might easily be framed as adhering to international legal norms against aggressive military actions by one state (Iraq) against another (Kuwait). Such international norms would implicitly touch upon Yemen's decision to clandestinely send military reserves to Iraq to assist in an illegal military action.

ii. *Advancing the Jus in Bello*

In some military conflicts of an international nature, it may be less clear to some soldiers that the conflict that they are going to participate in is unlawful or of questionable legality.[101] Many believe, at first, the *bona fides* of their commanders and/or civilian leadership about the legality and reasons for going to war. Moreover, it is only once they are present and participating in military operations that they begin to ask questions about the legality of what is transpiring and the means and methods used to achieve certain objectives. The agency of soldiers to ask questions, however, may extend to both the legality of an armed

[101] Some, however, do not subscribe to this rhetoric at all and refuse to be deployed. Some are court-martialed, while others flee and seek asylum. Although this thesis does not touch upon the former group, some have been subjected to a court-martial. See e.g. the case of Camilo Mejia. Camilo Mejia, "Regaining My Humanity" *Truth Out* (17 February 2005), online: Truth Out <http://www.truth-out.org>.

conflict itself (*jus ad bellum*) as well as the nature of the means and methods employed during the course of military operations (*jus in bello*). Cases of resisters to violations of the *jus in bello* offer an interesting case study of a highly decentralized form of implementation of international humanitarian law.

One such individual, amongst others,[102] was Joshua Key, a United States soldier who was deployed in Iraq for several months before deciding to desert once he returned to the United States on furlough.[103] When Key was first deployed, he believed the official positions advanced by the Bush administration about the existence of weapons of mass destruction being stockpiled by Saddam Hussein and the need to bring democracy to Iraq.[104] He asserted, "whenever Iraq came I was ready to go and do my job for my family. I thought my family was threatened, I thought weapons of mass destruction [sic]; I was going to do my

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[102] See Laurie Goodstein, "A Soldier Hoped to Do Good, but Was Changed by War" *The New York Times* (13 October 2006) at A16, online: NY Times <http://www.nytimes.com>.

[103] In recent years, United States veterans who served in Iraq have come out and spoken against the United States occupation and the conduct of servicemen and women particularly with respect to Iraqi civilians and non-combatants. Unlike Key, many opted to complete their service before earning an honorable discharge. Many of the types of incidents that Key recounts, which I will discuss below, can be found in the following sources: Chris Hedges & Laila Al-Arian, *Collateral Damage: America's War Against Iraqi Civilians* (New York: Nation Books, 2008); Iraq Veterans Against The War & Aaron Glantz, *Winter Soldier Iraq And Afghanistan: Eyewitness Accounts Of The Occupations* (Chicago: Haymarket Books, 2008) [*IVAW*]; Dahr Jamail, *The Will To Resist: Soldiers Who Refuse To Fight In Iraq And Afghanistan* (Chicago: Haymarket Books, 2009).

[104] Joshua Key as told to Lawrence Hill*, The Deserter's Tale: The Story Of An Ordinary Soldier Who Walked Away From The War In Iraq* (Toronto: House of Anansi Press, 2008) at 57. Joshua Key's narrative is unique in that his story and the substantial details of his experiences in Iraq are chronicled in a book and provide a fuller account of what led him to resist further participation in the war. Many of these details were left out the decisions relating to his application; although, presumably, he included much of this information as part of his application for refugee status. Thus, I have relied extensively upon the account in his book to demonstrate his developing ideas on the legality and ethics of the war. Furthermore, it is helpful to recall that his testimony was viewed as credible and that other soldiers have corroborated the types of circumstances Key encountered in Iraq. See *supra* note 103.

duty."[105]

Key's views about the war shifted when no evidence of weapons of mass destruction emerged and when he observed the severe mistreatment of Iraqi civilians at the hands of U.S. military forces, including at times, himself.[106] Amongst several duties, Key was assigned to a platoon that would commit a series of late night raids on civilian homes in search of terrorists and weapons.[107] The timing of the raids was established to maximize a sufficient degree of surprise on the inhabitants, who were usually sleeping and whose shock would be heightened by the sudden and violent invasion into their home.[108] Key's principal role was to set explosives to blow open the front doors, which was followed by his colleagues rushing into the house with weaponry and yelling at the residents to get down on the floor.[109] Once all the residents were accounted for, they were removed to the exterior of the house, and guarded at gunpoint while the interior of

[105] *Key, Re*, 2006 CarswellNat 5485 at para 11 (WL Can) (IRB) [*Key I*].

[106] *Ibid* at para 26. Some have offered reasons for the phenomenon of Iraqi civilian mistreatment. See Peter Rowe, "Military Misconduct During International Armed Operations: 'Bad Apples' or Systemic Failure?" (2008) 13 J Conflict & Security L 165; Thomas W Smith, "Protecting Civilians…or Soldiers? Humanitarian Law and the Economy of Risk in Iraq" (2008) 9 Int'l Stud Perspectives 144 ("Particularly in areas designated as hostile, hard-charging house raids, belligerent street patrols, and tense checkpoints make up for a shortage of soldiers on the ground and direct violence away from soldiers and toward civilians. Defying virtually every theory of counterinsurgency, military officials have pursued force protection even at the expense of mission accomplishment" at 145).

[107] *Key I*, *supra* note 105 at para 12. Key observes that one of his most common duties was to take part in house raids, of which he participated in roughly 200 during his time in Iraq. Key, *supra* note 104 at 134.

[108] Key, *supra* note 104 at 70-71.

[109] *Key I*, *supra* note 105 at para 12.

the house was searched amidst flagrant property damage and looting.[110] All males aged 16 and older were rounded up, placed on trucks and sent to places like Abu Ghraib prison for interrogation.[111] In the midst of the numerous raids, residents of the homes, due to surprise, the ensuing chaos and/or language barriers failed to immediately follow instructions and were mistreated through physical assaults.[112] Once raids were completed, the women and children were permitted to return to their broken, damaged, and ransacked houses, with the front doors destroyed, without any weapons, or the protection of the men in the house.[113]

With each raid, Key would assure himself that his platoon, or others that were tasked with similar duties, would eventually find terrorists, evidence of terrorism and weapons used to carry out terrorist attacks.[114] Yet with the growing

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[110] *Ibid*. See also Key, *supra* note 104 at 72-74. This aspect of widespread damage to property and theft of civilian belongings has been documented elsewhere. See Hedges & Al-Arian, *supra* note 103 at 69; IVAW, *supra* note 103 at 34-35, 72, 75, and 111. As Peter Rowe observes, there can be "no semblance of a military purpose served by [such] theft." Rowe, *supra* note 106 at 170. International law prohibits soldiers from engaging in pillage or plunder. *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287 at art 33 (entered into force 21 October 1950); *Prosecutor v Delalic*, Case No ICTY-96-21-T, Judgment (16 November 1998) ("[I]t is to be observed that the prohibition against the unjustified appropriation of public and private enemy property is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory" at para 590).

[111] *Key I*, *supra* note 105 at para 13. Abu Ghraib prison garnered numerous headlines as the site of notorious abuses committed by U.S. soldiers serving there. Seymour M Hersh, *Chain Of Command: The Road From 9/11 To Abu Ghraib* (Toronto: Harper Perennial, 2004).

[112] Key, *supra* note 104 at 71. Key states, "Sometimes they spoke English and sometimes they didn't. Often, we had no idea what they were saying and the only language of ours they understood were our pointed machine guns." *Ibid* at 72.

[113] In various instances, women and children were mistreated before being allowed to return to their destroyed homes. See Physicians For Human Rights, *Broken Laws, Broken Lives: Medical Evidence Of Torture By Us Personnel And Its Impact* (Cambridge, MA: Physicians for Human Rights, 2008) at 73-75.

[114] Key, *supra* note 104 at 70, 74, and 89.

frustration that came with finding no evidence of either contraband weapons or terrorist activity,[115] and not being able to see or locate the insurgents who did manage to carry out successful attacks against United States military forces, there was an escalation in violence against civilians,[116] the residents of houses who were caught during these raids,[117] and their property.[118] As Key recounts, "[even] though not one person tried to shoot us or made any effort to hurt us, it was common for American soldiers to beat the civilians."[119] Key continued to witness unjustified beatings, killings and other forms of severe mistreatment as his tour of duty progressed; abuses that were assuredly tolerated and condoned by superior officers through silence or other means.[120] As Key asserted, this would include an

[115] Key states that: "We never found weapons or indications of terrorism. I never found a thing that seemed to justify the terror we inflicted every time we blasted through the front door of a civilian home, broke everything in sight, punched and zipcuffed the men, and sent them away." *Ibid* at 134-35. As some soldiers have indicated, few raids had uncovered evidence of terrorist activity or weapons of mass destruction. As one soldier asserts: "We never went on a raid where we got the right house, much less the right person, not once." Furthermore, there are accounts that US military personnel were sometimes directed by other Iraqis that certain families were involved in order to settle old scores. IVAW, *supra* note 103 at 56. See also Hedges & Al-Arian, *supra* note 103 at 59-60.

[116] Killings and beatings of Iraqi civilians would also take place outside the context of house raids. Part of this, Key argues, was inspired by the failure to catch insurgents. "Only six weeks had passed since my arrival in Iraq, but I could already see that, for American soldiers at war, it had become too easy to shoot and too easy to kill. We couldn't catch or see the real insurgents, let alone take a clear shot at them, so civilians would have to do." Key, *supra* note 104 at 89.

[117] Key witnessed such beatings and mistreatment. See e.g. *ibid* at 136-37. Other Iraq War veterans have affirmed this pattern of abuse accompanying house raids. One former lance corporal in the United States Marine Corps posits that, "We kicked in doors and terrorized families. We segregated the women and children from the men. If the men of the household gave us problems, we'd take care of them any way we felt necessary, whether it be choking them or slapping their head against the walls." IVAW, *supra* note 103 at 26.

[118] Key recounts an instance during one raid where due to the mounting frustration at not being able to find contraband or illicit activity, the soldiers became more destructive with civilian property. Key, *supra* note 104 at 136.

[119] *Ibid* at 72. Key admits to having participating in such beatings, but was far less extreme and eventually lost his appetite or desire for it.

[120] *Ibid* at 82, 84.

incident where civilians were decapitated with massive gunfire, followed by soldiers kicking the severed heads as though they were soccer balls.[121] Key observed that, as with other incidents involving abuse by those in military service, the matter was not pursued by superior officers.[122] However, after witnessing the conduct of the soldiers kicking the severed heads and the failure of superiors to address the matter, Key changed his opinion about the military operations in Iraq and the lawfulness of the way in which the war was being prosecuted against civilians.[123]

Key drew inspiration from some fundamental normative lessons which he had learnt during his upbringing as part of the rural poor in the United States. First, it was wrong to attack defenseless people, and second, if one did engage in a fight, it was entirely unacceptable to keep assaulting one's opponent when they were down and defeated.[124] Key also made some important and critical reflections about the legality of what was transpiring in Iraq at the hands of U.S. soldiers. He posits:

> I didn't know much about the Geneva Conventions, but I knew one thing: what I witnessed was wrong. We were soldiers of the U.S. Army. In Iraq, we were supposed to be stomping out terrorism, bringing democracy, and acting as a force for good in the world. Instead we had become monsters in a residential neighborhood…I

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[121] *Ibid* at 105-06.

[122] *Ibid* at 108. It should of course be noted that not all abuses meted out by United States personnel have been ignored. In addition to the courts-martial respecting the abuses unleashed against prisoners by United States prison guards at Abu Ghraib prison, others have been tried and convicted for rape and murder of civilians. Jim Frederick, "When A Soldier Murders: Steven Green Gets Life" *Time* (21 May 2009), online: Time <http://www.time.com>.

[123] Key, *supra* note 104 at 108-09.

[124] *Ibid* at 109.

> didn't have to be a lawyer to know that armies at war were not supposed to rape, plunder, loot or pillage. They were not supposed to harm civilians or mutilate the bodies of the dead…[125]

Key concluded that the American military had betrayed its own values. "We had become a force for evil, and I could not escape the fact that I was a part of the machine."[126] After witnessing numerous crimes and abuses, and his own admitted participation in some, Key decided, while on furlough in the United States, to desert the military. He was fully aware that his actions might lead to a military court-martial and time to be served in a prison.[127]

With his wife and children accompanying him, he eventually left the United States, as a military deserter, and sought asylum in Canada. Key asserted: "I didn't want to participate in an unjust war, and I didn't believe it was right that I should become a prisoner in my own country for refusing to act like a criminal in Iraq."[128] He observed that while he did not witness or hear about mass atrocities such as what transpired in My Lai during the Vietnam War, he did witness "a steady stream of abuse and individual killing – a beating here, a shot there. Collectively, however, these incidents added up."[129]

The Immigration and Refugee Board found Key to be a credible witness but ultimately denied his application for refugee status. It determined that the actions he described did not constitute military conduct that was condemned by

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[125] *Ibid*.

[126] *Ibid*.

[127] Indeed he was duly informed of this. *Ibid* at 193.

[128] *Ibid* at 205.

[129] *Ibid* at 217.

the international community as contrary to the basic rules of human conduct, as prescribed in the UNCHR Handbook respecting individuals seeking asylum for evading military service.[130] While the panel conceded that the actions Key described likely amounted to violations of the Geneva Conventions,[131] it held that these violations did not rise to the level of Grave Breaches of the Geneva Conventions. As such, it came to the rather questionable conclusion that violations short of a Grave Breach do not constitute conduct that is contrary to the basic rules of human conduct. This legal determination was subsequently overturned by the Federal Court of Canada, holding that unlawful military conduct does not have to rise to the level of a grave breach or a crime against humanity in order to be considered conduct that is contrary to the basic rules of human conduct.[132] The court however remanded the case back to the Immigration and Refugee Board to decide whether the United States is a state that fails to provide protection to individuals objecting to be associated with such military conduct.

Key's account of his time in Iraq and the development of his resistance mark an important change and growth in his capacity to interpret and enforce

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[130] *Ibid* at paras 44-45.

[131] *Key I*, *supra* note 105 at paras 8, 9, and 42.

[132] *Key v Canada (Minister of Citizenship and Immigration)*, 2008 FC 838, [2009] 2 FCR 625, 2008 CarswellNat 2152 (WL Can) [*Key II*]. As the tribunal in *Key I* failed to make any determination regarding the availability of state protection in the United States, the Federal Court of Canada in *Key II* remanded the case back to a differently constituted panel of the Immigration and Refugee Board to make determinations on this matter. A decision was released in 2010 ruling against Key and holding that he failed to demonstrate that the United States did not provide sufficient state protection and that he had to be returned to face a military court-martial for his desertion. Key has stated that he would appeal the decision. See *Key (Re)*, 2010 CanLII 62705 (IRB).

legal norms. At first Key followed the normative pattern set down by commanders and other soldiers. As Key admitted, he even participated in several unlawful acts, involving theft of private property, and physical assaults on Iraqi civilians, including those who challenged his authority.[133] However, Key's agency and legal subjectivity emerged in his ability to think and reflect upon his own wrongful actions and refuse to engage in similar actions again. As a low-ranking soldier, Key, perhaps, symbolizes the quintessential subaltern actor who is expected to follow orders and commands and to not question them. He observed, "we lived in a military culture that had already taught us that although we could get away with beating or even killing Iraqi civilians, punishment would be swift and harsh if we even questioned our commanders. By remaining silent, we made it possible for the abuses to continue."[134] Key's defiance did not just come in the form of his desertion, but made its appearance, for instance, during his tours of duty in Iraq. Soldiers were admonished against "fraternizing" or showing sympathy[135] with Iraqis, as all Iraqis were deemed to be enemies and dehumanized through racial epithets (much like the Vietnamese during the Vietnam War or the Japanese in the Second World War).[136] Key began to rebel against this practice by showing some

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[133] Key, *supra* note 104 at 73-74, 82-83, 100.

[134] *Ibid* at 218.

[135] *Ibid* at 147-48 (positing that he was chastised for shedding tears after witnessing families grieving for their loved ones killed by United States servicemen).

[136] *Ibid* at 8 (noting during military training in preparation for his deployment to Iraq, Iraqi civilians were constantly referred to as "*sand niggers, ragheads, habibs, hajjis*, and most of all, *terrorists*"); *see also* Bob Herbert, "'Gooks' to 'Hajis'" *The New York Times* (21 May 2004) (showing the reality of generalizing all Iraqi civilians as a criminalized element has been noted elsewhere)*;* see Smith, *supra* note 106 at 152-53 (indicating many soldiers whose accounts of their experiences in Iraq are documented in the *IVAW* publication have noted the consistent use of racist and dehumanizing language used to refer to Iraqis)*;* see *IVAW*, *supra* note 103 at 59-100*;* see also

degree of kindness to certain Iraqis he encountered, notwithstanding that he was admonished and directed against doing so.[137] Part of Key's agency then was to actively unlearn this training of dehumanization. This led to changes in his behavior toward Iraqis.

Key's desertion and refusal to continue participating in the United States military efforts in Iraq, given the breaches of international humanitarian law that he observed and once participated in, amounted to a putative violation of United States federal law regarding such unauthorized leave. However, his refusal, even as a rather low-ranking serviceman, may also be viewed as, following Berman, cohering with other fundamental international legal values and norms regulating the conduct of soldiers in combat.[138] These norms include the protection of non-combatants under international humanitarian law and respect for both their lives and property interests during the course of armed conflict and occupation,[139] as well as at least a right if not an obligation to disobey orders manifestly in violation

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Hedges & Al-Arian, *supra* note 103 at 93-95; see also "'I Didn't Think of Iraqis as Humans,' Says U.S. Soldier who Raped 14-Year-Old Girl Before Killing Her and Her Family" *Daily Mail* (21 December 2010), online: The Daily Mail <http://www.dailymail.co.uk> (describing Steven Green, a former United States soldier who was convicted in 2009 for raping a fourteen year old Iraqi civilian and murdering her and her entire family, who recently noted that his ability to commit such vicious crimes stemmed from viewing his victims as something other than human).

[137] Key, *supra* note 104 at 111-24.

[138] It is worth recognizing that without the mass of low(er) ranking foot soldiers that comprise militaries, such institutions would be crippled. In the United States war efforts in Iraq and Afghanistan, the military has been subjected to shortages resulting in the phenomenon known as stop-loss mandating soldiers who have fulfilled their term of service to continue in combat operations or be redeployed. There has also been intense pressure on military recruiters to draw in new recruits resulting in tremendous stress and in some cases suicide amongst recruiters. See Mark Thompson, "Why Are Army Recruiters Killing Themselves?" *Time* (2 April 2009), online: Time <http://www.time.com>. Seen in this context, the desertion of many United States soldiers, including Key, their impact, and the reasons behind such desertion should not be underestimated.

[139] *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, *supra* note 110 at arts 2, 27-30, 33.

of international law. His refusal to engage in the dehumanization and discrimination of Iraqis, even as an unwritten but de facto norm amongst many soldiers, also speaks to a coherence with international norms respecting non-discrimination on the basis of race, religion, nationality, and other prohibited grounds.[140]

iii. *Affirming the Right to Self-Determination*

The agency of individuals to decide not to partake in military operations of questionable legality or definite illegality has not been restricted to instances of clear-cut international armed conflicts or foreign occupation. Indeed, most armed conflicts arise within states or amongst states that once occupied a common territorial and jurisdictional space. In addition to a reluctance to fight in wars of aggression against foreign states, some soldiers also demonstrate a strong disinclination to take part in what might be deemed a civil war.

One form of civil war might include instances where a smaller part or sections of a given state decide to breakaway and establish new polity or polities. What is implicated is the desire by such breakaway States to exercise a right to self-determination. The breakdown of the former Yugoslavia and efforts to achieve independence by Croatians, as well as Slovenians and Bosnians, elicited a harsh response from Serbians in the early 1990s, who sought to maintain control over these breakaway states. A number of Serbians were called to service to intervene to stop Croatia, Bosnia-Herzegovina, and Slovenia from achieving independence.

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[140] *Ibid* at art 27.

Slavko Ciric was a Serbian reserve soldier who was expected to report for duty to engage in hostilities against Croatia. Ciric, like Al-Maisri, expressed no objections to defending his country from foreign aggression; however, he refused to wage war against people he considered his own brothers, sisters, and friends.[141] Similarly, Serbian Radisav Vujisic refused to take part in his government's military attempts to quash the efforts of the former Yugoslavian republics seeking independence. Vujisic considered Slovenians, Croatians, and Bosnian Muslims friends and refused to take up arms against them – particularly to engage in the human rights violations emerging out of the ethnic cleansing policy of the Serbian government. In his words, "I could not fight and would not fight against these Republics. I could not fight against friends and family who desired nothing but independence and freedom to perpetuate the traditions of their heritage under a democratic form of government, free from the dogma of communism."[142] In both cases, Ciric's and Vujisic's claims for asylum, based on their individual well-founded fears of persecution on account of their desertion and refusal to participate in Serbia's aggression against the former Yugoslavian republics, were recognized by appellate courts deciding their appeals.

Although Ciric's and Vujisic's refusals to fight and their decisions to desert represented blatant breaches of their country's laws, their actions and opinions were also clearly in agreement with a number of international norms and values. These include the right to self-determination by populations within the

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[141] *Ciric v Canada (Minister of Employment & Immigration)*, [1994] 2 FC 65, 71 FTR 300, 1993 CarswellNat 188 at para 3 (FCTD) (WL Can).

[142] *Vujisic v INS*, 224 F 3d 578 (7th Cir 2000).

other former Yugoslavian states and the preservation of international peace, and adherence to norms against the use of force under the U.N. Charter. As is well documented, the Serb military and its ethnic Serb military allies in Bosnia and the other former republics engaged in a number of violent crimes against the Bosnian, Croatian, and Slovenian populations in contravention of international law.[143] This included genocide, crimes against humanity and war crimes – crimes that have been prosecuted by the International Criminal Tribunal for Former Yugoslavia (ICTY).[144] Although their desertions did not stop the illegal conduct from taking place, Ciric's and Vujisic's decisions at the very least did not contribute to the abuse or provide other indirect support that facilitated unlawful conduct – something which may have led to the imposition of subsequent criminal liability, if they followed their orders, or serious punishment, if they refused to comply with orders.[145] Such instances clearly demonstrate a political and legal vision of

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[143] See e.g. *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution* 780 (1992), UN Doc S/1994/674, Annex, online: <http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf>.

[144] See *Statute of the International Criminal Tribunal for the Former Yugoslavia*, SC Res 827 at arts 2-5, UN Doc S/RES/827 (May 25, 1993); *Prosecutor v Kristić*, Case No ICTY-98-33-A, Judgment, (April 19, 2004).

[145] See e.g. *Prosecutor v Erdemovic*, Case No ICTY-96-22-A, Judgment, (7 October 1997), *available at* http://www.icty.org/x/cases/erdemovic/acjug/en/erd-aj971007e.pdf. Erdemovic was a soldier in the Bosnian Serb army who was ordered to take part in the mass killings of Bosnian Muslim men at a collective farm. When Erdemovic expressed reluctance to carry out the orders, he was threatened himself. He was told, "If you are sorry for them, stand up, line up with them and we will kill you too." *Ibid* at paras 3-4. Notwithstanding the threat to Erdemovic's life were he to refuse to participate in the murders, the ICTY Appeals Chamber held that duress was not a complete defense to the acts he committed. *Ibid* at para 19. In their joint separate opinion, Judges McDonald and Vohrah assert that "we are of the view that soldiers or combatants are expected to exercise fortitude and a greater degree of resistance to a threat than civilians, at least when it is their own lives which are being threatened. Soldiers, by the very nature of their occupation, must have envisaged the possibility of violent death in pursuance of the cause for which they fight." *Prosecutor v Erdemovic*, Case No ICTY-96-22-A, Judgment, (7 October 1997) (Joint Separate Opinion of Judge McDonald and Judge Vohrah) at para 84, *available at* http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojmcd971007e.pdf. Ultimately, the duress

the right of self-determination by breakaway states, but also a refusal to commit or participate in fratricide manifested through violations of international humanitarian and criminal law.

iv. *Upholding the Principles of Equality and Non-Discrimination*

Visions of equality and the need to prevent blatant persecution against ethnic minorities as fellow citizens have animated various actors in the military to refuse to comply with discriminatory orders. In Fiji during the 1980s, the population was divided between ethnic, indigenous Fijians (constituting a slim majority) and ethnic South Asians. In 1987, the South Asian-dominated Labour Party of Fiji won a fair and free election. This prompted two military coups d'état in 1987 with the aim of establishing the political supremacy of the ethnic Fijian population. The attempt to establish such racial supremacy resulted in a number of arbitrary arrests and detentions and other forms of persecution. One military officer called upon to implement such racist policies, Aminisitai Tagaga, refused to follow his orders.[146]

Tagaga was an ethnic Fijian who held the rank of Major in the Army Corps of Engineers.[147] Through his experiences, Tagaga maintained strong ties with the Indo-Fijian community and two years prior to the 1987 coups became an

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that Erdemovic experienced was deemed to be a mitigating factor in considering his sentence. See *Prosecutor v Erdemovic*, Case No ICTY-96-22-T*bis*, Sentencing Judgement (5 March 1998) at para 17, online: <http://www.icty.org/x/cases/erdemovic/tjug/en/erd-tsj980305e.pdf>.

[146] *Tagaga v INS*, 228 F 3d 1030 (9th Cir 2000).

[147] *Ibid* at 1032.

active supporter of the Labour Party.[148] Following the first coup, he and others were directed to break all ties with the Indo-Fijian community. He refused. Tagaga asserted: "My relationship with the Indian community was too strong to have the ties broken."[149] Tagaga continued to attend Labour Party meetings even though he was aware that undercover agents were in attendance and would inform superiors of his presence.[150] Tagaga was later ordered to arrest and detain Indo-Fijians who were deemed to be threats to the regime's power. Tagaga not only refused to comply with the orders but also gave information to the community regarding planned arrests.[151] His actions were driven by a strong desire and belief "that Indo-Fijians deserved to be treated equally and have the same legal rights as others living in Fiji."[152] For his defiance, Tagaga was prosecuted for disobedience of military orders, breach of discipline, insubordination, and conduct unbecoming an officer.[153] Before the military authority, Tagaga openly posited during his prosecution that the military coup that brought the government into power was illegitimate and that the government should be democratic.[154] Following his sentence of six months of house arrest, Tagaga was reinstated to the same rank,

[148] *Ibid*.

[149] *Ibid*.

[150] *Ibid.*

[151] *Ibid*.

[152] *Ibid*.

[153] *Ibid*.

[154] *Ibid*.

but stripped of its attendant privileges and authority.[155] While stationed in Lebanon as part of a U.N. mission, a Fijian military officer informed Tagaga that he would face another court martial for treason when he returned to Fiji.[156] This led to his decision to seek asylum in the United States. The Federal Circuit Court of Appeal held that he qualified for refugee status as well as "withholding of removal" or *nonrefoulement*.[157]

As with other resisters in their respective jurisdictions, Tagaga's conduct was assessed as a violation of state norms. However, Tagaga's resistance was clearly consistent and cohered with other legal norms and social values reflected in international law. Specifically, his defiance was consistent with international law and values respecting equality and equal protection for individuals regardless of race.[158] Furthermore, his actions adhered to international protections respecting the right to political participation in the governance of one's own country. The policies of the Fijian government during this period targeted Indo-Fijians for arrest and detention, thus impacting their liberty and freedom to participate in the political, economic and social life of the country. This sent a powerful message to Indo-Fijians and those supporting them that any efforts to challenge these inequitable and discriminatory policies would lead to further deprivations and related infringements on their rights.

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[155] *Ibid*.

[156] *Ibid* at 1033.

[157] *Ibid* at 1035.

[158] See *ICCPR*, *supra* note 25; *ICERD*, *supra* note 31.

c. Challenging Rebel Groups

In many cases, oppression is not solely perpetrated by state actors. They may be perpetrated by rebel or resistance groups that challenge the state. However, in so doing, they may inflict their own series of crimes and human rights violations against the civilian population. As discussed in the cases below, many groups attempt to conscript new members, often through coercion and threats of death if necessary. They also inflict their own form of economic oppression through the collection of "taxes". Consequently, some who are the targets of such recruitment and/or taxation have resisted as a manifestation of their political opinion toward the actions of such groups. The following provides an illustration.

During the 1980s and 1990s, an extreme communist insurgency group called the New People's Army (NPA), opposing the Philippine government, would endeavor to recruit civilians into their ranks and demand their intended conscripts to pay a "revolutionary tax," either in addition to joining the group[159] or in lieu of joining it.[160] The NPA employed violent means and was known to murder their opponents as well as non-combatants, including children.[161] Teresita Borja refused to join the NPA, declaring to her persecutors forthrightly that she was a government supporter.[162] Furthermore, she indicated to the NPA insurgents that she objected to their killing of innocent people, including women and

[159] *Tarubac v INS*, 182 F 3d 1114 at 1117 (9th Cir 1999).

[160] *Borja v INS*, 175 F 3d 732 at 734-35 (9th Cir 1999).

[161] *Ibid.*

[162] *Ibid*.

children.[163] Rosario Tarubac, in addition to refusing to pay "taxes" and join the NPA, also resisted a demand that she stop teaching Bible classes.[164] Tarubac asserted to the NPA that she refused to join the NPA for political and religious reasons.[165] She stated: "I do not believe in the communist system. There's no justice and there's no freedom. And I told them that the communist belief-communists do not believe in-in God."[166] She furthermore refused to pay the "taxes" and was severely beaten for it, as was Borja when she could no longer afford to pay the taxes in lieu of military service.[167]

In both cases, the resisters fled the Philippines for the United States where the Ninth Circuit recognized that they were eligible for asylum on the basis of a well-founded fear of persecution for reasons of the political opinion. For both Borja and Tarubac, the nature of their resistance was borne out of a political (and for Tarubac specifically, also a religious) conviction that opposed the imposition of a violent, authoritarian and un-elected communist-based political and legal system. Apart from a resistance that stressed the value of political freedom, Borja also opposed the clear human rights violations that the NPA engaged in against non-combatants and political enemies. Tarubac refused to give money that would fund and perpetuate their violence and oppression. Thus, as with other resisters discussed above, theirs are actions that cohere with the norms of international

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[163] *Ibid*.

[164] *Tarubac*, *supra* note 159 at 1117.

[165] *Ibid*.

[166] *Ibid*.

[167] *Ibid*. *Borja*, *supra* note 160.

human rights and humanitarian norms;[168] they were aimed at fighting against a number of intersecting political, economic and military injustices.

IV. Conclusion

The aims of the resisters, as evidenced in the discussion thus far, touch upon a variety of issues. Ahmed's armed resistance against an authoritarian military regime sought to restore democratic rule and the rights attendant with such a polity, including judicial and legal fairness. Tagaga's resistance was also rooted in a number of concerns. In a broad sense, he was concerned about the re-establishment of democratic governance and the rights and entitlements that arise out of this. This interest included the rights of all citizens to freely participate in the political life of the country irrespective of race, the right not to be unreasonably detained merely on account of political and racial grounds, the right to equality under the law and the right to freely associate with others. Thus his actions might be explained or justified as cohering with larger values and norms existent within Fiji and at international law. Similarly, ZH's actions demonstrated the importance and capacity of soldiers to refuse and challenge orders to intentionally kill non-combatants and protected persons, actions that are in flagrant violation of international law. Furthermore, the context of the killings and proposed killings that transpired in Z's case highlighted the discriminatory persecution of indigenous peoples in the CHT and the need for local intervention.

[168] Although insurgency groups and other non-state actors may not have the extensive powers of governments and state actors, they may nevertheless wield such power and dominance that government actors are incapable of protecting their own citizens. As Borja testified, "the NPAs are everywhere and they have this vast network of intelligence and they can find people." *Ibid* at 735.

Z's action can also be understood in light of upholding fundamental international norms and prohibitions respecting the conduct of soldiers. Joshua Key's resistance arose at the intersection a number of concerns and issues of legality touching upon the *jus in bello* relating to the conduct of United States servicemen and women in Iraq as well as the dehumanization and racial discrimination that facilitated and inspired some of the brutality imposed on the civilian population. The actions of Al-Maisri, Ciric and Vujisic all suggest a legal vision regarding the necessary limitations that need to be imposed on military conduct in the context of non-defensive military actions. Ciric's and Vujisic's cases at the same time specifically illustrated the idea that the military should not be used to hinder the right of "peoples" to self-determination and democratic fulfillment of those seeking independence.[169] Borja's and Tarubac's conduct reflect the idea that resistance may be waged against intersecting forms of military, political and economic oppression perpetrated by rebel groups vying for state power. What all these decisions as a whole demonstrate, importantly, is that individuals have taken it upon themselves to act where governments and/or the international community have failed to. Their actions, following Berman may be viewed as cohering with a larger narrative of normative compliance. While violating specific local or national norms, their actions may nevertheless cohere to other larger normative objectives under international law. Furthermore, they might also be seen as defying the legitimacy of the legal system that their resistance is waged against.

[169] *ICCPR*, *supra* note 31 ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" at art 1(1)).

The decisions also disclose some illuminating aspects about the ethnic, regional, occupational, gender, and class diversities of resistance and resisters discussed above. For instance, with respect to regional and ethnic diversity, the emphasis in engaging in resistance in order to defend and advance certain fundamental norms is not restricted to one part of the globe, e.g. the Global North. The desire to obtain the rule of law, the advancement of human rights, democratic governance and economic justice is just as relevant to individuals like Saad Ahmed from Bangladesh, Aminisitai Tagaga from Fiji, Rosario Tarubac and Teresita Borja from the Philippines, as it is to Joshua Key from the United States and many others. Thus, contrary to those who have advanced ideas encapsulated in the Asian Values debate stressing the almost exclusivity of human rights and democratic discourse to the Global North, the work of such resisters proves that notions of human rights and humanitarian values are not foreign or of no interest to those outside of the Global North.[170] What this reveals is the capacities of individuals to play a part in global civil society whatever their social and occupational station in life, their ethnic and geographical background. Of course, it also demonstrates their vulnerabilities when engaging in resistance and the risk that they will become targets for persecution by those whose power and authority are being challenged, and hence the need to seek protection in foreign states.

Flowing from this discussion about the agency of individuals and the perils they may face in engaging in resistance, in the next chapter, I shall deal with how administrative tribunals or appellate courts have legitimized and given

[170] See Amartya Sen, *Development as Freedom* (New York: Anchor Books, 2000) at 231-38.

support to some of these resistive actions through the adjudication of asylum claims in the first instance or through appellate review. Specifically, I shall examine how and upon what bases asylum adjudicators and appellate judges justify and rationalize their recognition of resistance.

Chapter Two – Legitimizing Resistance

I. Introduction

This chapter shall examine the ways in which refugee tribunals, courts and international bodies such as the Office of the United Nations High Commissioner for Refugees have given some measure of legitimacy to the acts of resisters in challenging oppression, typically inflicted by state authorities. They do so first, by recognizing that individuals who engage in certain types of resistance may qualify for refugee status. This may even include conduct that would otherwise normally be in contravention of the penal laws of their country of nationality. Second, courts and tribunals legitimize certain acts of resistance through the language employed to describe the claimant's actions and the rationales expressed in their decisions to justify the outcomes. As I shall demonstrate below, three types of resistance have been recognized as falling within the scope of a political opinion under Article 1A(2) of the *Convention Relating to the Status of Refugees*.[171] They include: (1) armed resistance to an authoritarian regime and its actors; (2) refusal to be associated in military actions that are condemned by the international community as contrary to the basic rules of human conduct; and (3) opposition to corruption and criminal activity by state actors.

The granting of refugee status in such cases is in some ways extraordinary given that the normal response of dominant power to such flagrant and open threats by individuals engaging in resistance is to impose some punishment on

[171] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) [*Refugee Convention*].

those who engage in it. States have traditionally had no qualms about punishing acts of resistance taking place in their own jurisdictions, whether involving disobedience to official orders, refusal to partake in certain acts or outright violent resistance. However, in certain circumstances, legal systems have also recognized that some actions should not be seen as mere criminal activity when they are waged in response to a greater injustice, thus mitigating or even excusing their criminality.[172] Typically, these are legal systems of refugee receiving states that stand a safe distance from the events and may have no particular stake in the repression that other states engage in. However this does not preclude the real possibility that in some cases, there may also be political calculations for granting refugee status.

II. The Legitimacy of Armed Resistance

It is with respect to those who employ the use of force that states and the international community have shown or are likely to show the greatest reluctance to extend asylum. This reluctance is by all means understandable in circumstances where there are clearly legal and non-violent options that the resister may avail him or herself of.[173] This is also not surprising given the potential harm and destruction that armed resisters may inflict during the course of carrying out their activities. Courts and tribunals may not want to be seen as in any way validating

[172] For example, the international community has affirmed the use of armed struggle to achieve national liberation. A 1982 UN General Assembly resolution "[r]eaffirms the legitimacy of the struggle of the oppressed people of South Africa and their national liberation movement-by all available and appropriate means, including armed struggle-for the seizure of power by the people, the elimination of the *apartheid* regime and the exercise of the right of self-determination by the people of South Africa as a whole." *Policies of Apartheid of the Government of South Africa*, GA Res 37/69 at para 16, UN Doc A/Res/37/69 (1982).

[173] See *Chanco v INS*, 82 F 3d 298 (9th Cir 1996).

violence that is tailored to ignore distinctions between legitimate and illegitimate targets or by using means and methods that use more destruction than is necessary to achieve a stated objective. It is also likely that courts do not want to be seen as sending signals that they endorse such conduct lest it be interpreted as an invitation for citizens in their own country to employ such methods against the state. Despite this reluctance, there is still a set of cases within refugee jurisprudence which suggest that the use of force has been considered valid in very particular and discrete circumstances. In this section, I discuss cases arising out of the *Refugee Convention* and/or the 1967 *Protocol*[174] whereby individuals who engaged in armed resistance against authoritarian regimes had either been granted or qualified for refugee status.

Before proceeding, there is an important caveat worth stressing with respect to these cases, two of which are American, and a third, Canadian. Although they have never been overruled, subsequent legislative changes particularly in the United States and Canada have made it so that such cases would undoubtedly have different outcomes today if asylum claims were brought. Such legislative changes make it such that persons will be deemed inadmissible if they engage in subversion by force of any government (under Canadian law) or used forms of violence regardless of the targets, the existence of legitimate political objectives and the minimal amount of violence necessary to achieve such objectives. However, not every state has adopted such broad provisions and courts

[174] *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

in other jurisdictions may then look to these otherwise reasoned decisions as persuasive authority.

Before discussing these cases, it is worth examining upon what basis such recognition can be conferred. The *Refugee Convention* provides no specific mention of granting refugee status to an individual who has a well-founded fear of persecution for reasons of his/her acts of (political) resistance. Indeed, what the *Convention* does indicate is that where the well-founded fear of persecution is connected to the claimant's "political opinion", s/he may be entitled to refugee status (provided all other requirements are satisfied and no issues of exclusion arise). Yet, the use of the term "political opinion" however does not in itself indicate any explicit textual support for granting refugee status to those who adopt violent means against the state or any other oppressive power. A restrictive interpretation of the notion of a "political opinion" might suggest that the *Convention*'s framers did not seek to include even non-violent political activity, but persecution for merely holding or expressing a political opinion. Under this theory, it might well be argued that had the framers sought to include "political acts", they might have incorporated more explicit language to signal this intention.

One need merely observe other examples to see where this explicit endorsement for the protection of those engaged in political conduct had been expressed. Such examples explicitly use terms like "activity", "action", "struggle" or "struggling". Such words plainly indicate something more than the holding or expressing of opinions or perspectives but also include conduct. For example,

Article 1 of the 1967 *Declaration of Territorial Asylum* provides that: "Asylum granted by a state, in the exercise of its sovereignty, to persons entitled to invoke article 14 of the Universal Declaration of Human Rights, *including persons struggling against colonialism*, shall be respected by all other states."[175] Other examples arise out of national law. French law states: "La qualité de réfugié est reconnue à toute personne persécutée *en raison de son action* en faveur de la liberté [...]."[176] The *Constitution of East Timor* more robustly proclaims that political asylum shall be granted, in accordance with the law, "to foreigners persecuted as a result of *the struggle for national and social liberation, defence of human rights, democracy and peace*."[177] East Timor's *Immigration and Asylum Act*, enacted in furtherance of the Constitutional mandate, provides for very similar affirmative legislative language in support of resisters.[178] It states that "Foreigners and stateless persons, persecuted or seriously threatened by persecution as a result of *an activity carried out* in the country of their nationality or of their habitual residence, *in favor of democracy, social and national freedom, peace among the peoples, freedom and human rights, are guaranteed the right of asylum*."[179]

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[175] *Declaration of Territorial Asylum*, GA Res 2312 (XXII), UNGAOR, 22d Sess, 1631st plen mtg, UN Doc A/RES/2312(XXII) (1967) [emphasis added].

[176] Art L711-1 CESEDA ("Refugee status is granted to any person persecuted *because of his actions* in favor of freedom [...]") [emphasis added].

[177] *Constitution of the Democratic Republic of Timor-Leste*, 2002 at s 10(2).

[178] *Immigration and Asylum Act*, Law No 09/2003 at art 84(1).

[179] *Ibid*.

While more robust language in the *Convention* would indicate greater support for the notion of incorporating political activity (and possibly by implication, acts of political resistance), one must not be too quick to dismiss the idea that "political opinions" may incorporate political activity and further still acts of resistance. As indicated in the case law, political opinions need not be expressed but can be implied from conduct.[180] It is also worth noting that contextually, the notion of including resisters within the scope of the *Convention's* protections was provided for elsewhere. In Article 1F(b) of the *Convention*, individuals about whom there are serious reasons to consider have committed "serious non-political crimes" are excluded from being considered a refugee.[181] By implication, those who commit "political crimes" may qualify for refugee status. Furthermore, at the time that the *Convention* was drafted, the notion of political crimes as it existed in extradition law was fairly well-known and included violent political actions, including murder.[182] It stands to reason that a person may have a well-founded fear of persecution in connection with a political opinion that is manifested through the commission of an inherently political crime. Had the *Convention's* framers wanted to foreclose such a possibility, Article 1F(b) would not have left open the possibility to allow refugee status to be conferred upon those who engage in political crimes. [183]

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[180] *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 103 DLR (4th) 1, 1993 CarswellNat 90 (WL Can).

[181] *Refugee Convention*, *supra* note 171, art 1F(b).

[182] See e.g. *In re Castioni*, [1891] 1 QB 149.

[183] *Dwomoh v Savah*, 696 F Supp 970 at 977 (SDNY 1988).

Turning to the specific cases, what are of particular concern to courts and refugee tribunals is whether the acts in question can properly fall within the scope of a "political opinion" and whether the asylum-seeker's fear of prosecution by their country of nationality would be tantamount to a fear of persecution. In the cases discussed below, the regimes against which armed resistance was deployed by the claimants were authoritarian in nature. They were not states with democratic institutions through which resisters could channel political agendas or aspirations. The decisions indicate confirmation that violent political acts can qualify as manifesting a political opinion against such regimes that deny basic political rights recognized under international law. The tone of the decisions also suggests furthermore a certain attitude by the decision-makers about the nature of the form of government being opposed justifying the acts of resistance. By recognizing that the use of force was legitimate in those cases, it suggests a more explicit validation of such means.

In *Dwomoh v Savah*, the applicant was an officer in Ghana's military who was troubled by the political conditions in the country following the overthrow of the democratically elected civilian government. This included summary executions of generals and judges, as well as the intended execution of Dwomoh's friend who was a political activist.[184] Dwomoh conspired with others to free his friend from prison and furthermore to participate in the overthrow of the military regime by force.[185] Before the plan could be implemented however, Dwomoh was

[184] *Ibid* at 972.

[185] *Ibid*.

arrested and interrogated by government soldiers.[186] After being beaten in captivity for over a year and denied access to family visits, he escaped from jail and managed to travel to the United States and sought refugee status.[187] A United States federal court judge determined that Dwomoh qualified as a refugee.[188] The judge acknowledged that in cases where there is an attempt to overthrow a "lawfully constituted government" prosecution for such endeavors may not, as a general rule, constitute persecution.[189] However, the court observed that the general rule may not be applicable "where a coup is *the only means* through which a change in the political regime can be effected."[190] The court asserted that

> in countries where there is no procedure by which citizens can freely and peacefully change their laws, officials or form of government, and where some individuals who express views critical of the government are arrested and held incommunicado for long periods without due process, a coup attempt is a form of expression of political opinion the prosecution of which can qualify as "persecution" within the statutory definition of refugee.[191]

The court's recognition of Dwomoh's resistance as a valid expression of a political opinion then is contextually tied to certain factors. This includes the non-existence of procedures whereby citizens can take part in the political process.

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[186] *Ibid*.

[187] *Ibid*.

[188] *Ibid* at 979, fn 12 (stating "The Court notes that based on the uncontroverted evidence contained in the record, Mr. Dwomoh does qualify as a refugee" at 979).

[189] *Ibid* at 979.

[190] *Ibid* [emphasis added].

[191] *Ibid*.

Furthermore there is also the emphasis on the lack of due process through the operation of a fair legal system.

Drawing from the *Dwomoh* court, the United States Board of Immigration Appeal similarly granted refugee status to an individual who provided support (in the form of groceries, clothes and other supplies) to resistance fighters in Afghanistan combating the Russian-backed government.[192] It determined that the claimant "established that he is at risk of being punished *for his political activities*."[193] The Board also observed "the existing political situation in Afghanistan to be different from that of countries where citizens have an opportunity to seek change in the political structure of the government via peaceful processes."[194] The Board concluded that "there is no basis in the record to conclude that *any punishment* imposed by the Afghan Government would be a legitimate exercise of sovereign authority."[195]

In both decisions, it appears sufficient that in a state where there is no due process and no democratic options to change the government, law or personnel peacefully, the threat of prosecution or any punishment in such circumstances will qualify as persecution.[196] However, one may ask whether prosecution for essentially any political crime or activity against such states would be deemed

[192] See *Matter of Izatula*, 20 I & N, Dec 149 at 150, 153-154, 1990 WL 385750 (BIA 1990).

[193] *Ibid* at 154.

[194] *Ibid*.

[195] *Ibid*.

[196] In some instances the record may reveal that the governing authorities may demonstrate no actual desire to prosecute but to merely engage in physical beatings. See *Ahmed v Canada (Minister of Employment and Immigration)*, [1988] 5 Imm LR (2d) 219, 1988 CarswellNat 42 at paras 19 and 25 (WL Can) (Imm App Bd).

persecution. It is worth emphasizing that Izatula's role was largely as an accessory and the extent of Dwomoh's acts was limited to conspiracy. Should refugee status extend to instances where an individual has greater proximity to the violent crimes in question? One might argue that all actions that qualify as manifesting a political opinion, including a political crime should have to go through a more rigorous analytical process. A case from New Zealand offers some interesting insights.

In *Re KN*, the applicant was an Iranian of Kurdish origin who belonged to an underground movement named the Revolutionary Organization of Toilers or Komala.[197] This was a separatist organization which was targeted by the Iranian state.[198] KN and his family were all involved in Komala.[199] KN's main activity was to assist his father in the manufacturing of explosives and the transportation of weapons.[200] On one occasion, KN assembled a bomb which he knew was to be delivered to a designated location with the specific intent to kill a particular Iranian military officer.[201] The officer was responsible for the identification and arrest of suspected Kurdish separatists.[202] The bomb was delivered killing the intended target and two other soldiers.[203] No civilians were killed or harmed.[204]

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[197] Refugee Appeal No 1222/93, *Re KN* at 8-9 (NZ Refugee Status App Auth 1994).

[198] *Ibid* at 8-10.

[199] *Ibid* at 8-9.

[200] *Ibid* at 9.

[201] *Ibid* at 9-10.

[202] *Ibid* at 9.

[203] *Ibid* at 10.

KN's actions were driven by a sense of responsibility to further the cause of Kurdish autonomy coupled by a deep resentment regarding the Iranian government's long-standing and continued campaign against the Kurdish people.[205] The government's campaign included killings of innocent Kurdish civilians as well as imprisonment.[206] KN was however subsequently captured and tortured by the authorities.[207] He was later released but only after promising to be an informant for the government.[208] Through the assistance of other Komala members he fled Iran and sought asylum in New Zealand.[209]

The New Zealand Refugee Status Appeals Authority granted KN refugee status.[210] It determined that there was indisputably a "substantial "political opinion" component […] for reasons which are self-evident from the appellant's actions in participating in an armed struggle against the Iranian government."[211] It also undertook an analysis of whether KN feared legitimate prosecution or persecution.[212] The Authority affirmed that where a crime was a mere common law offence, prosecution for such offences did not amount to persecution.[213]

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[204] *Ibid.*

[205] *Ibid* at 10.

[206] *Ibid*.

[207] *Ibid* at 10-11.

[208] *Ibid* at 11.

[209] *Ibid* at 11.

[210] *Ibid* at 26.

[211] *Ibid* at 22.

[212] *Ibid* at 13-18.

[213] *Ibid* at 14.

However prosecution for an offence may amount to persecution where an otherwise common law offence was waged for a political purpose (relative political crime).[214] The Authority determined that KN was sincerely motivated by a commitment to advance the interests and political cause of Iranian Kurds.[215] It noted that all his acts including the assembling of the bomb and its delivery were directed against a purely military figure and high-ranking officer who was engaged in an operation to arrest Iranian Kurd separatists.[216] The Authority observed that the bombing of the officer was clearly intended as a means of preventing the arrest, torture, and execution of Kurds involved in or suspected of involvement in the Kurdish separatist movement.[217] As such, it held that the bombing was proportionate between the "good" sought in relationship to the harm that was inflicted.[218]

The Authority in KN concluded that Iranian Kurds were denied all forms of legitimate expression with respect to their political opinions and aspirations or legitimate means of changing the theocratic dictatorship by which they are ruled.[219] It enumerated the many rights which Kurds are denied under the *International Covenant on Civil and Political Rights* despite Iran's ratification of

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[214] *Ibid* at 14.

[215] *Ibid* at 15.

[216] *Ibid*.

[217] *Ibid* at 17.

[218] *Ibid*.

[219] *Ibid* at 16.

the Covenant.[220] The Authority observed that Kurds were subjected to extreme treatment through military campaigns and persistent efforts to assassinate Kurdish leaders.[221] Lastly, the Authority posited that KN could not receive a fair trial as the principal purpose of the legal system was to advance the political and religious "dogmas of the current theocratic regime."[222]

The Authority in KN like the previous United States decisions discussed justifies the legitimacy of KN's actions in connection with the conduct of the government and the rights violations they inflicted. However, through its analysis, it attempts to give greater justification for this by enumerating the provisions of the *ICCPR* that Iran breaches by suppressing Kurdish rights. The Authority further justifies the grant of refugee status by emphasizing the demonstrated restraint exercised by KN and his family through the specific targeting of only state actors.

The granting of refugee status to those who engage, participate or conspire to commit violent acts of resistance in support of overthrowing an authoritarian regime appears from the relatively few published decisions to be a rare occurrence. However, they are nevertheless sound decisions which in context recognize that armed resistance or support for it has a legitimate place and

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[220] *Ibid.* This included: (1) the inherent right to life and the right not to be arbitrarily deprived of life (art 6); (2) the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art 7); (3) the right to liberty and security of person (art 9); (4) the right, if deprived of liberty, to be treated with humanity and with respect for the inherent dignity of the human person (art 10); (5) the right not to be subjected to arbitrary or unlawful interference with privacy, family, home or correspondence (art 17); (6) the right to freedom of thought, conscience and religion (art 18); and (7) the right to hold opinions without interference (Article 19).

[221] *KN*, *supra* note 197 at 16.

[222] *Ibid* at 17-18.

protecting those who engage in it is an equally valid exercise of sovereign authority of a state granting refugee status. Unfortunately, as mentioned above, as a result of significant legislative changes countries such as Australia, Canada and the United States restricting access and excluding individuals who engage in violent acts regardless of the contexts in which they take place, it is quite likely that the cases discussed above would have different results today. I discuss these legislative developments in greater detail later in this thesis.

In the next section, I discuss a form of resistance with respect to which courts and tribunals have demonstrated a certain willingness to grant asylum for or recognize as a form of political opinion. This, as I shall demonstrate below, involves acts of desertion for the purpose of demonstrating a selective conscientious objection to illegal military actions.

III. The Legitimacy of Selective Conscientious Objection

The jurisprudence of courts and tribunals interpreting and applying the *Refugee Convention* and/or *Protocol* has demonstrated the validity of soldiers and officers in military organizations who refuse to comply with illegal orders that violate fundamental international norms. In so doing, these judicial and quasi-judicial decision-makers recognize that while certain acts such as desertion or draft-evasion would otherwise normally be subject to legitimate prosecution by state authorities, this is not the case where prosecution would be to punish those who perpetrate such acts in order to stop, prevent or at the very least dissociate from conduct that violates basic norms of international law. In addition, through these decisions, there is a recognition that soldiers may engage in selective

conscientious objection. This is the ability to object to taking part in specific military actions or armed conflicts. Generally, while soldiers are permitted to claim conscientious objector status when they object to all warfare, and as a result are either discharged or required to engage in alternative forms of service, they are not permitted to do so if the objection is with respect to specific wars or conflicts.

In this section, I argue that such deviations from the norm are justified. They are justified because while soldiers are normally expected to obey orders of superiors, they are obliged to disobey manifestly illegal orders. To underscore this point, since the Nuremberg trials, it is recognized that obedience to superior orders is not a defence to the commission of crimes pursuant to such orders. [223] As such, it is in keeping with the humanitarian goals of international law that soldiers and/or officers who refuse to perpetrate international crimes should be protected from prosecution for refusing to obey such orders.[224] If individuals are expected to avoid partaking in unlawful military conduct, whether as part of their obligations under international law or as a way to enforce such norms, the international community and the states that comprise it have an obligation to provide the necessary protection for their having done so.[225]

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[223] Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*,* 5 UN GAOR Supp No 12 at 11, UN Doc A/1316 (July 29, 1950).

[224] It is also worth noting from a legal pluralist standpoint, another normative basis for refusal is rooted in basic norms of civil society. For instance, one Israeli conscientious objector observed that "refusal is a civic obligation. Whoever was willing to participate in apartheid or in the genocide in Kosovo betrayed his basic duty not only as a human being but also as a citizen." Ronit Chacham, *Breaking Ranks: Refusing To Serve In The West Bank And Gaza Strip* (New York: Other Press, 2003) at 129.

[225] *Key v Canada (Minister of Citizenship and Immigration)*, 2008 FC 838, [2009] 2 FCR 625, 2008 CarswellNat 2152 (WL Can) ("Where the requirements of military service would put a person at risk of being excluded from refugee protection, the law must provide a meaningful anticipatory option. The idea that a refugee claimant in such circumstances ought to be returned to

The recognition that soldiers (and other state actors such as police officers) should be protected for refusing to engage in international violations, stems from both international bodies and judicial and quasi-judicial institutions in domestic jurisdictions. Within the military context in particular, the United Nations has provided express support for the notion of granting asylum to individuals who refuse to participate in the military or police corps when such bodies are engaged in forms of unlawful or otherwise oppressive conduct. For instance, a 1978 United Nations General Assembly resolution on the status of persons refusing service in military or police forces used to enforce apartheid called upon UN member states to "grant asylum or safe transit to another State [...] to persons compelled to leave their country of nationality solely because of a conscientious objection to assisting in the enforcement of apartheid through service in military or police forces."[226] While the resolution was non-binding, it indicated positive support that individuals should be granted refugee status in such cases.[227]

While the 1978 resolution was limited to individuals seeking to avoid enforcement of the apartheid regime's policies, the United Nations High

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his home country to face such a dilemma is repugnant and inimical to the furtherance of humanitarian law" at para 20).

[226] *Status of Persons Refusing Service in Military or Police Forces Used to Enforce Apartheid*, GA Res 33/165, UN Doc A/RES/33/165 (1978).

[227] Interestingly, a Dutch court recognized that pursuant to the resolution, it was "sufficient to grant South African conscientious objectors the status of *de facto* refugees." However it followed this by stating that each case must then be assessed to determine whether the applicant qualified for refugee status under the *Convention*. As such it is entirely unclear what the value of declaring persons to be *de facto* refugees was. Within the factual matrix of the particular case, the applicant was recognized as having a well-founded fear of persecution based on his political activism against the state. *NB v State Secretary for Justice*, [1994] 99 ILR 12 at 13 (Netherlands, Council of State (Judicial Division), 1981).

Commissioner for Refugees (UNHCR) Handbook broadened the circumstances where asylum may be appropriate for individuals evading or deserting military service that would involve their engaging in unlawful actions.[228] At paragraph 171, the *Handbook* states that:

> Where . . . the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.[229]

Before proceeding with an analysis of this paragraph and its impact on the jurisprudence respecting military deserters, a few observations with respect to the legal status of the *Handbook* and this provision specifically are in order. Although numerous courts have recognized the *Handbook* as highly persuasive or persuasive authority with respect to the interpretation of the *Refugee Convention* and/or *Protocol*, they have also clearly affirmed its non-binding nature.[230] Yet with respect to Paragraph 171 specifically, courts have interpreted its text and have applied it in numerous cases. It has become a part of the jurisprudence and standard in which to assess the refugee claims of military deserters.

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[228] United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/IP/Eng/Rev at paras 167-174 (1992) [*Handbook*]. These paragraphs include provisions that recognize that an individual who faces prosecution for resisting service for reasons of religious conviction may be eligible for asylum.

[229] *Ibid* at para 171.

[230] *Ward*, *supra* note 180 at para 34; *INS v Cardoza-Fonseca*, 480 US 421 at 439, 107 S Ct 1207 (1987); *Miguel-Miguel v Gonzales*, 500 F 3d 941 at 949 (9th Cir 2007); *Januzi v Secretary of State for the Home Department*, [2006] 2 AC 426 at 436-437, [2006] UKHL 5.

Paragraph 171 has a number of components that deserve explanation and reflection. First, Paragraph 171 is concerned with certain types of military action that contrary to the basic rules of human conduct. While "military action" is not specifically defined, courts and tribunals have explicitly or implicitly identified a number of actions committed by military actors that would qualify as violating such basic rules. They touch upon both the *jus ad bellum* and the *jus in bello*. They include[231] the refusal to: participate or assist in the prosecution of chemical warfare;[232] participate in an international armed conflict that was initiated without just cause;[233] take part in the murder of non-combatants,[234] fire onto an unarmed group of protestors;[235] engage in ethnic cleansing;[236] participate in systematic but non-grave breaches of international humanitarian law during the course of military operations;[237] arrest leaders of political parties and seize their property

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[231] In a number of selective conscientious objector decisions, courts and tribunals may not explicitly refer to the provisions of paragraph 171 for guidance, but in their decisions they nevertheless indicate that the orders that the resister refuses to perform are unlawful and implicitly violate the basic rules of human conduct.

[232] *Zolfagharkhani v Canada (Minister of Employment and Immigration*), [1993] 3 FC 540, 20 Imm LR (2d) 1, 1993 CarswellNat 89 (WL Can) (FCA).

[233] *Al-Maisri v Canada (Minister of Employment and Immigration)*, 183 NR 234, 1995 CarswellNat 133 (WL Can) (FCA). *See also Re Le*, 1994 CarswellNat 2901 (WL Can) (Imm & Ref Bd (Ref Div)).

[234] *Abarca v Canada (Minister of Employment & Immigration)*, 1986 CarswellNat 867 (WL Can) (Imm App Bd); *Phong v Director of Immigration*, [1997] HKCFI 284.

[235] Commission des Recours des Réfugiés [CRR] [Refugee Appeal's Board] July 5, 2007, *No 597325, I.*

[236] *Vujisic v INS*, 224 F 3d 578 (7th Cir 2000); *Ciric v Canada (Minister of Employment & Immigration)*, [1994] 2 FC 65, 71 FTR 300, 1993 CarswellNat 188 at para 3 (WL Can) (FCTD).

[237] *Key*, *supra* note 225 at paras 14 and 20.

following a military coup d'etat;[238] follow an order to engage in paid assassinations;[239] and participate in the persecution of an identified class of people based on race or some other prohibited ground.[240]

The second component looks to the nature of the relationship between the individual and the impugned military action. The language emphasizes military action that the individual does not wish to be *associated* with, but does not expressly require that the individual will be required to execute the illegal orders, or in any way participate in them. One Canadian court has stressed that "[the] language of Article 171 [...] is not the language either of direct participation or even complicity; rather, it speaks to unwanted association with objectionable military action."[241] Thus, the threat of prosecution or punishment for resisting participation in or refusal to be associated with such actions could in itself constitute a form of persecution.[242] The rationale behind this is that an individual should not have to be subjected to prosecution for refusing to perpetrate or be complicit in a manifestly illegal act, or even to be associated with it.

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[238] *Mohamed v Canada (Minister of Employment & Immigration)*, 176 NR 60, 1994 CarswellNat 1848 (WL Can) (FCA).

[239] *Barraza Rivera v INS*, 913 F 2d 1443 (9th Cir 1990).

[240] *Tagaga v INS*, 228 F 3d 1030 (9th Cir 2000); Refugee Appeal No 2248/94 *Re ZH* (NZ Refugee Status App Auth 1995).

[241] *Ibid* at para 21.

[242] See *Al-Maisri*, *supra* note 233 at para 6 ("I am persuaded that the Refugee Division erred in concluding that Iraq's actions [by invading Kuwait] were not contrary to the basic rules of human conduct. Accordingly, in my view, the punishment for desertion which would likely be visited upon the appellant if he were returned to Yemen, *whatever that punishment might be*, would amount to persecution of which the appellant has a well-founded fear.") (emphasis added).

The last component of Paragraph 171 looks to whether the international community has condemned the impugned military action. This is probably the most contentious component of the provision. There have been different perspectives as to what constitutes condemnation by the international community. The most restrictive interpretation has been expressed by the United States circuit court of appeal in *MA v INS*, which went so far as to require that international condemnation be expressed by recognized international governmental bodies such as the United Nations. [243] In that case, the asylum applicant refused to be conscripted into El Salvadoran military arguing that the armed forces were responsible for widespread attacks on the civilian population.[244] The problem with requiring that condemnation by the international community be evidenced through international bodies is that they are inherently political and the reality of international politics is such that states may be unwilling to engage in open criticism that would hinder diplomatic relations or spark tensions.[245] The

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[243] See *MA v INS*, 899 F 2d 304 at 312 (4th Cir 1990). The court's position in this respect was also supported by one scholarly commentator. See Kevin J Kuzas, Asylum For Unrecognized Conscientious Objectors to Military Service: Is There a Right Not to Fight?" (1991) 31 Va J Int'l L 447 at 472-473.

[244] *MA*, *supra* note 243 at 306.

[245] *Key*, *supra* note 225 (stating that "there are many reasons for countries to be reticent to criticize the decisions or conduct of an ally or a significant trading partner even where the impugned actions would, in some other political context, draw widespread international condemnation" at para 21). During the Vietnam War, thousands of draft-evaders fled to Canada in order to avoid conscription or criminal prosecution for evading the draft. Rather than being granted status through the asylum process, applications were processed through the regular immigration routes leading to many draft-evaders eventually obtaining Canadian citizenship. Although in so doing Canada effectively endorsed this form of resistance, it did so under the cover of granting immigration status rather than as a statement that the United States was engaging in acts of persecution. However, the true intent of the actions was reflected in Prime Minister Pierre Trudeau's statement that "Canada should be refuge from militarism." *See* Frank Kusch, *All American Boys: Draft Dodgers In Canada From The Vietnam War* (London: Praeger, 2001) at 94-97.

dissenting opinion in MA asserted that the *Handbook* does not explicitly restrict the notion of the international community to the United Nations, like bodies or for that matter exclude evidence by private organizations focused on documenting human rights abuses.[246]

A more moderate approach is to recognize that condemnation by the international community may be reflected through a broader range of sources including the statements, writings and documented reports of international non-governmental human rights organizations such as Amnesty International, Human Rights Watch and others.[247]

In both of the previous examples, whether it is intergovernmental agencies and/or non-governmental organizations such as Amnesty International or Human Rights Watch, there seems to be a desire for a specific statement of condemnation of the particular impugned conduct in the context of the conflict in which it is transpiring. However, as others have observed the text of paragraph 171 does not require such specificity. To recall, the text of Paragraph 171 indicates that condemnation by the international community is with respect to the "type of military action" that the individual refuses to be associated with.[248] The use of the words "type of" strongly suggests that condemnation by the international

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[246] *MA*, *supra* note 243 at 322-323.

[247] See *Ciric*, *supra* note 236.

[248] *Key*, supra note 237 ("Article 171 of the UNHCR Handbook speaks of the need for international condemnation for "the type of military action" which the individual finds objectionable. Thus, even where the response of the international community is muted with respect to objectionable military conduct, the grant of refugee protection may still be available where it is shown that the impugned conduct is, in an objective sense and viewed in isolation from its political context, contrary to the basic rules or norms of human conduct" at para 21).

community can, for example, relate to the use of chemical or biological agents more generally without having to locate specific statements about their particular use in a given context.[249] Professor James Hathaway observes that "there is a range of military activity which is simply never permissible, in that violates basic international standards."[250] Hathaway asserts that these would include military acts perpetrated with the intent to "violate basic human rights, ventures in breach of the Geneva Convention standards for the conduct of war, and non-defensive incursions into foreign territory."[251]

As a slight variation of the previous approach, courts and tribunals in the UK indicate that evidence of condemnation by the international community should merely be relevant but not a mandatory or determinative consideration.[252] In support of this, one UK tribunal decision suggested that to require condemnation by the international community for military deserter cases is incongruous with the general approach applied in other refugee claims assessments.[253]

I argue that the approach articulated by Hathaway, the *Key* court and pursued by the *Zolfagharkhani* court ("The Hathaway Approach") is most consistent with the text of paragraph 171 and the humanitarian objectives of

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[249] *Zolfagharkhani*, *supra* note 232 at paras 29-31

[250] James C Hathaway, *The Law of Refugee Status* (Toronto: Butterworth, 1991) at 180.

[251] *Ibid* at 180-181.

[252] See *Krotov v Secretary of State for the Home Department*, [2004] EWCA Civ 69 at para 48, [2004] 1 WLR 1825, 2004 WL 62143 (Eng CA); *Lebedev v Canada*, 2007 FC 207 at para 70, 62 Imm LR (3d) 161, 2007 CarswellNat 1919 (WL Can).

[253] *Foughali v Secretary of State for the Home Department*, 2 June 2000 [00/TH/01513].

international law. However, unlike the UK approach, the reference to condemnation of the international community as it appears in Paragraph 171 does not seem to read as merely optional language. Yet, the need to prove international condemnation does not require specific condemnation of new outbreaks of international law violations. As already noted, certain "types of military conduct" have already been generally condemned by the international community through international conventions and the recognition of certain customary international legal prohibitions.

The importance of paragraph 171 and its application by courts represents the legitimization within the refugee system of selective conscientious objection and desertion as valid forms of resistance to oppressive modes of military conduct and service. It also represents a way of furthering international humanitarian norms by making such acts of resistance a basis for inclusion under the *Refugee Convention*. Typically international humanitarian law's presence is felt the most when individuals are excluded for having committed a war crime or crime against humanity. Indeed the possibility of selective conscientious objection has become a key debate to chart the evolution of the military in relation to key rights and international law. While many states may permit individuals to claim conscientious objector status and in some cases require alternative civilian service in the case of universal adult conscription, this is usually only where an individual objects to war in its entirety as a religious or moral principle. The ability of individuals to claim conscientious objector status with respect to specific military

conflicts is typically not permitted.[254] This may produce the paradoxical result where a national court or asylum tribunal may grant a foreigner asylum for engaging in an act of selective conscientious objection in their country of nationality on one hand, while the executive branch of the state from which the deserter seeks asylum denies its own soldiers the ability to selectively object to participating in a specific military conflict that political actors deploy their soldiers to engage in. As this thesis demonstrates however, a number of judges and asylum adjudicators have granted asylum to such individuals nevertheless or have recognized that desertions in protest to certain military conduct will allow individuals to qualify for international refugee protections.[255]

IV. Resisting Corruption and Economic Oppression

In this section, I shall demonstrate how courts and tribunals have legitimized a third stream of resistance, namely resistance to corruption by the state and/or state actors. Like armed resisters and selective conscientious objectors, those challenging corruption have either been granted refugee status or in the alternative, their acts have been deemed as a matter of law to qualify as falling within the scope of a political opinion. I first examine definitions of state corruption as forms of economic oppression and its impact on enjoyment of human rights. I then proceed to examine the ways in which resisters have

[254] See *Gillette v United States*, 401 US 437, 91 S Ct 828 (1971).

[255] A diplomatic and political problem emerges however when individuals from one democratic state refuse or leave military service and seek asylum or some other alternative immigration status in a fellow (and sometimes neighboring) democratic jurisdiction. As has become well known, a number of United States soldiers have fled to Canada seeking asylum claiming that they will be prosecuted for refusing to fight in Iraq. I address these cases later in this thesis.

challenged such economic oppression and how courts have legitimized such resistance through their decisions.

Definitions regarding what constitutes corruption abound, but at the root of state-based corruption is the abuse of entrusted power for private gain.[256] It can be perpetrated by a whole host of state actors, including, inter alia, politicians, judges, bureaucrats, military, law enforcement, and prison officials.[257]

Corruption has been a longstanding issue throughout human history,[258] and one that the United Nations and other organizations have turned their attention to. The dangers it poses to societies are considerable. As the first preambular clause of the *UN Convention against Corruption* indicates, corruption poses serious problems and threats to the stability and security of societies and undermines its institutions and the values of democracy, ethical values, and justice, which in turn jeopardizes sustainable development and the rule of law.[259]

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[256] Transparency International, *Global Corruption Report 2004* (London: Pluto Press, 2004) at 1 [hereinafter *Global Corruption Report 2004*].

[257] For a discussion on the impact of predatory policing and rampant bribe-seeking by law enforcement officials, see Theodore P Gerber & Sarah E Mendelson, "Public Experiences of Police Violence and Corruption in Contemporary Russia: A Case of Predatory Policing" (2008) 42 Law & Soc'y Rev 1.

[258] The following is an illustration of the long standing nature of corruption and government efforts to confront it. The *Arthashastra*, an ancient Indian text written by Kautilya (although historians have disputed whether it is really the work of one author) speaks to the issue of combating corruption. The book sets out amongst the thirteen types of people designated as undesirable persons, corrupt judges, magistrates and heads of villages or departments who extort money from the public. The *Arthashastra* prescribes certain rewards for individuals who inform the state of acts of corruption taking place. If a case of corruption is sufficiently proven, the informant receives a portion of the amount in question. The informant will be "permitted" to escape the wrath of the guilty official by going into hiding or blaming someone else for the information. There were, however, examples of corporal punishment exacted on informants if it was shown that the official had not performed the corrupt acts. Kautilya, *The Arthashastra*, translated by LN Rangarajan, ed (New Delhi: Penguin Books, 1992) at 221, 298.

[259] *United Nations Convention against Corruption*, 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005).

It also has a serious impact on the enjoyment of human rights. Mary Robinson observes that "[when] individuals and families have to pay bribes to access food, housing, property, education, jobs and the right to participate in the cultural life of a community, basic human rights are clearly violated."[260] Lastly, corruption undermines the proper running of the government and adequate access to its services. Evan J Criddle and Evan Fox-Decent have similarly noted that "brazen kleptocracy undermines the very governmental institutions that are charged with preserving legal order and jeopardizes the physical security and liberty of nationals who depend on government assistance for relief from violence, starvation, and disease."[261] Given the impact that corruption has had on the provision of essential government services, Criddle and Fox-Decent contend that the international norm against corruption ought to be elevated to peremptory status.[262]

Corruption must be seen as a multi-faceted form of oppression which may call for different and varied form of resistance. As with many challenges to oppressive power though, this has also resulted in counter-resistance, violence and threats of violence from those challenged. The jurisprudence of courts and tribunals indicates that people have resisted in three key ways which may be

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[260] Mary Robinson, "Corruption and Human Rights," in *Global Corruption Report 2004*, *supra* note 256 at 7; see also International Council on Human Rights Policy & Transparency International, *Corruption and Human Rights: Making the Connection* (Geneva: International Council on Human Rights Policy, 2009) online: <http://www.ichrp.org/files/reports/40/131_web.pdf>.

[261] Evan J Criddle & Evan Fox-Decent, "A Fiduciary Theory of Jus Cogens" (2009) 24 Yale J Int'l L 331 at 372.

[262] *Ibid*.

plotted along a continuum ranging from less public forms of resistance to more active public and visible forms of resistive conduct.[263] The first and least publicly visible form of resistance is the refusal to pay bribes or engage in other forms of corruption.[264] This involves the resister informing the individual seeking the payment of a bribe or some other unlawful action that they refuse to carry out the request. However, for others the resistance may not end with simply refusing to carry out an action but may extend to a second form of resistance – reporting said corruption to public authorities, such as the police or other state officials.[265] This also includes government actors who as part of their job have pursued investigations to expose corruption by other government actors.[266] As one can easily fathom, if the mere refusal to commit illegal acts may elicit harmful consequences, blowing the whistle to the authorities can carry more profound and detrimental consequences for the individual resisting. The third and last category involves blowing the whistle on corrupt activities to the larger public, which can

[263] However, I do not suggest of course that because an act of resistance is less public this makes the act of resistance easier to pursue.

[264] *Desir v Ilchert*, 840 F 2d 723 (9th Cir 1988); *Zhang v Gonzales*, 426 F 3d 540 (2d Cir 2005); *Vassiliev v Canada (Minister of Citizenship and Immigration)*, 131 FTR 128, 1997 CarswellNat 1373 (WL Can) (FCTD); *V v Minister for Immigration and Ethnic Affairs*, [1999] FCA 428, 92 FCR 355, 1999 WL 33125570 (Austl Fed Ct); Commission des Recours des Réfugiés [CRR] [Refugee Appeal's Board], 27 April 2006, 556398, MA.

[265] *Fedunyak v Gonzales*, 477 F 3d 1126 (9th Cir 2007) (refusing to pay bribes and reporting the extortionate demands to local authorities); *Sagaydak v Gonzales*, 405 F 3d 1035 (9th Cir 2005) (reporting tax fraud and corruption to local prosecutors); *Maldonado-Castro v Ashcroft*, 2004 WL 1404697 (9th Cir 2004); *Galicia v Canada (Minister of Citizenship and Immigration)*, 2009 FC 962, 2009 CarswellNat 2939 (WL Can); *Klinko v Canada (Minister of Citizenship & Immigration)*, [2000] 3 FC 327, 184 DLR (4th) 14, 2000 CarswellNat 283 (FCA).

[266] *Grava v INS*, 205 F 3d 1177 (9th Cir 2000); *Maldonado-Castro*, *supra* note 265; *Haxhiu v Mukasey*, 519 F 3d 685 (7th Cir 2008).

be manifested in various ways, including the organization of campaigns or strikes[267] or the writing of newspaper articles.[268]

One may ask whether and how resistance to corruption manifests a political opinion. One Australian justice has observed that an attitude of resistance to systemic corruption of, and criminality by, government officers can fall within the description "political opinion".[269] A well-founded fear of persecution for reasons related to individual resistance to corruption by state actors is most identifiable when forms of corruption are so endemic that the nature of governance might be aptly described as a kleptocracy or government by thievery.[270] In *Desir v. Ilchert*, a Haitian fisherman refused to give in to numerous extortion demands of the Ton Ton Macoutes. The Macoutes were described by the court as "an elaborate network of official and semi-official security forces, factions of which were fiercely loyal to the [ruling] Duvalier family, [and who] formed the heart of the system."[271] Desir was jailed and detained on several occasions. He was subjected to beatings and threats to his life. He fled to the United States, but was denied asylum by an immigration judge. In granting Desir's appeal, the court observed that "because the Macoutes are an organization created for political purposes, they bring politics to the villages of Haiti. To

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[267] *Baghdasaryan v Holder*, 592 F 3d 1018 (9th Cir 2010); *Bu v Gonzales*, 490 F 3d 424 (6th Cir 2007).

[268] *Hasan v Ashcroft*, 380 F 3d 1114 (9th Cir 2004); *Biro v Canada (Minister of Citizenship & Immigration)*, 2005 FC 1428, 2005 CarswellNat 3495 (WL Can).

[269] *V v Minister for Immigration and Multicultural Affairs*, *supra* note 264 at para 18, Wilcox J.

[270] *Desir*, *supra* note 264 at 724.

[271] *Ibid* at 727.

challenge the extortion by which the Macoutes exist is to challenge the underpinnings of the political system. Accordingly, to *resist extortion* is to become an enemy of the government."[272]

Resistance to corruption need not however take place only where the government can be characterized as a kleptocracy or is supportive of corruption. Indeed in many instances, governments may even have clear policies condemning acts of corruption perpetrated by its own agents. Courts have nevertheless recognized that refusal to cooperate with rogue state agents manifests a political opinion. In *Klinko v Canada*, the applicant was a businessman who, along with other businessmen, filed a complaint with a regional authority in Ukraine complaining about corrupt practices committed by customs and police officials.[273] Although their complaint was dismissed, it was clear that issues of corruption were endemic in the country, as thousands of officials were prosecuted for various economic crimes the year after Klinko and the others filed their complaint.[274] Thus, at the level of national policy, the government of Ukraine was concerned about the degree of corruption engaged in by its own employees and took steps to correct it. Yet, following the filing of the complaint, Klinko and his family were subjected to numerous forms of retaliation including a beating, destruction of

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[272] *Ibid.* (emphasis added). A Canadian court similarly observed that where corruption is prevalent, "to decry corruption, in some cases is to strike at the core of such governments' authority." *Berrueta v Canada (Minister of Citizenship & Immigration)*, 109 FTR 159, 1996 CarswellNat 321 at para 5 (WL Can).

[273] *Klinko*, *supra* note 265 at para 4.

[274] *Ibid* at para 5.

property, intimidation of his employees, and an arrest and interrogation.[275] Klinko and his family fled Ukraine for Canada and sought asylum. Their application was denied. The Immigration and Refugee Board of Canada determined that because acts of corruption were formally condemned by the state, Klinko's filing of a complaint did not amount to a political opinion about a matter that was "engaged in" by the state, in the sense of the latter supporting, condoning or sanctioning such corrupt activities.[276]

It makes little sense that resistance to even rogue state actors will only be considered to manifest a political opinion if the state disagrees with the claimant. Indeed, the Canadian Federal Court of Appeal in *Klinko* held that even where individuals such as Klinko shared the same opinion as the government on corruption, this shared opinion did not diminish the fact that it was an exercise in expressing a political opinion.[277] It posited that a "political opinion does not cease to be political because the government agrees with it."[278] Under Canadian law, a political opinion has been defined as "any opinion on any matter in which the machinery of state, government, and policy may be engaged."[279] As the *Klinko* court identified, "engaged" did not require official government sanction or

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[275] *Ibid* at para 6.

[276] *Ibid* at para 11.

[277] *Ibid* at paras 27, 31, 34-35.

[278] *Ibid* at para 31.

[279] *Ward*, *supra* note 180 at para 90. This definition was constructed by Professor Guy S Goodwin-Gill. See Guy S Goodwin-Gill & Jane McAdam, *The Refugee In International Law,* 3d ed (New York: Oxford University Press, 2007) at 87.

support for corrupt actions.[280] The court asserted that the government itself does not have to be the agent of persecution or condone it; it is enough that the state is incapable of providing protection to those who have expressed a political opinion.[281]

What *Klinko*, and other decisions noted above, suggest is that resistance to dominant power manifested through oppressive means does not have to be waged or aimed against the entire state or machinery of government itself in order to obtain asylum. *Klinko* demonstrates that lower-ranking state officials carry a significant amount of power to oppress members of society whom they are meant to serve, even when the authority to which they are employed does not approve or endorse the unlawful actions of such rogue employees. It illustrates the non-monolithic nature of the state, the distribution of power which exists therein, and the ways in which "lower ranking" individuals can assume a greater share of power and illegally acquire wealth without significant deterrence by the state. In order to combat such violations, individual can play a significant role in calling attention to the misdeeds of criminals. The *Desir* and *Klinko* decisions show that they can expect a certain measure of indirect support from foreign states, if only through the granting of asylum.[282]

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[280] *Klinko*, *supra* note 265 at paras 31-37.

[281] *Ibid*.

[282] The *United Nations Convention against Corruption* recognizes the importance of states providing sufficient domestic protections from retaliation with respect to witnesses, victims and those who report instances of corruption. However notably it does indicate the importance of the refugee protection mechanism to serve as a way to protect individuals who challenge corruption. *United Nations Convention against Corruption, supra* note 259*,* arts 32 and 33.

V. Conclusion

As I have suggested thus far, where courts or tribunals have either granted asylum or have recognized that certain actions fall within the scope of an enumerated ground under the *Refugee Convention*, namely political opinion, this amounts to a legitimization of such resistance. This legitimization does not evidence the judicial legalization of an explicit right to resist oppression any more than a jury engaging in jury nullification or a judge applying the defense of necessity formally legalizes the actions of criminal defendants. Also the asylum granting state's decisions have no direct legal incidence in the law of the state where the events occurred, except very indirectly through the decentralized reinforcement of the condemnation of certain forms of oppression. Yet, what is transpiring is a judicial and/or quasi-judicial (in the case of administrative tribunals) recognition that even prosecution of individuals or that the threat of any punishment for having engaged in such defiance may constitute an act of persecution. This is notwithstanding the fact that the acts of resistance constitute violations of legal norms in the country where the resistance transpired. By recognizing that prosecution or any punishment is improper in cases where legitimate resistance was involved, the courts and tribunals in question essentially justify such resistance.

There are instances, however, where it is not necessarily the possibility of any punishment that will trigger the need for granting refugee status, but punishment that would be deemed harsh or disproportionate under the circumstances. In other words, a government's imposition of criminal liability and

some form of punishment for an individual's act of resistance may be deemed legitimate and not in itself an act of persecution, but the mode or quantum of punishment might be seen as constituting persecution.[283] Examples of this might include the potential for a Chinese court to impose a one and a half year sentence on an individual, who, at the age of fifteen, merely voiced opposition to the government,[284] or a Russian soldier potentially receiving a lengthy sentence accompanied by harsh physical punishment during confinement for refusing to take part in military actions in Chechnya.[285]

One might be hesitant to even assert that what is transpiring in the cases discussed amounts to a legitimization, excusing or mitigation of outlawry. After all, an asylum adjudication is a formal determination as to whether an individual, who is outside of his or her country of origin or place of last habitual residence, and is unable or unwilling to return on account of a well-founded fear of persecution for reasons of race, nationality, religion, membership in a particular social group or political opinion, qualifies as a refugee. This inquiry emphasizes persecution or the possession of a well-founded fear of it, and the failure of state protection. Thus, much focus relates to the actions or failure of the state of origin to protect one of its own nationals.

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[283] See *UNHCR Handbook*, *supra* note 86 at para 169.

[284] See *Li Wu Lin v INS*, 238 F 3d 239 (3d Cir 2001) ("At oral argument the government maintained that a year and a half of incarceration and forced labor for a fifteen-year old who voiced opposition to the government is not sufficiently severe punishment to qualify as persecution. We emphatically disagree. That is a very long sentence for simply voicing opposition to the government" at 248). One senses here, however, that the court is also finding difficulty with the idea of any criminal liability for such an "offence" whatsoever.

[285] *Krotov*, *supra* note 252 at para 48.

Yet, it is the necessary nexus between the well-founded fear of persecution and one of the identified grounds that leads to one's official recognition as a refugee. Furthermore, as the discussion above indicates, the acts of resistance discussed in this article are largely situated within the concept of a political opinion. In some instances, resistance is explicitly tied to the concept of political opinion rather than it being implied.[286] By including such resistive – and sometimes violent – actions into a more expansive understanding of a political opinion, courts and tribunals have at the very least implicitly legitimized such conduct by allowing agentive individuals an opportunity to escape prosecution in a court of law or generalized extra-judicial persecution and be granted a status normally reserved for people deemed to be non-agentive victims.

This phenomenon represents an evolving discourse within international refugee law as practiced within certain national jurisdictions applying the *Refugee Convention* and/or *Protocol.* This shift should not be entirely surprising given that refugee law is part of the larger corpus of international law – a body of law that is dynamic and evolving. Indeed, as the foregoing discussion has shown, international refugee law interfaces with other areas of international law and is constantly developing. International refugee law would miss its *raison d'être* if state actors charged with implementing its provisions excluded individuals who engaged in actions that were in furtherance and in defense of international legal

[286] In *Tarubac v INS*, the claimant claimed that she had a well-founded fear of persecution by the New People's Army (NPA) for reasons of her political opinion. The NPA was a violent revolutionary group that sought to overthrow the government of the Philippines. They wanted to her to join their group and pay a "revolutionary tax". It asserted: "Tarubac not only resisted the NPA's demands but expressed political reasons for her resistance, the NPA's subsequent persecution of her is best understood as being on account of her political opinion." *Tarubac v INS*, 182 F 3d 1114 at 1119 (9th Cir 1999).

norms and principles that garner the support of many within the international community. This includes norms and principles respecting human rights, limitations on the conduct of military forces and prohibitions on corruption and other forms of oppression. Those who engage in resistance to those who perpetrate violations of international norms have something important to contribute to its advancement. As international refugee law is a branch of international law, it has a significant role in protecting those who take reasonable steps to advance it.

The granting of refugee status to resisters has particular consequences for the development of international refugee law. That is, it changes or alters the narrative of the refugee condition as being defined as the epitome of pure victimhood. I turn to this development in the next chapter.

Chapter Three – Reimagining Refugees

[A]sylum law is supposed to protect *innocent* victims of persecution.[287]

- Justice Kleinfeld, United States 9th Circuit Federal Court of Appeal

Traditionally, a refugee has been an individual in whose case the bonds of trust, loyalty, protection, and assistance existing between a citizen and his country have been broken and have been replaced by the relation of an oppressor to victim.[288]

- United States Board of Immigration Appeals

I. Introduction

Human beings by their very nature and conduct tend to defy simplistic characterizations and labels. Yet, in substantial ways, refugees are still nevertheless largely constructed as victims of persecution.[289] As I discuss below, victims in turn are more often than not defined by crimes committed against them, as well as a sense of helplessness and/or innocence. This simplistic construction is dominant, if not hegemonic in that many applicants in asylum proceedings will likely attempt to locate themselves in this narrowly defined box in order to be considered a refugee; it is a construction against which many are judged and

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[287] *Aguirre-Aguirre v INS*, 121 F 3d 521 at 526 (9th Cir 1997), Kleinfeld J (dissenting) [emphasis added].

[288] *Matter of Acosta*, 19 I & N 211 at 235 (BIA, 1985) (overruled in part by *INS v Cardoza-Fonseca*, 480 US 421, 107 S Ct 1207 (1987), with respect to the standard required to demonstrate persecution under withholding of removal).

[289] Jay M Marlowe, "Beyond the Discourse of Trauma: Shifting the Focus on Sudanese Refugees" (2010) 23 J Refugee Stud 183 ("Within the popular media and much of the academic literature, refugees are often presented as those who are traumatized, lost, psychologically damaged and overwhelmed by grief" at 186).

assessed. However, despite this label and the images it may invoke, when asylum is granted to resisters or where their actions are considered to fall within the scope of a "political opinion" under the *Refugee Convention*, such decisions pave the way for an important re-imagination of the notion of the refugee within international and domestic legal systems as well as scholarly discourse.[290]

In this chapter, I argue that the recognition of resisters as individuals eligible for asylum challenges this dominant conception of refugees in a substantial manner by forcing others to recognize refugees as constituting more than helpless, innocent and/or traumatized victims. Rather they are individuals imbued with agency and the capacity to resist oppression while also victims as a result of the exercise of this agency. They cannot be reduced to either being just victims or resisters, but embody both constructs, albeit not necessarily symmetrically. Furthermore, and drawing from scholarship discussed below, a breakdown of the victim/agent dichotomy allows us to recognize that resisters are not caricatured warriors who fight or are expected to fight to their end and perish in a blaze of glory, but are also victims subject and vulnerable to oppressive circumstances which they should not have to endure. Victims are in their own right not just persons impacted by criminal and oppressive acts, but also individuals who challenge the oppressions mounted against them and/or others.

This chapter is divided into three sections. In the first section, I shall first set out how refugees are predominantly constructed as innocent and/or helpless victims of (prospective) persecution in legal and scholarly discourse. Juxtaposed

[290] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) [*Refugee Convention*].

against the discussions and representations of agency in the preceding chapters, the contrast will indeed appear at first discordant. In the second section, I argue that while discourses on victimhood outside of the refugee law context can replicate the same emphases on innocence and helplessness, there has also been a developing discourse that challenges such reified constructions. Within this developing discourse, scholars and jurists have argued for a more nuanced perspective which sees victims being imbued with agentive qualities. Seen in relationship with this alternative view of victimhood, the space is now created to conceive of the resister as being a refugee who contains within him or her both the attributes of victim and agent interacting with one another across a porous boundary where the two identities and their attributes cannot easily be untangled. In the third and final section, drawing from both the developing discourse discussed in the second section, as well as case law discussed in earlier chapters, we may begin to see resisters seeking refugee status alternatively as victimized agents or agentive victims. But in either formulation, the refugee is more than just a reified construct. The resister who is recognized as a refugee or whose eligibility is affirmed on account of his or her acts straddles representations of both victimhood and resistance.

II. Refugees as Victims

Human societies, through a variety of avenues, excel in producing classifications which separate and differentiate their constituent members – e.g., citizen, permanent resident, illegal alien and/or undocumented migrant. They imbue them with meanings that may have significant juridical as well as political,

social and economic consequences for those who (are deemed to) belong to a particular classification and those who do not.[291] To be classified or to self-classify oneself as belonging to a particular group within society[292] may result in the enjoyment of certain entitlements and/or rights not given to others excluded from this group.[293] In other circumstances, being categorized in a certain fashion may result in the deprivation of one's rights, including the right to life and liberty.[294] Within the legal context of adjudicating asylum applications, obtaining the classification of "refugee" entails access to certain rights that are not available to those who are mere asylum-seekers.[295] Yet, *how* the notion of a refugee is legally constructed also matters a great deal, for failure to persuasively situate

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[291] This is not to suggest that the creation of or emphasis on a particular classification as a category for membership in a distinct group cannot be overcome through legal recourse. *See generally Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1, 1989 CarswellBC 16 (WL Can) (holding that the requirement that an applicant to become a member of the Law Society be a Canadian citizen was an infringement of s 15 of the *Canadian Charter of Rights and Freedoms*).

[292] It is quite evident that most will or can identify themselves with more than one classification.

[293] See *Canadian Charter of Rights and Freedoms*, s 15(2), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 ("Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" at s 15(2)).

[294] For instance, during World War II, both the United States and Canadian governments forcibly interned citizens and non-citizens of Japanese ancestry on the pretense that such persons constituted a national security threat given the belligerent relations existing with the Japanese government following the attack on Pearl Harbor. Being classified as Japanese, regardless of any other characteristic, including United States citizenship, allowed authorities to deprive such individuals of their liberty through internment. Such state action was upheld by the United States Supreme Court in *Korematsu v United States*, 323 US 214, 65 S Ct 193 (1944).

[295] For example, under the 1951 *Refugee Convention*, refugees are to be accorded the same treatment as nationals of the host (contracting) country with respect to a variety of rights, including: the right to free association in trade union and non-political and non-profit making organizations, right to free access to the judicial system and legal assistance, elementary education, and freedom to practice one's religion. *Refugee Convention*, *supra* note 290 at arts 4, 15, 16, 22.

oneself within that "narrative" or range of acceptable narratives can have tremendous ramifications, most notably, deportation or removal.[296]

For many asylum-seekers, the attainment of refugee status often requires them to present themselves as a victim of trauma, or in the language of refugee law and discourse, the victim of persecution.[297] Didier Fassin and Richard Rechtman observe that in the context of French asylum adjudications: "Survivors of [...] oppression, and persecution adopt the only persona that allows them to be heard – that of victim."[298] They argue that we know little of asylum-seekers' subjectivities, whether they view themselves as victims or as something more substantial – for example as political activists.[299] This is in part strengthened by the growing and overwhelming reliance on clinical psychological certificates to support, if not supersede, the word of the asylum-seeker.[300] Fassin and Rechtman report that, for many, assuming the obligatory label of victim requires significant

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[296] In *Padilla v Kentucky*, 559 US 356, 130 S Ct 1473 (2010), the United States Supreme Court held that a criminal defense lawyer's failure to apprise a non-citizen client of the eventual ramification of pleading guilty, namely deportation, amounted to ineffective assistance of counsel under the Sixth Amendment. Although deportations are part of the immigration regime and civil in nature, the Court characterized deportation as a "drastic measure" with "harsh consequences" thus recognizing its potentially serious impact on a non-citizen located within the country. *Ibid* at 1478.

[297] See Maggie O'Neill, "Global Refugees: (Human) Rights, Citizenship, and the Law" in Sinkwan Cheng ed, *Law, Justice, and Power: Between Reason and Will* (Stanford: Stanford University Press, 2004) ("Dominant images and stereotypes [of refugees and asylum-seekers] include those of victim, passivity, and dependence and do not reflect the courage or resistance, as well as the need for building self-esteem, self-identity, and cultural identity, in the face of tragedy and loss" at 71).

[298] Didier Fassin & Richard Rechtman, *The Empire Of Trauma: An Inquiry Into The Condition Of Victimhood*, translated by Rachel Gomme (Princeton: Princeton University Press, 2009) at 279.

[299] *Ibid*. However, as the previous chapters have demonstrated above, there are instances where successful asylum applicants have been able to demonstrate their subjectivity and agency.

[300] *Ibid* at 255-57.

adjustment as part of the process of being recognized as a refugee.[301] Expecting the asylum-seeker to reduce his or her experiences to fit within the framework of victimhood, and at that, a particular type of victimhood, may force some individuals to advance an incomplete if not unauthentic version of who they are.[302]

This noted association between victimhood and refugee status emerged in more explicit terms following the end of World War Two, when the international community acting through the newly-formed United Nations created the International Refugee Organization in 1946. Specifically, the IRO's Constitution largely defined refugees as either victims of Nazi persecution or by their allied regimes, or as victims of the Phalangist regime in Spain.[303] Although a number of individuals and communities fit that description, including those who engaged in armed resistance, it is surely those who were freed from Nazi concentration camps at the end of the war or those who were fleeing Nazi persecution who strongly emblemized the classification.[304]

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[301] *Ibid* at 280.

[302] There is a certain analogy between asylum-seekers having to hide their agency in order to project an image of victimhood in the hopes of increasing their chances of achieving refugee status and United States soldiers from lesbian, gay, bi-sexual or transgendered communities who have had to hide their sexual orientation in order to remain soldiers or gain access to serving in the military. Soldiers are expected to live by a code of honor that stresses honesty, but they were expected to lie or keep hidden a core aspect about themselves that their heterosexual counterparts do not have to do. Similarly, asylum-seekers are expected to tell the truth about themselves, but in having to stress their victimhood they must to some degree diminish their agency.

[303] *Constitution of the International Refugee Organization*, 15 December 1946, 18 UNTS 3, annex I(1)(A)(I) (entered into force 20 August 1948) [*IRO Constitution*].

[304] It is perhaps worth noting that in subsequent decades scholarship and producers of popular culture would represent Holocaust survivors in more nuanced ways, as persons subjected to persecution and harsh discrimination while still retaining more than a modicum of agency in the face of this oppression. See Michael R Marrus, "Jewish Resistance to the Holocaust" (1995) 30 J

In 1951, the United Nations finalized the *Refugee Convention*, which entered into force in 1954. The text of the *Refugee Convention* emphasized that a refugee was an individual who was outside of his or her country of nationality or place of last habitual residence and was unable or unwilling to return to such place on account of a well-founded fear of persecution for reasons of race, nationality, religion, membership in a particular social group or political opinion.[305] The text of the *Refugee Convention* replaced certain aspects of the *IRO Constitution* relating to the definition of refugees. Absent in the *Refugee Convention* were explicit references to "victims" of (past) persecution.[306] Indeed, an individual need not actually experience persecution, but may merely have a well-founded fear that he or she will experience persecution. Furthermore, one's well-founded fear need not be tied to threats of persecution from a fascist state specifically.

While the term "victim" was excised from the final language of the *Refugee Convention*, the trope of victimhood has remained an inexorable part of the refugee image and narrative, and consequently the legal narrative within which asylum seekers must situate themselves. As the United Nations High Commissioner for Refugees' Handbook explicitly states: "*a refugee is a victim* –

Contemp Hist 83; Ruby Rohrlich, ed, *Resisting The Holocaust* (New York: Berg, 1998), and; Nechama Tec, *Defiance: The Bielski Partisans* (New York: Oxford University Press, 1993).

[305] *Refugee Convention*, *supra* note 290, art 1. The definition is reproduced in a variety of national legislation. See e.g. *Immigration and Refugee Protection Act*, SC 2001, c 27, s 96; *Migration Act, 1958*, s 91-R (Austl); *Immigration and Nationality Act*, 8 USC §1101 (a)(42).

[306] In an earlier draft of the *Refugee Convention*, the refugee was defined as an individual who has "a well-founded fear of being *the victim of persecution* for reasons of race, religion, nationality, or political opinion." *Report of the Ad Hoc Committee on Statelessness and Related Persons (Lake Success, New York, 16 January to 16 February 1950)*, 17 February 1950, E/1618; E/AC.35/5 at 12 and 39 [emphasis added].

*or potential victim – of injustice***[…]**."[307] Not every injustice will suffice however. The *bona fide* refugee is one who has experienced past persecution or has a well-founded fear of prospective persecution.[308] Persecution is furthermore tied to the notion of state protection and the lack thereof. The status of being a victim is directly connected to the failure of a refugee's country of nationality to provide protection from such oppression.[309] One British court has observed: "the international refugee protection regime is meant to come into play only in situations when the home state fails to provide for the *potential victim* the degree of protection ("practical protection") which the international community expects a state to provide for its citizens."[310]

The putative refugee must therefore fit himself/herself into the proper mold of the victim or the potential victim of persecution through a particular construction and presentation of facts warranting conferral of such status.[311]One

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[307] United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/IP/Eng/Rev at para 56 (1992) [*UNHCR Handbook*] [emphasis added].

[308] François Crépeau, *Droit d'asile – De l'hospitalité aux controles migratoires* (Brussels: Bruylant, 1995) ("La persécution est le seul motif de crainte qui justifie la qualité de réfugié.") ("The fear of persecution is the only fear that justifies recognizing refugee status" at 82) (trans by text's author).

[309] *R v Immigration Officer at Prague Airport and Another, ex parte European Roma Rights Centre and others*, [2004] UKHL 55, [2005] 2 AC 1 (stated that the *Refugee Convention* "represented a compromise between competing interests, in this case between the need to ensure humane treatment of the victims of oppression on the one hand and the wish of sovereign States to maintain control over those seeking entry to their territory on the other" at para 15).

[310] *Souad Noune v The Secretary of State for the Home Department*, 2000 EWCA Civ 2669, 2000 WL 1791543 at para 8 (Eng CA) (WL) (emphasis added).

[311] The High Court of Australia has similarly observed: "The Convention does not require that the individual who claims to be a refugee should have been the victim of persecution. The Convention test is simply whether the individual concerned has a 'well-founded fear of persecution'." *Minister for Immigration and Multicultural Affairs v Haji Ibrahim*, [2000] HCA 55 at para 16, 2004 CLR 1, 2000 WL 1245829 (WL) [*Haji Ibrahim*].

United States Federal Court of Appeal posits that to establish "the requisite fear of persecution, an applicant must present specific facts demonstrating that he has actually been the victim [of] persecution or has good reason to believe that he will be singled out for persecution."[312] Thus an individual's "[status] as a victim of persecution makes an alien *eligible* for asylum[…]."[313] One's identity as a victim who is or has been singled out for persecution is crucial. Canadian authorities have similarly stressed, it is not enough for a person to be a victim or potential victim of generalized violence or crime.[314] The (prospective) persecution must be individualized and connected to a *Convention* ground.

Although persecution has not been defined in the *Refugee Convention*, the various legal and scholarly descriptions of what constitutes persecution suggest an inexorable synonymity between this central feature of determining one's refugee status and victimhood.[315] Numerous decisions use or incorporate the phrase "victim of persecution" and in so doing stress the connection between victimhood

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[312] *Petrovic v INS*, 198 F 3d 1034 at 1037 (7th Cir 2000). See also *Torres v Mukasey*, 551 F 3d 616 (7th Cir 2008) ("Successful applicants for either asylum or withholding of removal must show that they have been, or will be, the victim of persecution" at 625).

[313] *Alsagladi v Gonzales*, 450 F 3d 700 at 701 (7th Cir 2006) [emphasis in original].

[314] *Canada (Minister of Employment and Immigration) v Villafranca*, (1992) 18 Imm LR (2d) 130, 99 DLR (4th) 334, 1992 CarswellNat 78 (WL Can) [citing to Carswell] ("Terrorism in the name of one warped ideology or another is a scourge afflicting many societies today; its victims, however much they may merit our sympathy, do not become Convention refugees simply because their governments have been unable to suppress the evil" at para 7).

[315] However, it is worth noting that regional agreements respecting the definition of refugees have included other reasons that extend beyond the traditional criteria of persecution. See e.g. *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, OAU Doc No CAB/LEG/24 3, 1001 UNTS 45, art 1, para 2 (entered into force 20 June 1974).

and persecution.[316] However, even where courts do not use phrase "victim of persecution", the nature of persecution is such that it implicates a significant degree of victimization. For instance, James Hathaway, a leading international refugee law scholar, has defined persecution as "the sustained or systematic violation of basic human rights demonstrative of a failure of state protection."[317] By contrast, persecution neither includes mere "unpleasantness, harassment, and even basic suffering"[318] nor "every sort of treatment our society regards as offensive."[319] Australia's *Migration Act* establishes that persecution entails "serious harm" to the asylum seeker, and involves systematic and discriminatory conduct.[320] The *Migration Act* further enumerates a non-exhaustive list of actions that would constitute "serious harm" and includes threats to the life and liberty of the asylum-seeker as part of this list.[321]

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[316] This statement is based on a search of the Westlaw database using the exact phrase "victim of persecution". While some non-asylum cases turn up using this exact phrase, a rather substantial number of the decisions are refugee cases.

[317] James C Hathaway, *The Law Of Refugee Status* (Toronto: Butterworths, 1991) at 104-105. Hathaway also observes that amongst numerous scholars, the prevailing view is that "refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systematic denial of core human rights is the appropriate standard." *Ibid* at 108.

[318] *Abdelmalek v Mukasey*, 540 F 3d 19 at 23 (1st Cir 2008).

[319] *Ghali v INS*, 58 F 3d 1425 at 1431 (9th Cir 1995).

[320] *Migration Act*, 1958 at s 91R(1)(b)-(c).

[321] *Ibid* at s 91R(2)(a)-(f). These include: a threat to the life and liberty of the asylum-seeker; significant physical harassment of the person; significant physical ill-treatment of the person; significant economic hardship that threatens the person's capacity to subsist; denial of access to basic services, where the denial threatens the person's capacity to subsist; denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist. One United States Court has similarly stated that persecution may include "detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings, or torture." *Mitev v INS*, 67 F 3d 1325 at 1330 (7th Cir 1995) (the BIA held that an individual who presented no evidence that he had been subjected any of these types of mistreatment had not experienced past persecution).

Within the context of international refugee law as applied through courts and tribunals Party to the *Refugee Convention*, persecution is thus intimately tied to the victimization of individuals through extreme or serious conduct at the hands of forces that are usually much more powerful and in some cases better organized than the victim and waged against the latter. However, it is not just that the putative refugee is a victim or potential victim of such harm, there is also an accentuation on their helplessness. The High Court of Australia has observed that persecution includes "sustained discriminatory conduct or a pattern of discriminatory conduct against individuals or a group of individuals who, as a matter of fact, are unable to protect themselves by resort to law or by other means."[322] Little in these definitions and descriptions of persecution indicates any vision of individuals targeted as persons with agency. They are the objects upon whom significant abuse has and/or may be inflicted.

Much of the imagery surrounding refugees relates to a construction of victimhood embodied by women and children, and particularly those from the Global South. This imagery in turn frames women and children in simplistic ways and lacking agency. For instance, Liisa Malkki observes that "perhaps it is that women and children embody a special kind of powerlessness; perhaps they do not tend to look as if they could be "dangerous aliens"; perhaps their images are more effective in fundraising efforts than those of men."[323] Children in particular

[322] *Haji Ibrahim*, *supra* note 311 at para 18.

[323] Liisa Malkki, *Purity And Exile: Violence, Memory And National Cosmology Among Hutu Refugees In Tanzania* (Chicago: University of Chicago Press, 1995) at 11.

personify the image of powerlessness and the faultless or innocent victim.[324] Malkki asserts that infants are portrayed as powerless beings "with no consciousness of history, traditions, culture, or nationality" and embody the notion of elementary humanity.[325]

The highlighting of gender and age in the viewing of refugees as sympathetic and paradigmatic victims of persecution is also illustrated in the UNHCR guidelines on international refugee protection for victims of trafficking and persons at risk of trafficking.[326] The *Guidelines* posit that although trafficking is not restricted to women and the sex trade, "[trafficking] in the context of the sex trade is well documented and primarily affects women and children who are forced into prostitution and other forms of sexual exploitation."[327] Indeed, to accentuate the close proximity of victims of sex trafficking with persecution, the Guidelines state that "trafficking may constitute a crime against humanity, and in armed conflict, a war crime."[328] Refugee tribunals have also recognized the eligibility of trafficking victims to refugee status.[329]

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[324] *Ibid*. See also Nicholas D Kristof, "Rwandans, Once Death's Agents, Now Its Victims" *The New York Times* (13 April, 1997), online: New York Times <http://www.nytimes.com>.

[325] Malkki, *supra* note 323. This discourse of innocence has extended to child soldiers being constructed as faultless even in the face of vast cruelties committed by many. It should be noted as well that not only have some committed atrocities, they have exercised their ability to resist orders they deem unjust. They may embody victim, resister and criminal. See Mark A Drumbl, *Reimagining Child Soldiers in International Law and Policy* (New York: Oxford University Press, 2012) at 36-40, 86-89.

[326] UNHCR, *Guidelines On International Protection: The Application Of Article 1a(2) Of The 1951 Convention And/Or 1967 Protocol Relating To The Status Of Refugees To Victims Of Trafficking And Persons At Risk Of Being Trafficked*, 7 April 2006, UN Doc HCR/GIP/06/07.

[327] *Ibid* at para 3.

[328] *Ibid*.

[329] See e.g. *SB v Secretary of State for the Home Department*, [2008] UKAIT 00002.

The emphasis on victimhood and its connection with female asylum-seekers persists for some jurists even in the face of evidence of agency. The reality is that many victims, notwithstanding the assaults on their person, can and do demonstrate a modicum of agency and defiance while still maintaining their status as a victim. This includes instances of women who have sought asylum based on domestic abuse or other gender-based violence in their country of nationality and have claimed that the state has failed to protect them.[330] They may demonstrate their agency by seeking protection from authorities in their country of nationality. Indeed, refugee case law illustrates that a condition for obtaining asylum under the *Convention* is to seek protection from one's home state before seeking protection from another state. Where authorities demonstrate their unwillingness or inability, such victims may also demonstrate their agency by refusing to remain in the country.[331] To refuse to be a victim of persecution demonstrates a type of agency in itself. However, despite the agentive quality inherent in not remaining an object of someone else's oppression by seeking protection in a foreign state, the language adopted by some jurists can be to consciously or unconsciously ignore or downplay this and highlight a victimhood that stresses helplessness. In *Alexander v Canada (Minister of Citizenship & Immigration)*, the court observed the high number of female asylum applicants

[330] See *Sousa v Canada (Minister of Citizenship & Immigration)*, 2011 FC 63, 96 Imm LR (3d) 338, 2011 CarswellNat 345 (WL Can).

[331] Fleeing a jurisdiction in order to avoid being subjected to further abuse can also be seen as a form of resistance. In the 1950s and 1960s, certain extradition courts held that fleeing communist states was a political crime and as such was a non-extraditable offense. *In Re Kavic, Bjelanovic and Arsenijevic*, [1952] 19 ILR 371; *R v Governor of Brixton Prison, ex parte Kolczynski*, [1955] 1 QB 540, [1955] 1 All ER 31.

fleeing domestic abuse from St. Vincent and the Grenadines. The court asserted: "There is something very wrong in the relationship between men and women in St. Vincent and the Grenadines. Year after year, *woman after woman washes up on our shores* seeking protection from abusive, violent husbands or boyfriends."[332] In the court's characterization, such women are essentially mere victims who "wash up" on Canadian shores, like detritus from a shipwreck floating lifeless rather than agentive beings assertively making their way to a safe space.

The construction of victimized refugees in relationship to gender, age, and specific geographical origins in the Global South is not monolithic however. This is in part because refugee case law has also demonstrated that asylum seekers are also male and/or can come from "developed" states in the North. Yet, even in such cases, there is not necessarily any real escape[333] from the trope of victimhood.[334] The case of Abrahim Baballah provides an example.[335] Baballah

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[332] *Alexander v Canada (Minister of Citizenship & Immigration)*, 2009 FC 1305, 88 Imm LR (3d) 75, 2009 CarswellNat 4566 at para 1 (WL Can).

[333] However, this is not always the case. It is worth noting a famous image by French photographer Henri Cartier-Bresson of male refugees taken at the Kurukshetra refugee camp around the time of the (forced) partition migrations along the then newly created Indo-Pakistani border in 1947. The wide-angle image depicts a group of male refugees playing some game in an effort to break the monotony of camp life. Henri Cartier-Bresson, *Henri Cartier-Bresson in India* (New York: Bulfinch Press, 2001) at 32-33; Christopher Turner, "Expert Witness: Henri Cartier-Bresson" *Telegraph*, (12 April 2010), online: Telegraph <http://www.telegraph.co.uk>.

[334] Helene Joffe, "Identity, Self-Control, and Risk" in Gail Maloney & Iain Walker, eds, *Social Representations And Identity: Content, Process, And Power* (New York: Palgrave MacMillan, 2007) ("One is the object of someone else's fantasies but not a subject with agency and voice" at 198). Such fantasies carry with them assumptions as well about people's education and levels of intelligence. Asylum-seekers from the Balkans have noted how they are treated as infantile and stupid, incapable of handling the simplest of tasks or as being unexposed to modern technology. As one interviewee in a study of Balkan refugees in Australia has attested: "[many] Australians regard us, refugees from the Balkans, as if we never saw a computer or dishwasher before we came to Australia." Val Colic-Peisker & Iain Walker, "Human Capital, Acculturation and Social Identity: Bosnian Refugees in Australia" (2003) 13 J Community Appl Soc Psychol 337 at 342.

was an Arab Israeli, the offspring of a mixed Jewish and Muslim marriage. Due to his mixed parentage, which was well known in the town, he was turned away for positions as an accountant, the first profession he trained for.[336] He then trained as a diver and lifeguard but was denied employment for the same reasons, his mixed ethnicity. Finally, Baballah took up employment with his family as a fisherman, likely a profession he was attempting to avoid given his previous endeavors. However, for a ten-year period during his attempts to make a living in the family business, Baballah "was the victim of incessant threats and acts of violence by the Israeli Marines, who relentlessly harassed him."[337] This harassment included circling around Baballah's boat with a much larger government vessel, forcing his boat to rock precipitously and fill with water. The Marines would also shoot bullets in the air above his boat and throw eggs at the crew. In other instances, the Marines aimed six-inch hoses at the boat, filling it with water and forcing the fishing crew to bail water out of the boat to prevent it from sinking. In yet another instance, Marines boarded Baballah's boat, tied his brother to a pole and sprayed him with pressurized water in freezing weather. The brother was then accused of assault, arrested and imprisoned for over a year, after which he was rendered mentally impaired. These acts of aggression extended beyond the waters' edge. Marines followed Baballah and members of his crew on land, yelling taunts and engaging in acts of intimidation. When Marines observed Baballah capturing

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[335] *Baballah v Ashcroft*, 367 F 3d 1067 (9th Cir 2004).

[336] His parents were the only known family of mixed Jewish-Arab ethnicity in the town. *Ibid* at 1071.

[337] *Ibid*.

large quantities of fish, they would damage his fishing nets with their vessels' propellers, forcing him to spend days repairing the nets. Using their powers as state actors, the Marines singled out Baballah for unwarranted citations, which required him to pay substantial fines. The Marines continued their assault on his livelihood by intentionally destroying his boat under the guise of providing him assistance. Ultimately, the cumulative effect of this persecution crippled Baballah's efforts to earn a livelihood. He decided to seek asylum in the United States, concluding that back in Israel, "I couldn't work. [...] I couldn't do anything."[338]

The depiction provided in the court's recounting of the facts, supplemented by Baballah's own statements, suggests a certain emphasis on his helplessness against insurmountable odds, notwithstanding of course his industrious attempts at continuing to make a living despite the persistent persecution he experienced. The source of his persecution was fundamentally rooted in certain characteristics personal to him, something he could not change – his mixed heritage and ethnicity as well as his status as a Muslim. The basis of his persecution was not at least primarily based on attacking Baballah for something he was doing – his attempts to make a livelihood. Baballah's experience, like that of many others, fits within this idea the refugee as hapless victim – an individual who is rendered largely helpless in the face of overwhelming persecution.

Throughout much of this discussion thus far, I have endeavored to explain the dominant nature of victimhood within refugee law discourse. At the core of

[338] *Ibid* at 1072.

this concept is the idea that refugees are in essence helpless and/or innocent victims in need of protection from the violence of others in their countries of nationality.[339] If a dominant construct of refugees is focused on victimhood, what then are the core meanings at the center of being a victim? If the status of being a victim were to extend beyond the reified notions of helplessness and/or innocence (in the sense of being without fault) to include space for agency and agentive qualities, how then may this in turn impact on the understanding of the refugee as a victim with agentive qualities?

III. Broadening the Construct of Victimhood

In this section, I argue that there are at least two broad competing narratives of victimhood. The first and more traditional narrative is similar to that which was discussed above. It situates the victim as an individual embodying abuse, helplessness and faultlessness. In this account, a victim is not associated with being an agent or resister. In the second narrative, individuals are capable of being perceived as having the capacity to be both victim and agents simultaneously. Indeed because the boundary separating the victim and agent may be somewhat porous, they are not endowed with mutually exclusive attributes. As

[339] There is of course the imagery of the asylum-seeker as a fraudulent queue jumper who is seeking economic prosperity and/or economic benefits from their new hosts rather than protection from persecution. They are viewed with tremendous suspicion, leading many to avoid being identified and associated with the identity of asylum-seeker or refugee. Colic-Peisker and Walker observe that in the context of asylum in Australia, and outside of the detention centres, the term refugee is an undesirable identity which many in the mainstream view with suspicion. Indeed it is viewed as a pariah status that gives welfare and social entitlements but little else. Val Colic-Peisker & Iain Walker, *supra* note 334 at 342. Thus "rather than viewing themselves as heroes, who have stood up to and escaped oppressive regimes, many refugees are reluctant to admit their status." Barbara Harrell-Bond, "The Experience of Refugees as Recipients of Aid" in Alastair Ager, ed, *Refugees: Perspectives on the Experience of Forced Migration* (New York: Cassell, 1999) at 143.

such we may need to logically understand someone as being an agentive victim and/or a victimized agent. This more nuanced understanding in turn helps to situate the resisters discussed in previous chapters as refugees who symbolize both attributes of agency and victimhood.

a. Pure Victimhood

A great deal of attention has been showered on victims and their plight over the past few decades. As above, victims are partly defined by their suffering of crimes and abuses that have been meted out upon them, in addition to their status of being faultless and/or helpless in the face of such actions. At the international stage, a World Society of Victimology, empowered with consultative status to the U.N. Economic and Social Council was created to address the rights of those harmed by crime, the abuse of power, terrorism and other grave incidents.[340] Who constitutes the victim and why is there so much attention that surrounds individuals who hold that label? As one United Nations' definition provides, victims are persons who, "individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power."[341] The principal feature then is a person who is identified as suffering harm.

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[340] See World Society of Victimology, online: <http://www.worldsocietyofvictimology.org/index.html>.

[341] *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UNGAOR, 40th Sess, A/RES/40/34 (1985).

Analogous definitions accentuating one's status as a victim of crime can be found in national and sub-national jurisdictions. An example of this can be found in the British Columbia *Victims of Crime Act*. A victim is statutorily defined as an individual who "suffers" because of an offence committed against them, "physical or mental injury or economic loss as a result of an act or omission that forms the basis of the offence" or "significant emotional trauma and is an individual against whom the offence was perpetrated or, with respect to an individual against whom the offence was perpetrated, is a spouse, sibling, child or parent of the individual[.]"[342] As such, one gains access to this label by not only being the object of the crime but also through a relationship to someone who has been the object of such crime.

The perception of victims as hapless individuals subjected to violence or other criminal activity has been a theme over the past century. Historian Paul Brass observes that the term victim has "a kind of valorized meaning, identifying members of a community or the community as a whole as hapless innocents." [343] Brass posits that "these hapless innocents are valorized as peaceful, law-abiding, often defenseless persons living normal, if not exemplary, lives, who became targets of violence through no fault of their own."[344] This depiction erects the

[342] RSBC 1986, c 478, s 1.

[343] Paul R Brass, "Victims, Heroes, or Martyrs?: Partition and the Problem of Memorialization in Contemporary Sikh History" (2006) 2 Sikh Formations 17 at 18.

[344] *Ibid*.

notion of the "pure victim" – a faultless or innocent being who is subjected to torment by perfidious actors.[345] Such narratives exist in abundance.[346]

This notion that victims are largely powerless individuals is also reinforced in some popular psychological literary genres dealing with victimhood arising from abusive relationships. According to one source, an individual who chooses to remain in an abusive relationship cannot be a victim because such an individual has the free will to be in such a relationship. Thus, a victim is a person who does not have agency or the ability to exercise their free will.[347] Another study on child sexual abuse refers to victimhood in relationship with the condition of the child at the time of the actual abuse, not to the adult years later seeking to recover from their experience.[348] It stresses that victimhood signifies an emotional hopelessness and helplessness.[349]

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[345] As will be discussed below, when refugees are expected to play the role of the pure victim, any evidence suggesting that their persecution is based on their acts of resistance might suggest some degree of fault, thus resulting in the denial of asylum. However, as the phenomenon discussed in this thesis suggests, faultlessness is not insurmountable where resistance may be engaged in against a greater wrong.

[346] See for instance the story of Kausar Bano. Bano was a pregnant Muslim woman attacked during the organized pogroms in the Indian state of Gujarat in 2002. Her attackers sliced open her stomach and extracted her nine-month old fetus before throwing both into a fire. In reporting about this and other similarly gruesome murders, the murders were characterized as a meta-narrative of helpless victimhood. See Amitava Kumar, *Husband Of A Fanatic* (New Delhi: Penguin Books, 2004) at 35.

[347] Jill Murray, *But I Love Him: Protecting Your Teen Daughter From Controlling, Abusive Dating Relationships* (New York: HarperCollins, 2000) at 15.

[348] Mike Lew, *Victims No Longer: The Classic Guide For Men Recovering From Child Sex Abuse*, 2d ed (New York: Quill, 2004) ("Regardless about how you feel about yourself, or how severely abuse has wounded you, you are a strong, creative individual. You had the ability to survive to this point, and now you have the ability and the resources to recover. That doesn't sound like a victim, does it? Therefore, in this book, I shall try to use "victim" only when referring to the condition of the child at the time of the actual abuse" at xxxiv).

[349] *Ibid*.

b. Attractiveness of the Pure Victim

Constructions of victims as passive sufferers of oppression can evoke different if not opposing responses ranging from sympathy to repudiation of such an identity. One response to such suffering is to experience a sense of sympathy[350] and desire to help such victims or populations afflicted with oppressive abuses.[351] The image of the victim resonates, as Professor Martha Minow observes, in an attention-taxed world; victims can acquire attention through news broadcasts and other mediums.[352] She posits that "to purchase the image of the victim is to purchase the opportunity to be privately moved by images of victims and their suffering […]."[353] She asserts that the "stories of victims are attractive because they arouse attractive emotions."[354]

Minow's observations have particular resonance within international legal discourse and concern for abuses and human rights violations experienced by

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[350] See Martha Minow, "Surviving Victim Talk" (1992) 40 UCLA L Rev 1411 at 1413-14.

[351] See David Kennedy, "Spring Break"(1985) 63 Tex L Rev 1377 at 1402.

[352] *Ibid*. However, as I shall discuss below, where the trope of victimhood so profoundly occupies the public's consciousness, there may be competition to grab this much sought after attention by invoking one's identity as a victim of the worst crime possible in order to prevail in securing some conferrable status.

[353] Minow, *supra* note 350 at 1414-15. Take for example the story of Rasheeda, whose husband was killed during a Hindu-Muslim communal riot in India in 1989 and was left to raise three children on her own. Rasheeda decided not to reveal her story or her troubles. She asserted that "[by] not telling my story, I would have my honour. If I were to reveal my difficulties, others would express pity, but they would do nothing else." Kumar*, supra* note 346 at 287. However, it should also be noted that sympathy for victims can and has prompted individuals to respond to the suffering of the "Other." For instance, as bell hooks has observed, white liberals during civil rights movement were galvanized by the suffering of African-Americans during the 1950s and 1960s to the point of marching and engaging in Freedom Rides in the south. bell hooks, *Killing Rage: Ending Racism* (New York: Henry Holt and Company, 1995) at 54.

[354] Minow, *supra* note 350 at 1414-15.

vulnerable populations in the Global South. As Makau Mutua observes, international human rights practice and discourse, which are largely guided and driven by states and international non-governmental organizations in the Global North, are propelled by a messianic need to save hapless victims bereft of agency.[355] These victims are most often located in the Global South and are oppressed and victimized by "savage" states and state actors in the Third World. Frédéric Mégret also observes that a victim-oriented discourse in connection with the international repression of genocide has gained prominence in the last two decades. It is one where the concept of the "genocide victim" is framed in univocal terms. He writes that a victim must be seen as "meek, weak and subdued ("lambs to the slaughter")." [356] This meek and subdued nature then feeds into the validation and self-image of interventionist efforts as necessary and heroic.[357]

Personifying the image of the victim most within Mutua's victim metaphor are women and children – particularly those subjected to female genital

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[355] Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42 Harv Int'l LJ 201. Kennedy uses a similar nomenclature to characterize this phenomenon. See Kennedy, *supra* note 351, at 1387. However, stories of victimization by individuals from a defined community may prompt or be exploited as a reason for retaliatory responses against a rival community. For instance, before and after the partition of India, mass exoduses by Hindus and Sikhs to India from territories that would become Pakistan brought a host of narratives depicting Hindus and Sikhs as victims of Muslim persecution. This would result in the victimization of Muslims in India resulting as well in many fleeing from victimization. These individuals would in turn carry their stories with them to Pakistan. Thus, the spiral of victimization was repeated. Tropes of victimization emanating from this period would continue to stoke hostility for generations in the subcontinent, impacting upon Indo-Pakistani foreign relations and the writing of history. See Vazira Fazila-Yacoobali Zamindar, *The Long Partition And The Making Of Modern South Asia: Refugees, Boundaries, Histories* (New York: Columbia University Press, 2007); Gyanendra Pandey, *Remembering Partition: Violence, Nationalism And History In India* (New York: Cambridge University Press, 2001).

[356] See Frédéric Mégret, "Not "Lambs to the Slaughter": A Program For Resistance to Genocidal Law" in René Provost & Payam Akhavan eds, *Confronting Genocide* (New York: Springer, 2010) at 203.

[357] *Ibid* at 204.

mutilation.[358] Professor Ratna Kapur asserts that women as "'Third World victim [subjects] [have] come to represent the more victimised subject, that is, the real or authentic victim subject."[359] She adds that "[the] image we are left with is that of a truncated third world woman, who is sexually constrained, tradition bound, incarcerated in the home, illiterate, poor and victimized."[360] Even where third world women and girls are not engaged or forced to engage in "traditional" domestic activities, but are associated with soldierly duties during an armed conflict, they are still largely perceived in the role of victims or entirely involuntary soldiers conscripted by brutish men.[361]

The emphasis on victimhood is also superimposed on male children, particularly former male child soldiers. As Professor Mark Drumbl illustrates, despite having committed atrocious crimes (including by those who are nearing the age of eighteen), child soldiers are chiefly constructed as vulnerable victims bereft of agency.[362] This sanitized and politically correct image is one that is deployed to mobilize support, sympathy and efforts to stop child soldiering

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[358] Mutua, *supra* note 355 at 203, 225-26. See also Isabelle Gunning, "Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries" (1991) 23 Colum HRL Rev 189.

[359] Ratna Kapur, "Babe Politics and the Victim Subject: Negotiating Agency in Women's Human Rights" in David Barnhizer, ed, *Effective Strategies for Protecting Human Rights: Economic Sanctions, Use of National Courts and International Fora and Coercive Power* (Burlington, VT: Ashgate, 2001) at 85. See also Vrinda Narain, *Reclaiming the Nation: Muslim Women and the Law in India* (Toronto: University of Toronto Press, 2008) at 68-79.

[360] Kapur, *supra* note 359 at 89.

[361] Alice Macdonald, "'New Wars: Forgotten Warriors': Why Have Girl Fighters Been Excluded from Western Representations of Conflict in Sierra Leone?" (2008) 33 Afr Dev 135.

[362] Drumbl, *supra* note 325 at 36.

(which is of course not an unworthy goal in itself).[363] Former child soldiers are consistently schooled about their faultlessness in their crimes.[364]

The attraction toward saving pure and innocent victims finds a logical place in refugee protection. With so many seeking asylum, there may be a desire to confer refugee status to only the most needy and deserving – which is in turn understood as victims of persecution. To recall, persecution is an essential touchstone to establishing refugee status and while persecution is not defined in the *Convention*, case law and statutory provisions indicate that it often entails significant physical violence or other forms of substantial harm. Because persecution includes the lack of state protection and no internal flight alternative, a refugee is in many ways cornered and helpless with nowhere to turn in their country of nationality. Lastly, the focus on the innocent victim also stresses the worthiness of the individual upon whom protection is granted. It is a person who has done nothing to court this well-founded fear of persecution. As such, given the vast number of refugee claimants, it may well be the innocent and helpless individual or those who can situate themselves most closely within this construct who will be seen as most worthy of the state's benevolence.

c. Rejecting Victimhood

The construction of certain classes of people as passive victims, however, does not necessarily acquire sympathy or support from all quarters – particularly

[363] *Ibid* at 36-37.

[364] *Ibid* at 37-40.

amongst those who are expected to assume the posture of the passive victim.[365] Because victims are so heavily associated with passivity and weakness, there is a desire for some to renounce any connection with victimhood and repudiate those who seek to acquire the label.[366] As African-American scholar and activist bell hooks[367] affirms, "[my] repudiation of the victim identity emerged out of my awareness of the way in which thinking of oneself as a victim could be disempowering and disenabling."[368] hooks offers that the "[internalization] of victimization renders black folks powerless, unable to assert agency on our behalf. When we embrace victimization, we surrender our rage."[369] Rage, in hooks' view, is a necessary part of a resistance struggle and a primary catalyst for inspiring courageous action.[370] Indeed, the habitual violence inflicted upon African-Americans for centuries instigated many to advocate for their right not to be harmed by using violence to counter violent attacks by White supremacists.[371] This ran counter to the popular approach of Martin Luther King Jr.'s non-violent

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[365] See Fassin & Rechtman, *supra* note 298.

[366] As Brass observes, Khalsa Sikhs viewing themselves as a martial caste/community repudiate any linkage or connection with the concept of victimhood. Thus according to a certain interpretation of Sikhism, it is the duty of Sikhs to perish combating enemies, and the failure to do so renders such individuals cowards or patently as non-Sikhs. See Brass, *supra* note 344.

[367] The name bell hooks is a pseudonym which she spells all in lower case. Hence, when referring to bell hooks, I shall refrain from using any capitalization with respect to the spelling of her name.

[368] hooks, *supra* note 353 at 51.

[369] *Ibid* at 17-18.

[370] *Ibid*.

[371] Timothy B Tyson, "Robert F Williams, "Black Power," and the Roots of the African American Freedom Struggle" (1998) 85 J Am Hist 540. It would be a mistake however to assume that the Black Panthers were a-legal in their mindset and framework. Their perspectives and goals were very much animated by legal discourse. See David Ray Papke, "The Black Panther Party's Narratives of Resistance" (1994) 18 Vt L Rev 645 at 662-671.

resistance (drawing from Mohandas K. Gandhi) or the legal approaches to advancing civil rights through court actions.

Individuals and groups who have been subjected to past and current systemic discrimination and oppression are not the only ones who express antipathy towards victimhood. It also emerges amongst those who feel a sense of deprivation when the voices and claims of victims of past and present oppression are considered and addressed at the purported expense of the society that has committed the oppression. Writing within the American political and cultural context,[372] Alyson Cole documents that the term "victim" is often used as an epithet by social and political conservatives to demean claims by those who have been victimized by past and present policies.[373] Cole notes that victims are reconstructed as manipulative, aggressive and even criminal, if not victimizers themselves against society.[374] She argues that in opposition to "victimism" (which constitutes bogus claims to victim status), conservatives have promoted an alternative imagination of the true and genuine victim.[375] A true victim demonstrates agency by not exploiting his injury and at minimum is reluctant to

[372] It is worth noting that while Cole's observations are focused on the American political context, the politics surrounding the redress of past wrongs meted out against particular communities that have experienced systemic oppression is not limited to this particular country. There has been a tremendous backlash within India amongst "high-caste" Hindus against implementing affirmative action policies to assist individuals from lower-caste and Dalit castes. See Manoranjan Mohanty, "Introduction: Dimensions of Power and Social Transformation" in Manoranjan Mohanty, ed, *Class, Caste, Gender* (New Delhi: Sage Publications, 2004) at 15.

[373] Alyson Cole, *The Cult Of True Victimhood: From The War On Welfare To The War On Terror* (Stanford: Stanford University Press, 2007) at 2.

[374] *Ibid* at 3.

[375] *Ibid* at 5.

assume the role of victim and at best rejects the status altogether.[376] Furthermore, a true victim is one who is completely innocent and has not contributed to his or her injury in any way. This person is deemed to be morally upright and pure.[377]

Although hooks and those on the political right may stand at opposite ends of the spectrum on a number of issues relating to rights and damages suffered by African-Americans and other minority communities, both sides are in some agreement about their view of victimhood or "victimism." Either term is deemed to be the antithesis of agency, or at least an affirmative form of agency.[378] In the repudiation of victimhood and any association with it, this type of perspective leaves little room to acknowledge that individuals can be agents while simultaneously acknowledging their experience as victims. For example, Murray argues that heroes in history may have started out as victims but empowered themselves to become victorious, thus shedding their victim status.[379] Murray draws upon the example of Rosa Parks, who during the years of segregation in the American south refused to sit at the back of the bus when ordered to by another white passenger, to bolster her position. Murray writes: "One may see [Parks] as a victim, and indeed, it would have been very easy to see herself that way as well. However, there isn't a victim alive who would have taken the courageous stand

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[376] *Ibid*.

[377] *Ibid*.

[378] *Ibid* at 9.

[379] Murray, *supra* note 347 at 15.

that she did at that time."[380] Murray thus reinforces the caricature that a victim must be not only be helpless and without agency, but also without courage.

If one were to assume and/or adopt the simplistic idea that victims are characterized by helplessness, weakness, and/or faultlessness, it is then certainly understandable why one would reject the label of victim for one that is more affirmative and agentive. However one can still be a victim of systemic racism and still have the type of rage that hooks speaks of and also engage in violent or non-violent resistance. One may still be a person who resists oppression and still suffer trauma and immense loss. Most importantly for the purposes of this thesis, an individual may be both a victim and/or prospective victim of persecution and still be a resister. I discuss this further in the next subsection.

d. Sharing A Single Corporeal Space - Agency and Victimhood

In this subsection, I discuss evidence of a discrete conceptual shift toward perceiving individuals as being able to embody both attributes of agency and victimhood. This can in turn allow for a more sophisticated conceptual understanding and recognition that refugees, in particular, who have engaged in resistance, can be both victims and agents.

While there is a fair amount of focus on the plight of victims amongst international institutions and discourse relating to human rights, there is some recognition that individuals may embody an agent and victim. For example, the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* states that victims may include "persons who have suffered harm in

[380] *Ibid*.

intervening to assist victims in distress or to prevent victimization."[381] While the *Declaration* does not incorporate the term "resistance" within the language of the document, the conduct that it speaks of can certainly incorporate those who engage in an act of resistance to prevent or intervene against another person(s) becoming a victim(s).

Legal scholarship represented in part through the individual work of Martha Minow and Ratna Kapur has advanced the notion of the agent and the victim co-existing within a single being. Minow and Kapur argue that a delicate balance exists between identifying an individual as being a victim and as a person with agency. Minow posits that an overemphasis on victimization undermines the capacity for choice and action.[382] Specifically, when individuals only see themselves as hapless victims, they are not prompted to exercise the power they hold to change the circumstances in their lives.[383] For example, a person may be enslaved and recognize that they are a victim but still balance this against their ability to engage in various forms of resistance ranging from murder, revolt, and/or flight to more mild forms of defiance, such as working slowly or damaging property so as to undermine productivity.[384] Yet, Minow similarly contends that a heightened focus on choice and action may minimize the real effects of

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[381] *Supra* note 341, Annex, para 2.

[382] Minow, *supra* note 350 at 1427-28.

[383] *Ibid* (referring to the work of Patricia H Collins work on black feminist thought).

[384] James C Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (New Haven: Yale University Press, 1990); Eugene D Genovese, *Roll, Jordan, Roll: The World The Slaves Made* (New York: Vintage Books, 1976).

victimization.[385] Indeed, when one suffers physical and mental trauma as a result of engaging in resistance (or alternatively they may have resisted in response to being victimized), it may be highly detrimental to ignore such trauma in the short or long term in the belief that an agent does not need to seek help or assistance.

Minow asserts that scholars need to eschew an "either/or" dichotomy and replace it with a "both/and" terminology.[386] She offers for example that a "person who is raped and robbed is neither just a victim nor just a multifaceted person who happens to have had those experiences."[387] Similarly, in connection with refugee claims, an individual who is violently persecuted for challenging power is neither just a victim of persecution nor just an agentive individual upon whom such action happened to have been inflicted. She is perhaps both.

Kapur adopts a similar approach but which has greater relevance within the context of resistance and oppression within the Global South. Her objective is to promote a shift within a feminist legal politics that almost exclusively emphasizes protection of women from the excesses of power to one that promotes strategies that enable women to share in power and decision-making.[388] As Kapur notes with respect to women in the Global South, "we need a more sophisticated subject that is both a victim and has agency."[389] Kapur further posits that "[when] we go down the road of agency feminism, we must not completely reject victim

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[385] *Ibid*.

[386] *Ibid* ("When we opt for either/or thinking, we actually opt out of thinking" at 1442-43).

[387] *Ibid*.

[388] Kapur, *supra* note 359 at 92.

[389] *Ibid* at 90.

feminism, because we are all victims in some way. The idea is to negotiate the space between."[390] She adds that "we need to think about how to retain the disruptive possibilities of the subject, without marginalizing or reducing the harms and discrimination to which she has been subject."[391]

The importance of critically examining dominant binaries is also important within the framework of litigation. Judges have recognized that legal constructs which narrowly cast aside those who do not conform or appear to conform to a particular stereotype can have detrimental effects. This has relevance to murder cases where women who have suffered from spousal abuse and use lethal force to defend themselves. Jurists on the Supreme Court of Canada, specifically Justices Claire L'Heureux-Dubé and Beverley McLachlin (as she then was) have articulated a concern that a stereotype surrounding battered women was developing such that only those presenting themselves as a particular archetype would be able to successfully assert a self-defence claim. The archetype was that of a "victimized, passive, helpless, dependent, battered woman."[392]As such, Justices L'Heureux-Dubé and McLachlin asserted that "women who have demonstrated too much strength or initiative, women of colour, women who are professionals, or women who might have fought back against their abusers on previous occasions, should not be penalized for failing to accord with the

[390] *Ibid* at 91.

[391] *Ibid.*

[392] *R v Malott*, [1998] 1 SCR 123 at para 40, 155 DLR (4th) 513, 1998 CarswellOnt 419 (WL Can).

stereotypical image of the archetypal battered woman."[393] She thus contended that "women with these characteristics are still entitled to have their claims of self-defence fairly adjudicated, and they are also still entitled to have their experiences as battered women inform the analysis."[394]

Such reflections have relevance for refugee adjudications. If the failure to conform to a stereotype may result in denial or the strong potential for denial of refugee status for example, individuals may seek to emphasize if not embody such stereotypes of passivity because it may gain them access to that which they seek, protection from persecution.[395] Passivity can range along a spectrum with the asylum-seeker exhibiting subtle to more blatant shifts in demeanor to demonstrate the experience of harm and its impact, to, in some cases, fabricating more damaging instances of victimization to secure refugee status.

Just as the problematic binary of agent/victim must be re-examined in connection with gender issues, so too must it be revisited with respect to children and particularly child soldiers. Recalling Malkki above, children, as well as women are often constructed as innocent and lacking in agency. As Mark Drumbl writes, the determined focus and construction of child soldiers as solely victims, even in the face of the crimes they commit, also fails to account for the resistive agency many demonstrate by escaping, refusing to kill and/or intentionally

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[393] *Ibid*.

[394] *Ibid*.

[395] Drumbl, *supra* note 325 at 37 (writing that former child soldiers will accentuate their passive victimhood in order to reap the benefits of other people's pity and benevolence).

protecting civilians.[396] Similarly Professor Myriam Denov, who studied child soldiers in the context of the conflict in Sierra Leone, and spoke to many about their acts of resistance, observed that their perspectives "reveal a spirit of volition and a capacity for independence of action that counters the deterministic and commonly held depiction of children as having no capacity to resist or modify the circumstances and forces imposed upon them."[397] Yet there can be little doubt that amidst their demonstrations of agency, child soldiers were also victimized by being conscripted and forced into circumstances against their will as well as to kill and cause harm.

These writings evidence an important recognition of a more nuanced understanding of individuals being capable of embodying both attributes of victimhood and agency simultaneously.[398] It is also important to reflect here that where a person is both a victim and agent, the boundary that divides victimhood and agency within that person may be rather porous or even blurred. Through their intermingling, the assumed meaning(s) of what is means to be a victim or an agent assumes certain attributes of the other. Victimization, as indicated above is associated with one or a combination of the following: passivity, helplessness

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[396] Drumbl, *supra* note 325 at 86-87.

[397] Myriam Denov, *Child Soldiers: Sierra Leone's Revolutionary United Front* (Cambridge: Cambridge University Press, 2010) at 182.

[398] There are also a number of insightful anthropological field studies on how discrete groups of victims who, while victimized, have mobilized against the persons or groups oppressing them. This includes methodologies that emphasize their victimhood to gain advantage and confront their oppressors. See e.g. Sissel Rosland, "Victimhood, Identity, and Agency in the Early Phase of the Troubles in Northern Ireland" (2009) 16 Identities: Global Stud In Culture And Power 294; Matei Candea, "Resisting Victimhood in Corsica" (2006) 17 Hist & Anthropology 369 (Studying "victimhood as the foundational ground of (re)action, a type of 'resisting victimhood' which is a hallmark of the language of minority struggles in other French regionalist contexts" at 372); Laura Jeffery, "Victims and Patrons: Strategic Alliances and the Anti-Politics of Victimhood among Displaced Chagossians and the Supporters" (2006) 17 Hist & Anthropology at 297.

and/or faultlessness. Agency by contrast tends to be associated with activity, strength, and self-reliance. When a person is victim and a resister, we may begin to recognize that a person who has been the victim of a serious crime as having been subjected to abuse and trauma can also exhibit attributes of agency, such as strength and activity. This may be exemplified by refusing to remain silent about his or her suffering, and by speaking out and do so vigorously.[399] This does not negate that he or she has suffered some trauma or abuse.

An individual who is more readily identifiable as a resister demonstrates his or her agency by challenging dominant and oppressive power. However, he or she may not always be active and agentive at all times or have the opportunity to do so. In some cases, he or she may have to be passive, maintain a low profile and perhaps remain largely inactive,[400] or alternatively escape persecution altogether by fleeing his or her country. Such circumstances do not negate an individual's status as a resister but provide context about the extent of the adversities he or she endures and certainly exposes the reality that he or she, too, is a victim of

[399] Minow argues the failure to assert victim claims in its own way perpetuates victimization and countenances oppression. "Unless people have the chance to tell the stories of their pain and suffering, they are diminished and, yes, victimized." Minow, *supra* note 350 at 1431. Yet she warns: "telling one's story as a victim story risks reducing oneself to stereotypes of suffering. Describing yourself as a victim has a self-fulfilling and self-perpetuating feature; and yet, failing to acknowledge or assert one's victimization leaves the harm unaddressed and the perpetrators unchallenged." *Ibid*. Minow's warning has resonance if one were to rely on the singular definition of the victim as a hapless object rather than as an individual capable of action.

[400] An example of this was the Bielski Otriad – a Jewish partisan group comprised of individuals who fled to the forests of Belorussia to escape Nazi persecution. While the Otriad at times engaged in armed confrontations with the Nazis, they also had to avoid confrontations to maintain their hiding positions. The members of the Otriad were clearly victimized in a number of ways as they were targeted for destruction by the Nazis and were forced to relinquish lives they once knew. Yet, their efforts to survive were acts of resistance against the Nazis' program of extermination. See Nechama Tec, "Jewish Resistance in Belorussian Forests: Fighting and the Rescue of Jews by Jews" in *Resisting The Holocaust*, *supra* note 304 at 77-94.

oppression while combating them. Thus, rather than existing as two distinct polar entities, the resister contains facets of the victim and vice-versa. This will help shape an understanding and a vision of the refugee as something more than a victim as defined by extreme passivity, but rather as a victimized or persecuted resister or perhaps, put another way, a type of agentive victim.

Drawing from such work, I posit that the narratives and examples of resistance discussed in the two previous chapters provide us with evidence to similarly argue that refugees cannot, at least in all cases, simply be seen as victims of persecution.

IV. The Refugee as a Victimized Resister and Resistive Victim

If victims have simplistically been characterized as hapless persons subjected to criminal activity, resisters have been constructed as their antithesis. Resisters are portrayed as paradigms of agency (particularly within popular culture). They are cast as heroes risking their lives for noble causes, and if necessary stoically risking or enduring injury, and even valiantly sacrificing their lives for such causes. The paradigm is normally gendered. Resistance has often been characterized as masculine and embodied by male figures venturing out and taking primary roles in the public domain or battlegrounds where combat is to be engaged in.[401] Male soldiers, in particular, have thrived in the social and self-imagery of the soldier as gallant warrior. Those who do not live up to this image,

[401] There are of course notable female exceptions. For instance, during the rebellion of 1857 by Indian soldiers, the soldiers of the princely state of Jhansi were led by Queen Laxmibai, who perished in battle.

by refusing to fight or resist the enemy, are portrayed as cowards shirking their duty to their country and their people.[402]

Despite such caricatures, recognizing that refugees can simultaneously embody a victimized resister and a resistive victim emerges in the jurisprudence discussed in the two previous chapters. It is also reflected in United States refugee legislation. The United States Congress has explicitly defined refugees to include individuals who have resisted coercive population control programs.[403] The statutory language reads as follows:

> For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or *who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program*, shall be deemed to have been persecuted on account of political opinion, and a person who has a well[-]founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, reversal, or resistance shall be deemed to have a well[-]founded fear of persecution on account of political opinion.[404]

At one level, this statutory provision reinforces the trope of the refugee as a pure victim subjected to persecution through sexual and reproductive violence. However, the provision also clearly emphasizes that one may be a victim or prospective victim of such violence or other punishment for refusing to comply with a coercive population control program or for other resistance. In a rather unique way, the legislation recognizes the role of individual as an agent in

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[402] Brass, *supra* note 343.

[403] *Immigration and Nationality Act*, § 101(a)(42), 8 USCA § 1101(a)(42)(B).

[404] *Ibid*.

resisting such government programs while also acknowledging the individual's status as a victim of persecution or prospective persecution.

While the United States legislation is unique in incorporating the capacity of the refugee to be both resister and victim simultaneously, resisters can become victims in a number of other ways. First, like all refugees, at a minimum there is the physical and psychological dislocation that a resister may experience on account of being forced to leave her country in order to survive or avoid persecution. This may entail separation from family and friends and fears that her loved ones may be subjected to harassment or, worse still, persecution connected to the resister's conduct and escape. This separation may be for an extended period and may extend into perpetuity. There are also difficulties associated with adjusting to one's new environment, developing a sense of belonging and being able to communicate with those around you.[405] It may also entail the experience and trauma of witnessing or knowing that a family member or co-resister has been subjected to violence for the acts of resistance.[406] Second, there is the victimization that is manifested through beatings and torture on account of one's resisting actions. As discussed in previous chapters, Saad Ahmed's persecution for resisting a military regime entailed significant beatings and torture requiring a lengthy period of convalescence.[407] Ahmed illustrates well the duality of one

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[405] See "Soviet Deserters Face New Enemies: Guilt and Uncertainty" *The New York Times* (31 May 1989), online: NY Times <http://www.nytimes.com>.

[406] *Jiminez v Canada (Minister of Citizenship & Immigration)*, 162 FTR 177, 1999 CarswellNat 93 (FCTD) (WL Can).

[407] *Ahmed v Canada (Minister of Employment and Immigration)*, 5 Imm LR (2d) 219, 1988 CarswellNat 42 (WL Can) (Imm App Bd, 1988).

becoming a victimized resister and resistive victim. He was persecuted and victimized for his resistance but continued with his efforts nevertheless while in exile in the Chittagong Hill Tracts after suffering the effects of his victimization.

The impact of persecution on a resister, or any victim of persecution for that matter, can be present for years after the persecution and in the country of asylum. For example, Wilfredo Jiminez was a police officer in El Salvador who organized a group of twenty police officers to privately investigate the murders of a number of individuals whose bodies showed signs of torture and mutilation.[408] The group suspected the murders to be the work of a military officer and his death squads. As a consequence of this investigation, which was seen as a challenge to the power of the particular authorities committing these atrocities, Jiminez, amongst others, was subjected to torture. This included rape, electric shock, cuts to the body, and having boiling liquid poured on him. His body was subsequently dumped with others, and he was found alive by the Red Cross with his face inflamed and teeth broken. After hiding away and convalescing for a period of time, Jiminez organized those left amongst his group of investigators and staged a raid on a military area to retrieve files kept on them. After this, Jiminez left El Salvador, and eventually arrived in Canada to seek asylum. While in Canada, and as a likely consequence of his persecution, this once former police officer became addicted to drugs and alcohol and also became involved in the trafficking of narcotics.[409] A psychologist later examined him and determined that he had post-

[408] *Ibid*.

[409] Similar circumstances befell an individual who merely witnessed El Salvadoran death squads in action. The anxiety occasioned by this drove the applicant to alcoholism and criminality. See

traumatic stress disorder. Not all resisters, of course, experience this degree of post-traumatic stress or turn to drugs and alcohol as a way of coping with trauma they experienced as a result of being persecuted for their challenge to the unlawful conduct of state actors; although perhaps not all experience it to the extent that Jiminez did, either. What certainly emerges from this case, however extreme, is the immense cost of confronting oppressive power and how resisters subjected to such oppression may also be viewed as victims.

There is a strong dissociation between the image of the resister and the victim amongst civil society and official actors.[410] The notion of the "resisting victim" is excluded from the confrontation between perpetrators of genocide or other atrocities on one side and the recipients of such brutality on the other.[411] Similarly, with respect to those serving in the military or who are from a military background, there is a martial tradition that views soldiers as persons who are or ought to be able take the pains that come with the duties of being a soldier, and

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Martinez-Soto v Canada (Minister of Immigration and Citizenship), 2008 FC 883, [2008] FCJ No 1101, 2008 CarswellNat 2503 (WL Can).

[410] As Frederick Douglass, a former slave in the American south who escaped his bondage, observed: "A man without force is without essential dignity of humanity. Human nature is so constituted, that it cannot honor a helpless man, though it can pity him, and even this it cannot do for long if signs of power do not arise." Frederick Douglass, *Life And Times Of Frederick Douglass: From 1817 to 1882* (London: Christian Age Office, 1882) at 114-115. There is in part here a strong gender component in play. Whereas women are erroneously presumed to be and expected to act as victims, men cannot easily assume this posture. As Paul Nathanson and Professor Katherine Young postulate, "being designated a class of victims will provide no consolation for men if, like being designated a class of victimizers, it means effacing the range of their culturally defined identities as well as their dignity." Of course much the same could be said about women as well. See Paul Nathanson & Katherine K Young, *Spreading Misandry: The Teaching of Contempt for Men in Popular Culture* (Montreal: McGill-Queen's University Press, 2001) at 61.

[411] *Ibid*.

thus not assume the posture of a victim.[412] Hence, for those seeking asylum, there can be a strong conceptual hurdle to overcome. In the case of conscientious objectors,[413] there is a perceived cultural bias against someone who is viewed as shirking one's responsibilities.[414] In addition to leaving one's country, there are also the ramifications of a successful military prosecution for desertion or civilian prosecution for evasion. In the United States, for example, a dishonorable discharge is analogous to a felony conviction and may have dire economic circumstances for individuals trying to avoid contributing to an unjust military campaign – a consequence many former United States soldiers face for having evaded service in Iraq.[415]

Yet, in addition to the economic and social ramifications that arise when an individual refuses to take part in military operations for genuine political, legal

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[412] In many respects this is also buttressed within popular culture. For instance, in Nelson DeMille's *The General's Daughter* the character Captain Ann Campbell is found murdered on military property. Although a victim of a crime, at her eulogy, an army officer offers the following statement: [If] you expand the meaning of battlefield to include any place where any soldier is standing and serving, then we can truthfully say that Ann died in battle . . . And it is only proper and fitting that we remember her not as a victim, but as a good soldier who died doing her duty." Nelson DeMille, *The General's Daughter* (New York: Warner Books, 1992) at 422.

[413] Of course this can be overcome by redefining the nature of certain actions. As Professor Anthony Synnott notes,"[draft-dodgers] who fled to Canada were redefined as draft-resisters; and refusal to fight was redefined from cowardice to bravery." Anthony Synnott, *Re-Thinking Men: Heroes, Villains And Victims* (Burlington, VT: Ashgate, 2009) at 48. See also *Soviet Deserters Face New Enemies: Guilt and Uncertainty*, *supra* note 405.

[414] This bias can be rooted even in religious texts. For example, in the Bhagavad Gita, the character Arjuna becomes despondent as he is about to face his opponents on the battlefield. These opponents consist of cousins and uncles and he demonstrates a reluctance to engage in fratricide. Arjuna is admonished by his charioteer Krishna, a reincarnation of the God Vishnu, for his refusal to engage in battle. Krishna reminds Arjuna that it is the latter's duty and obligation (his *Dharma*) as a warrior to fight, regardless of the consequences of his actions in fulfilling his duties. See S Radhakrishnan, *The Bhagavad Gita* (New Delhi: HarperCollins, 1993).

[415] Mary Jo Leddy, "Let Iraq War Resisters Stay Here" The Toronto Star (28 May 2009), online: The Toronto Star <http://www.thestar.com>; "War Deserter Released From U.S. Prison" *CBC News* (16 January 2010), online: CBC News <http://www.cbc.ca>.

and/or other reasons of conscience, there is a tremendous personal toll which combat operations can take, perhaps particularly those that involve participation in unlawful conduct.[416] For example, when Joshua Key returned to the United States from Iraq on furlough, he discussed his emotional and mental state. He asserts that he suffered from so many nightmares that he had to take prescription medications.[417] He would experience blackouts. Key recounts one story of when he was driving on a rural road. While driving, he saw a cardboard box on the side of the road, which he imagined was a bomb. Key swerved off the road and onto the grass. When he regained consciousness, he was sweating and shaking behind the steering wheel.[418] However, for Key, it was the treatment meted out against Iraqi civilians that he witnessed and that he participated in that has caused him turmoil. He has had nightmares of decapitated heads and children dying.[419] The instability that PTSD has caused Key has rendered him unable to date to pursue a career in the field of his choice. For many other veterans, the consequences of combat have rendered them vulnerable to serious mental instability[420] leading to

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[416] Soldiers are by no means exempt from the trauma experienced due to combat and from executing orders handed to them. For instance, Amitava Kumar documents the experiences of Indian soldiers dispatched to the troubled state of Kashmir where they are positioned against insurgents and a local population that does not particularly appreciate their presence. The consequence is that many have sought medical and psychological assistance. See Kumar, *supra* note 346 at 152.

[417] Joshua Key as told to Lawrence Hill*, The Deserter's Tale: The Story Of An Ordinary Soldier Who Walked Away From The War In Iraq* (Toronto: House of Anansi Press, 2008) at 6 and 229.

[418] *Ibid* at 6.

[419] *Ibid* at 185.

[420] See Damien Cave, "A Combat Role, And Anguish, Too" *The New York Times* (31 October 2009) at A1, online: NY Times <http://www.nytimes.com>.

death via suicide.[421]

Still, resisters like Ahmed, Key and others, notwithstanding the various types of pain they have suffered, refused to capitulate and resign themselves to their punishment for pursuing their resistance. Indeed, many have left their countries of nationality, where they would meet with albeit different types of punishments for their defiance; punishment which they have felt would be unjust given what they believed was the proper legal and moral course of conduct under the circumstances. It is worth recalling the words of Joshua Key: "I didn't want to participate in an unjust war, and I didn't believe it was right that I should be become a prisoner in my own country for refusing to act like a criminal in Iraq."[422] In refusing to stay in their countries of nationality, such victimized resisters acted as resistive victims refusing to cooperate and participate in their (further) victimization.

V. Conclusion

The jurisprudence discussed in the two previous chapters illustrated the stories of those who have received refugee status or whose claims for such status may as a matter of law qualify for asylum under the *Refugee Convention*. In so doing it, it disrupts the dominant image of the refugee as a victim of persecution, who is in turn largely imagined as the helpless object of serious criminal actions and abuse. The presence of such resisters within ranks of those characterized as

[421] See Lizette Alvarez, "Suicides of Soldiers Reach High of Nearly 3 Decades" *The New York Times* (29 January 2009) at A19, online: NY Times <http://www.nytimes.com>. *See also* Charles W Hoge et al, "Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care" (2004) 351 New Eng J Med 13.

[422] Key, *supra* note 417 at 205.

refugees or who may be considered refugees helps us to re-imagine the concept of refugees as embodying both agency and victimhood. It also permits the meaning of victimhood to be broadened so as to contemplate those who have agency and vice-versa. These conceptual shifts are in line with scholarly and other legal developments which indicate albeit discrete affirmation that a person may be both victim and an agent through their resistance.

Chapter Four – *Personae Non Gratae*:

Targeting The Use of Force As A Basis For Excluding Resisters

I. Introduction

Article 1F(b) of the 1951 *Convention Relating to the Status of Refugees* states that the "provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that […] he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee."[423] This clause is intended to protect host societies from being required to grant refugee status to individuals who commit serious crimes. At the same time, by inserting the crucial reference to the non-political nature of the crime for which exclusion is to be imposed, it signals the *Refugee Convention* framers' intent that individuals who commit so-called "political crime" were/are not to be excluded from the benefits afforded by the *Convention*.[424]

The political crimes doctrine originated within the framework of extradition law in the nineteenth century. For over a century, numerous treaties between states have included clauses which provide that states shall not extradite an individual where the crime for which extradition is sought is an offence of a political character. The concept of the political crime was thereafter inserted into the *Refugee Convention*.

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[423] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, art 1A(2) (entered into force 22 April 1954) [*Refugee Convention*].

[424] *Minister for Immigration and Multicultural Affairs v Singh*, [2002] HCA 7, 209 CLR 533, 2002 WL 342793 at para 97, Kirby J.

What constitutes a political crime as a matter of law has largely been left to tribunals and courts to interpret and apply to cases before them. This is a proper approach as courts and tribunals are the appropriate institutions to undertake fact-based inquiries into the circumstances of each case to determine whether the crime in question qualifies as a political crime or non-political crime. However, significant legislative developments in several jurisdictions now severely limit the protective value of the "political crimes" doctrine and curtail the ability of courts/tribunals to undertake such analyses. Broadly worded standards that essentially label otherwise political actions as serious non-political crimes or "terrorist activity" undermine the ability of courts to consider context and the relationship between the crimes committed and the political purposes and objectives.

In this chapter, I argue that such developments are detrimental to those seeking refugee status or who are seeking to evade extradition. They are detrimental because they erase any meaningful distinctions between those who use violence in a proportionate way that is closely linked to identifiable political purposes with those who make no attempt whatsoever to observe such constraints. An individual, as part of a group seeking to overthrown a totalitarian state is to meet the same fate as an individual belonging to a designated terrorist organization – exclusion and deportation in the case of refugee law or extradition.

The legislative changes are also unnecessary. As an examination of the relevant case will demonstrate below, court definitions of the concept of "political crimes" have been more than adequate tools by which to exclude those who have

engaged in violence against non-state or non-military targets or those who have otherwise used disproportionate force. In other words, the courts were doing their job. The system functioned properly. Where in the few limited instances that courts have recognized the political crimes doctrine as properly applying, the courts have done so in a conscientious manner which again considered whether there was a political purpose or objective, and whether the crime had some close or direct nexus to the objective.

This chapter is divided into three parts. In the first part, I analyze treaties and legislative enactments situated within the context of refugee law and extradition law that have effectively erased the distinction between non-political and political crimes. I focus on legislative developments in Australia, Canada, the United States and the European Union.

In the second part, I demonstrate through an examination of the political crimes jurisprudence that courts have been successful in distinguishing between those individuals who properly qualify for the political crimes exception and those who have not. This jurisprudence is focused on relative political crimes – these are common law offences such as murder that are committed with political motives and impact upon rights of individuals. Pure political crimes, by contrast, are offences such as treason, sedition and espionage and are targeted against the state. It is the former category that has received the greatest amount of jurisprudential examination. This chapter will show that courts and the tests that they have created have taken into account fundamental considerations such as the

political objectives of the individuals in question, the identity of the targets of the crimes and the use of proportionate force necessary to carry out the objectives.[425]

In the third part, I shall examine in particular three cases that have been decided in recent decades in the United States, Australia and New Zealand where courts have either recognized that the political crimes doctrine either applies or may possibly apply. Just as the cases that will be discussed in the second part illustrate the capacity of judges to distinguish between proper and improper applications of the political crimes, so to do these cases illustrate courts' abilities distinguish between terrorist activity and legitimate uses of violence in accordance with the norms of international law. Furthermore the cases illustrate a judicial sensitivity particularly in the context of adjudications under Article 1F(b) to the fact of different power dynamics which exist in other societies and the role of judges not to look at the notion of political crimes through a purely "Northern" or "Western" lens.

I note at the outset that in all parts of this chapter, I shall be examining the notion of relative political crimes as it is situated in both refugee law and extradition law. While the focus of this thesis has clearly been focused on developments in refugee law with respect to protecting resisters, an examination of how relative political crimes has developed in extradition law is nevertheless justified and appropriate. First, given that the large portion of the jurisprudence

[425] I hasten to add however that this should not be taken to mean that the tests are flawless either. As I suggest in chapter five, the concept of the political should have a broader meaning given the varying power dynamics in a given society may justify recognition that a crime may be considered political when waged against particular non-state actors. Yet, as with standard political crimes, there will still need to be an observation of the proper and proportionate use of force.

surrounding political crimes is situated in extradition law, refugee law jurisprudence has made extensive reference to and has also drawn from the political crimes jurisprudence in extradition law.[426] Second, the extradition case law on the political crimes doctrine illustrates the capacity of judges to account for context and arrive at decisions that exclude those who improperly target or disproportionately impact on civilians. Third, while there are differences between the purposes of extradition law and refugee law broadly, when it comes to the political crimes doctrine specifically and this is reflected more in earlier jurisprudence, the notion of refusing to grant extradition to a requesting state because of the political crimes doctrine was viewed as a form of asylum.[427] This was particularly so prior to the *Refugee Convention* or when the *Convention* was only applicable for those who became refugees as a result of events taking place before January 1951.[428]

II. Legislative Exclusions – Carving Violence Out of Resistance

This section shall demonstrate that within national legislation and regional agreements formulated over several decades, efforts have been made to circumscribe the ability of persons who use force to achieve political objectives

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[426] See e.g. *T v Secretary of State for the Home Department*, [1996] 2 All ER 865 at 891-899, [1996] 2 WLR 766 [*T v Secretary of State*]; *Gil v Canada (Minister of Employment and Immigration)*, [1995] 1 FC 508, 119 DLR (4th) 497, 1994 CarswellNat 165 at paras 17-66.

[427] See e.g. *Schtraks v Government of Israel and Others*, [1964] AC 556, [1962] 3 All ER 529, [1962] 3 WLR 1013 (stating that s.3 of the Extradition Act of 1870 relating to the refusal to extradite on the basis that the crime was political, was "clearly intended to give effect to the principle that there should in this country be asylum for political refugees[…]" at); *In re Kavic et al*, [1952] 19 ILR 371 (writing that the purpose of the political crimes exception in extradition law was "that asylum should be granted to the alien worthy of sympathy who had fought for his political convictions and had been prosecuted for so doing" at 373).

[428] *Refugee Convention*, *supra* note 423 at art 1A.

from acquiring refugee status or to evade extradition. In the examples that follow, political crimes are radically re-defined or limited largely by reference to specific crimes and/or the means and methods employed. Political crimes are defined not by broader contextual factors or the objectives/purposes that serve as the basis of the offences, but solely by the means used or in reference solely to the specific crime. Depending on the designations used, individuals may be branded as "terrorists" or "criminals" regardless of the motivations and/or the identity/nature of their targets (and for that matter the acts of oppression committed by such targets as well).[429]

Concerns in the 1970s about terrorist attacks prompted changes to what are construed as "political crimes" in extradition law amongst European states. In the *European Convention on the Suppression of Terrorism*, the language provides that for the purposes of extradition law certain crimes or actions are not to be viewed as a "political offence or as an offence connected with a political offence or as an offence inspired by political motives."[430] Of particular concern at the time were the seizure of and/or attacks on civilian aircrafts prohibited under other

[429] In an article by Asha Kaushal and Professor Catherine Dauvergne, the authors articulate similar arguments but with respect to the application of Article 1F(b) in Canadian cases in particular, rather than the legislative clause addressed in this section. The authors articulate that the interpretation and application of these exclusion clauses illustrate a culture of exclusion. I agree with the authors in that such a culture has been produced (and certainly not just in Canada). However, and at least in connection with "political crimes" under 1F(b), I would locate this culture of exclusion more in the framework of the types of broadly worded legislation discussed in this chapter. Also the discussion of the case law relating to Article 1F(b) appears limited to a few cases, and the discussion does not give a wider account of why some of the claimants may have been excluded including whether civilians were targeted or the means were likely to cause death or injury that was avoidable. Asha Kaushal & Catherine Dauvergne, "The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions" (2011) 23 Int'l J Refugee L 54 at 72-74.

[430] *European Convention on the Suppression of Terrorism,* 27 January 1977, 1137 UNTS 93 (entered into force 4 August 1978).

international conventions.[431] In addition, the *Convention* excludes from the notion of political crimes serious offences involving attacks against the "life, physical integrity or liberty or liberty of internationally protected persons, including diplomatic agents."[432] The *Convention* also specifically excludes crimes relating to forced confinement including kidnapping, hostage taking or serious unlawful detention.[433] It also bars the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if the use of such materials endangers persons.[434] The *Convention* also stipulates that contracting states *may* decide that certain offences involving violence (apart from those mentioned above) against the "life, physical integrity or liberty of a person", acts against property creating a collective danger to persons, do not qualify as political offences or offences connected to a political offence or offences inspired by political motives.[435] As the breadth of this optional provision suggests, the political crimes doctrine could largely be restricted to predominantly non-violent activity altogether.

Canada's *Extradition Act* establishes a similar list of acts where, if an individual commits murder, manslaughter, or sexual assault, inflicts serious bodily injury, kidnaps, abducts, takes hostages, commits extortion, or uses "explosives, incendiaries, devices or substances in circumstances in which human life is likely to be endangered or serious bodily harm or substantial property

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[431] *Ibid* at art 1.

[432] *Ibid*.

[433] *Ibid*.

[434] *Ibid*.

[435] *Ibid* at art 2.

damage is likely to be caused," s/he has not perpetrated a political offence.[436] The *Extradition Act* also extends the exclusion on the basis of accomplice liability and related inchoate offences associated with the enumerated crimes.[437] As such conspiracy to commit murder and attempted murder are also designated a non-political crime.

Rather than set out a lengthy list of offences which will considered non-political, Australia's *Extradition Act 1988* explicitly bars offences which involve "an act of violence against a person's life or liberty."[438] The breadth of this short phrase incorporates the crimes designated in Canada's *Extradition Act* as non-political crimes in addition to many others. Furthermore, by amendments made in early 2002 to Australia's *Migration Act 1958*, the limitations set out with respect to political crimes in the extradition context also apply to the interpretation of serious non-political crimes in the application of Article 1F(b) of the *Refugee Convention*.[439] As such any act of violence against a person's life or liberty automatically is a serious non-political crime as a matter of law.

These approaches are conceptually striking for it is really the political context and objectives underlying a crime which makes a crime political or not. By contrast, the seriousness of a crime, including any lethal or significant

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[436] *Extradition Act*, SC 1999, c 18, s 46(2).

[437] *Ibid* at s 46(2)(f). India has similar provisions set out in a schedule to the *Extradition Act, 1962 (No. 34 of 1962)*. While some of the identified offences designated as "non-political" refer to contraventions of international conventions from the 1970s and 1980s, it is unclear whether other offences (such as murder) were part of this schedule from the passing of the Act in the early 1960s.

[438] *Extradition Act 1988* (Cth), s 5.

[439] *Migration Act 1958* (Cth), s 5.

consequences attached to particular conduct does not alter its political character were it to be waged for political purposes. To understand the (counter-intuitive) implications of these provisions, the successful assassination of a head of state or head of government that is committed for the clear objective of changing government policy or its overthrow would be designated a non-political crime. Conversely, the assassination of such political figures could in fact be perpetrated for patently non-political reasons or objectives, thus transforming the act into a non-political crime. The legislation however does not distinguish between the two.

In these examples, the "political" in "political crime" – even under a traditional understanding of the term as connected to the state – is effectively erased or render entirely meaningless. No room is given to courts to ascertain whether the context of any such designated crime demonstrates a patently political objective or that the targets are patently political in nature. Crimes committed, or the means and methods employed may certainly be disproportionate, but the political character of the crime/conduct conceptually still remains.

Crimes that are disproportionate have also been deemed non-political as discussed in the case law below. This too is questionable since a disproportionate act may demonstrate significant zeal and signify that other motivations are also in play, but it does not mean that it does not also still maintain its character as a political crime. Rather than designating a disproportionate crime as non-political, a different approach would be to use an alternative or qualifying designation where political crimes are deemed as disproportionate to the objective. For

example, legal systems could develop the concepts of legitimate and illegitimate political crimes. The latter would constitute crimes whereby a political purpose of objective may exist but the means are disproportionate and thus could not be considered (perhaps even ever) legitimate. An obvious example would be the acts of sexual assault or torture. Acts which violate international law such genocide or crimes against humanity would be others.

Apart from limiting the definition of "political crimes" to effectively encompass solely non-violent means, states have also passed other significant legislative measures to exclude individuals who adopt violence from obtaining refugee status. The Canadian Parliament for example has formulated provisions that render certain applicants "inadmissible" on account of "national security reasons". In 2001, the government of Canada passed the *Immigration and Refugee Protection Act* which deems inadmissible individuals who engage in or instigate "the subversion by force of *any* government."[440] In the absence of explicit statutory definitions, "subversion" has been judicially defined as "accomplishing change by illicit means or for an improper purpose related to an organization" as well as "[a]ny act that is intended to contribute to the process of overthrowing a government."[441] The term "by force" has been judicially interpreted to include "coercion or compulsion by violent means, coercion or compulsion by threats to

[440] *Immigration and Refugee Protection Act*, SC 2001, c 27 s 34(1)(b) [*IRPA*] [emphasis added].

[441] *Maleki v Canada (Minister of Citizenship and Immigration)*, 2012 FC 131 at para 8, 2012 CarswellNat 283 (WL Can).

use violent means, and […] reasonably perceived potential for the use of coercion by violent means."[442]

Adopting such uncompromising language discounts even the legitimate use of proportionate force to subvert a cognizable totalitarian state or government perpetrating genocidal violence and renders persons challenging such oppressive power through violence inadmissible. As the Federal Court of Canada observed, there is no doubt that had this provision been in force at the relevant times, it "could have had potentially startling impact on historical, and even contemporary figures. Arguably such revered and diverse figures as George Washington, Eamon De Valera, Menachem Begin and Nelson Mandela might be deemed inadmissible to Canada."[443] The court took solace in the fact *IRPA* permits "Minister the responsibility to assess whether a person who falls within paragraph 34(1)(*b*) might be a threat to Canada or might otherwise be inadmissible."[444] The current provision states that a foreign national to apply to the relevant Minister to seek an exception to inadmissibility where the "Minister is satisfied that it is not contrary to the national interest."[445] The notion of "national interest" is not defined in *IRPA* and leaves open the potential for a number of political considerations to intrude into the determination of someone's status as a refugee. Put another way, the determination of whether someone qualifies for refugee status in such cases is

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[442] *Oremade v Canada (Minister of Citizenship & Immigration)*, 2005 FC 1077 at para 27, [2006] 1 FCR 393, 2006 CarswellNat 3099 (WL Can).

[443] *Ibid* at para 17.

[444] *Ibid* at para 18.

[445] See *IRPA*, *supra* note 440 at s 42.1.

contingent on the political inclinations of the party in power rather than, at least in theory, a more politically neutral assessment of the person's actions in challenging the state. As I discuss further below, the political crimes doctrine allows judges to play a politically neutral role in determining what political purposes exist and what actions are taken in relationship to those objectives.

These measures do not re-define "political crimes" within the scope of the *Refugee Convention* directly, but they have a substantial collateral effect on the application of "political crimes" nevertheless. If the use of force entirely becomes a disqualifying factor for obtaining refugee status (or immigration status more broadly even after refugee status has been acquired), then it will hardly matter how broad political crimes are defined and interpreted with respect to the use of violence.

IRPA's predecessor legislation included similar clauses but they were qualified and restricted in their scope. Under the earlier *Immigration Act, 1976-77*, ss 19 (e) and (f) identified certain inadmissible classes of persons relevant to this discussion.[446] Under s 19(f)(i), a person would be inadmissible if there were reasonable grounds to believe that they "have engaged in acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada[.]"[447] The differences between s 19(f)(i) in the *Immigration Act* and s 34(1)(b) of *IRPA* resides in the type of government that is the object of the subversion or espionage as well as the very explicit reference to the use of

[446] *Immigration Act, 1976-77,* c 52, ss 19 (e) and (f) online: Refworld < http://www.refworld.org>.

[447] *Ibid* at s 19(f)(i).

force. What the framers of the *Immigration Act* recognized was that subversion against non-democratic states by their nationals or others may be legitimate or at the very least not grounds for disqualifying an individual.

Lastly, under the *Immigration Act*, Parliament deemed inadmissible persons who there are reasonable grounds to believe: "*will*, *while in Canada*, engage in or instigate the subversion by force of any government"[448] or who "are members of an organization that there are reasonable grounds to believe will […]engage in or instigate the subversion by force of any government."[449] These phrases appear similar to what currently exists under s. 34(1)(b), except that there are certain critical differences. In the *Immigration Act*, both of the cited provisions are focused on prospective conduct while the former (s 19(e)(ii)) stresses acts of subversions while in Canada (although not necessarily against the government of Canada).

It is certainly reasonable for a hosting state to require that individuals who are granted refugee status refrain from engaging in the use of force against another state while on its soil. This is supported by provisions in the *Refugee Convention*. Article 2 of the *Refugee Convention* states that "Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order."[450] Furthermore, a refugee is excluded from relying

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[448] *Ibid* at s 19(e)(ii).

[449] *Ibid* at s 19(e)(iv)(B).

[450] *Refugee Convention*, *supra* note 423 at art 2.

on the norm of *non-refoulement* where there are reasonable grounds for regarding this person is "a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."[451] Engaging in subversion of another government from a host nation may produce certain dangers for the host nation and its community.

Another type of far-reaching legislative measure which invalidates legitimate or potentially legitimate uses of force for political purposes is the designation of a broad spectrum of activity as terrorist activity. After the Al-Qaida attacks of September 11, 2001, the United States Congress passed revisions to the *Immigration and Nationality Act* where those engaged in "terrorist activity" or belonged to "terrorist organizations" could be deemed inadmissible for refugee status. A terrorist organization is understood, in part, as a "group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in" terrorist activities set out in the *INA*.[452] Terrorist activity in turn is defined as "any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State)…."[453] Notably this

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[451] *Ibid* at art 33(2).

[452] 8 USC § 1182 (a)(3)(B)(vi)(III). The terrorist activities in question are set out in 8 USC § 1182 (a)(3)(B)(iii)(I-VI), online: Findlaw <http://codes.lp.findlaw.com/uscode/8/12/II/II/1182>. The INA sets out that particular organizations may be designated as terrorist organizations. See 8 USC § 1182 (a)(3)(B)(vi)(I) and (II).

[453] 8 USC § 1182 (a)(3)(B)(vi)(III).

includes amongst other acts,[454] the use of an "explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property."[455] This clause in particular indicates that any number of violent actions can constitute terrorist activity, regardless of the presence of clearly discernible political motives or the identity of its targets. Furthermore the intent of said violent acts requires simply the intent to *endanger* the *safety* of one or more individuals, and thus does not mandate even the intent to cause serious injury or death to said victims. Moreover, the individuals in question whose safety may be endangered can range from a dictator, his/her security personnel to a three year old. In other words, it fails to distinguish between an Adolf Hitler and those resisting his oppression. To make matters worse, persons involved in such designated terrorist activities may be excluded for various degrees of involvement ranging from commission or incitement to commit "under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity,"[456] preparing or planning a terrorist activity,[457]

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[454] 8 USC § 1182 (a)(3)(B)(iii)(I-VI) online: <http://codes.lp.findlaw.com/uscode/8/12/II/II/1182>. The full list of actions considered terrorist activity are: (a) highjacking or sabotage of any conveyance; (b) taking an individuals or individuals hostage and threatening to kill, injure or continue to detain them in order to compel a third party to do or abstain from doing any act as an explicit or implicit condition respecting the release of the hostage(s); (c) a violent attack upon an internationally protected person or upon the liberty of such person; (d) an assassination; (e) use of any biological agent, chemical agent, or nuclear weapon or device; (f) use of an "explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property"; and (g) a threat, attempt, or conspiracy to do any of the aforementioned acts.

[455] *Ibid.*

[456] 8 USC § 1182 (a)(3)(B) (iv)(I), online: <http://codes.lp.findlaw.com/uscode/8/12/II/II/1182>.

soliciting funds for a terrorist activity,[458] to the commission of an act that the actor knows, or reasonably should know, affords material support.[459] Material support is defined broadly to include providing a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training.[460]

These provisions establish a rather expansive understanding of terrorist activity, casting the legislative net rather wide. It also excludes any explicit reference to political motivations or objectives behind such activity or the prohibited targets which make it terrorism. For example, United States law elsewhere defines terrorism as "premeditated, *politically motivated violence perpetrated against noncombatant* targets by subnational groups or clandestine agents."[461] Such a definition indicates a clear appreciation for terrorism being perpetrated against non-combatants. As Judge Posner of the United States 7th Circuit Federal Court of Appeal acknowledges, the definitions of terrorist activity and terrorist organization in the *INA* stretch and deform the common definitions of terrorist or terrorism, found in other legislation, that associates it with the

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[457] 8 USC § 1182 (a)(3)(B) (iv)(II), online: <http://codes.lp.findlaw.com/uscode/8/12/II/II/1182>.

[458] 8 USC § 1182 (a)(3)(B) (iv)(IV), online: <http://codes.lp.findlaw.com/uscode/8/12/II/II/1182>.

[459] 8 USC § 1182 (a)(3)(B) (iv)(VI) online: <http://codes.lp.findlaw.com/uscode/8/12/II/II/1182>.

[460] *Ibid*.

[461] 22 USC § 2656f (d)(2) online: <http://codes.lp.findlaw.com/uscode/22/38/2656f> [emphasis added].

achievement of political end and the targeting of non-combatants.[462] The INA definitions untether activity from specified goals or specified targets.

The definitions pave the way for harsh results that leave judges and tribunal adjudicators with little or no room to take into account the particularities of a specific situation and the context in which certain activities take place. Most notably, the political context in which these crimes are committed is absent. If political objectives and targets tend to be part of what constitutes an act of terror, the statute intentionally excludes such considerations. While Judge Posner appears untroubled by such breadth,[463] in cases I discuss below, other jurists have expressed dismay about its application to situations that Congress probably never intended it to apply to.

SK, an asylum applicant from Myanmar was excluded for providing "material support" for "terrorist activities". She donated one thousand one hundred United States dollars, in addition to binoculars and a camera to the Chin National Front (CNF).[464] SK was deemed inadmissible for refugee status because she provided "material support" to individuals who she knew, or had reason to know, used firearms and explosives to endanger the safety of others or to cause substantial property damage.[465] The CNF is a group that engaged in resistance efforts against the military regime in Burma. This includes the use of landmines and engaging in combat with government forces. Although the immigration judge

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[462] *Hussain v Mukasey*, 518 F 3d 534 at 537-538 (7th Cir 2008).

[463] *Hussain*, *supra* note 462 ("The statute may go too far, but that is not the business of the courts" at 538).

[464] *In Re SK*, 23 I & N Dec 936 (BIA 2006) ["*SK I*"].

[465] *Ibid* at 937.

determined that SK had a well-founded fear of persecution, the court held that she was excluded under the *INA* for having provided material support to the CNF. The Board of Immigration Appeal (BIA) held that the immigration judge reached the correct result under the statute. However, a concurring BIA panel member, Juan Osuna took pains to note the problematic nature of the law's breadth and its application in SK's case. He recognized the context in which SK's actions were situated. Osuna identified that the CNF was an organization that was "resisting the government of Burma."[466] Furthermore, Osuna noted that the CNF "is allied with the National League of Democracy, which is recognized by the United States as a legitimate representative of the Burmese people."[467] Osuna also framed the resistance as one borne out of self-defence given the Burmese government's history of persecuting opponents and minorities – including the ethnic Chin population. In addition, he posited that the CNF was not an organization designated as a terrorist organization by the United States government, nor had it been accused of committing terrorist attacks or abuses against the civilian population on a systematic scale.[468] Osuna also observed that the CNF was hardly an organization that the United States government would view as a terrorist organization. He insisted:

> In sum, what we have in this case is an individual who provided a relatively small amount of support to an organization that opposes one of the most repressive governments in the world, a government that is not recognized by the United States as legitimate and that

[466] *Ibid* at 947.

[467] *Ibid*.

[468] *Ibid* at 948.

> has engaged in a brutal campaign against ethnic minorities. It is clear that the respondent poses no danger whatsoever to the national security of the United States. Indeed, by supporting the CNF in its resistance to the Burmese junta, *it is arguable that the respondent actually acted in a manner consistent with United States foreign policy*.[469]

Like Posner, Osuna appreciates the breathtaking scope of the *INA*'s provisions but goes further in identifying and criticizing the incongruous results it produces. The provisions in effect label any group that uses a weapon for purposes other than monetary gain as a terrorist organization. Consequently, an individual who provided "material support" to the Northern Alliance against the Taliban in Afghanistan would be excluded for engaging in terrorist activity, even though the former is allied to the United States. It would apply equally to resistance fighters combating a totalitarian regime.

It is worth noting that following the BIA's decision in *SK I*, the United States Secretary of Homeland Security made a determination under his discretionary authority granted by statute that the material support bar with respect to granting refugee status would not apply to applicants who have provided material support to the CNF.[470] Following the Secretary's determination, the Attorney General vacated the BIA's original decision in *SK I*. In addition, Congress passed a bill providing that the CNF, amongst other designated groups were not to be considered "terrorist organizations" for the purposes of *INA*.[471] On

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[469] *Ibid* at 950.

[470] *In Re SK*, 24 I & N Dec 289 at 290 (BIA 2007), [*SK II*].

[471] *Consolidated Appropriations Act, 2008*, Pub L No 110-161, § 691(b), 121 Stat 1844, 2365.

remand before the BIA, and in light of the foregoing developments, the BIA granted SK asylum on the basis of the findings of the immigration judge that she had a well-founded fear of persecution for reasons of her political opinion.[472] It is nonetheless rather awkward and onerous that such a matter had to be settled by legislative fiat, and that the net effect of the United States framework is to create a considerable presumption that all violence is illegitimate. It represents, to some degree a mistrust that those charged with the duty of determining whether a person is eligible for refugee status are incapable of differentiating between *bona fide* refugees and those who should be excluded for engaging in serious non-political crimes.

Within the context of refugee status adjudications, both the Canadian and United States legislative provisions disempower jurists from considering context and the possibility that the main target of the acts in question is an oppressive or otherwise totalitarian regime that perpetrates systematic human rights abuses and/or international crimes. While such provisions do not directly impact upon the definition and application of "political crimes" in the refugee law context, in the way the Australian legislation does with respect to defining "serious non-political crimes", it nevertheless has the potential to deleteriously affect the claims of resisters seeking asylum. It does so in the following way. Given that political crimes in the refugee law context in Canada and the United States are constructed to include violent action, such individuals may nevertheless be designated inadmissible by these separate provisions. As such, there is a real concern that practically, while political crimes may allow room for some violent action, the use

[472] *In Re SK*, 24 I & N Dec 475 at 478 (BIA 2008), ["*SK III*"].

of violent resistance may likely result in a claimant being found inadmissible through the operation of the provisions under discussion. In effect, such provisions render most if not all legitimate violent resistance invalid.[473]

Depriving jurists of the ability to undergo a contextual analysis can in many ways inflict its own type of injustice that does not account for the individual claimant that lies at the heart of the inquiry.[474] In one case, Malachy McAllister, a former member of the Irish National Liberation Army was deemed inadmissible by reason of terrorist activities as set out in the provisions discussed above.[475] His crimes included serving as a look-out in an attack on a Royal Ulster Constabulary officer as well as conspiracy to kill another RUC officer. It is notable therefore that the targets were recognized state and military actors and the actions fit within a long standing political struggle to reunify Northern Ireland with the Republic of Ireland. There was no indication in the facts of the case that any civilians were targeted, injured or killed with respect to these crimes. McAllister was subsequently tried and convicted in England for the two crimes and served his time. He then became subjected to attacks by the Loyalist forces and the RUC and subsequently fled to the United States. The court in its decision was forced to

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[473] Arundhati Roy has posited the legitimacy of using violence to counter state oppression: "Non-violence is a piece of theatre. You need an audience. What can you do when you have no audience? People have the right to resist annihilation." Stephen Moss, "Arundhati Roy: 'They are trying to keep me destabilised. Anybody who says anything is in danger'" *The Guardian* (5 June 2011), online: The Guardian Unlimited <http://www.guardian.co.uk/>.

[474] It is worth noting that in the context of criminal sentencing, judges have bristled at the notion of mandatory sentencing which effectively denudes jurists of the ability to exercise judgement through an examination of the context. This has led one Canadian judge in Ontario to characterize such mandatory sentencing as cruel and unusual punishment. See *R v Smickle*, 2012 ONSC 602, 91 CR (6th) 132, 2012 CarswellOnt 1484 (WL Can).

[475] *McAllister v Attorney General of US*, 444 F 3d 178 (3rd Cir 2006).

deem him inadmissible because of his involvement in "terrorist activity". As Judge Barry, writing in concurrence, painfully expressed, it simply should not be that:

> the individual and his individuality are largely, if not entirely, irrelevant, lost in a sea of dispositive definitions and harsh and complex laws. And we cannot be the country we should be if, because of the tragic events of September 11th, we knee-jerk remove decent men and women merely because they may have erred at one point in their lives. We should look a little closer; we should care a little more.[476]

What the foregoing discussion illustrates is a developing legal culture wherein, at least the particular legislatures of Australia, Canada and the United States have demonstrated a concerted mistrust of individuals who have engaged in violence whatever the cause or context. This began prior to the September 11 attacks in 2001 in the extradition context. After the September 11th attacks which were certainly of a significant and precedential nature in terms of its scope and destruction, the reactive move to exclude all individuals who had engaged in any use of force from gaining refugee status quickly took place. This has resulted in the provisions discussed above in connection with the expansive scope of what constitutes "serious non-political crimes" in Australia, *IRPA*'s inadmissibility clauses and the *Immigration and Nationality Act*'s inadmissibility provisions on terrorist activity. As a consequence of these legislative enactments, particularly, in

[476] *Ibid* at 192. It is worth noting that since the court's ruling, the deportation order has been continuously delayed by various grants of temporary relief from removal. As such, administrative agencies can exercise their powers in such ways. However, it requires individuals such as McAllister and his family to go through this process each year and face consistent uncertainty. "McAllister Family Gets Another Year", *The Irish Echo* (21 March 2012) online: The Irish Echo <http://irishecho.com>.

the United States and Canada, cases such as *Dwomoh v Savah*[477] or *Ahmed v Canada (Minister of Employment and Immigration)*[478] respectively which were discussed earlier in this thesis would not likely lead to the same results, unless members of the executive branches of each country exercised their discretion conferred by law to conclude otherwise.[479]

III. In Defence of the Political Crimes Doctrine

Rather than the sweeping and broadly worded legislative enactments discussed above, in this section, I argue that the jurisprudence concerning the political crimes doctrine illustrates the merits of contextual approaches that look to the resister's objectives, targets and/or the means and methods employed. While the tests surrounding the political crimes doctrine are not worded the same way, or without certain flaws, they nevertheless demonstrate a healthy respect for the role of armed resistance balanced against necessary restraints on the use of force.[480] To the extent that any such flaws exist, they do not work in the favour of those claiming the benefit of the political crimes doctrine but to their detriment, and as such states have little to fear that dangerous criminals will be able to evade extradition or obtain refugee status by virtue of the political crimes doctrine.

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[477] 696 F Supp 970 (SDNY 1988)

[478] 5 Imm LR (2d) 219, 1988 CarswellNat 42 (WL Can). See also *Camara v Canada (Minister of Employment and Immigration)*, 13 Imm LR (2d) 145, 1991 CarswellNat 36 (FCA).

[479] See *IRPA*, *supra* note 440, s 42.1

[480] One of these flaws is a restrictive definition of what constitutes the "political" as synonymous with the state or government. As I examine in chapter six of this thesis, the concept of the political should be expanded to cover other societal actors or entities that exercise significant power. However, even under this broader definition, the results would not change the outcome if applied in the cases where a court determined that the impugned crime was considered a non-political crime.

As demonstrated below, many if not most cases litigated under the political crimes doctrine have not furnished a great amount of protection to those invoking it. This is not to suggest either that those who invoked and failed had otherwise deserved its protection. What the jurisprudence demonstrates is that courts have rejected invocations of the political crimes doctrine due to the non-state status of the targets or victims of the crime and/or the disproportionality of the use of force relative to the political objective(s).

a. Origins of the Political Crimes Doctrine

Conceptually, the political crimes doctrine is rooted in the upheavals of the late eighteenth century marked by the American and French Revolutions.[481] Officials validated the notion of protecting resisters fleeing persecution or who had been banished. Following the French Revolution, the framers of the Constitution of 1793 incorporated a right to asylum to foreigners banished from their country of origin for engaging in the cause of freedom.[482] While the framers of the Declaration of Independence (who subsequently authored the United States Constitution) firmly declared the right of individuals to resist tyrannical governments, there was a clear absence of any commensurate legal commitment to granting asylum to those fleeing persecution or banishment for such actions.[483]

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[481] See *Ordinola v Hackman*, 478 F 3d 588 at 595 (4th Cir 2007).

[482] *Constitution of 1793*. In the *Constitution of 1958*, this was further modified to state that the "the authorities of the Republic shall remain empowered to grant asylum to any foreigner who is persecuted for his action in pursuit of freedom or who seeks the protection of France on other grounds." Online: <http://www.assemblee-nationale.fr/english/8ab.asp>.

[483] See the *Declaration of Independence* (1776).

Still, the idea of extending some legal protection to resisters was not wholly absent either.

Writing as the United States secretary of state within the context of ongoing extradition treaty negotiations between the United States and other states, Thomas Jefferson expressed the belief that the United States should not wish to return resisters and patriots who fight against the oppressions of government to the executioner of the state requesting extradition of the political fugitive.[484] Jefferson observed that where "real" treason existed, such conduct deserved the highest punishment.[485] Yet he also noted that there was a distinction between acts waged against a government and acts carried out against the oppressions of government.[486] Jefferson asserted "the latter are virtues; yet have furnished more victims to the executioner than the former; because real treasons are rare, oppressions frequent. The unsuccessful strugglers against tyranny have been the chief martyrs of treason-laws in all countries."[487]

The refusal to grant extradition by reason that the fugitive's crime was of a political nature only first became enshrined into law in a Franco-Belgian extradition treaty in 1834. The political crimes exception was first incorporated

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[484] Letter from Thomas Jefferson to William Carmichael and William Short, April 24, 1792 in Thomas Jefferson Randolph, ed., *Memoir, Correspondence, And Miscellanies, From The Papers Of Thomas Jefferson*, 2d ed, vol 3, (Boston: Gray and Bowen, 1830), online: <http://www.gutenberg.org/dirs/1/6/7/8/16783/16783-h/16783-h.htm#2H_4_0108>.

[485] *Ibid.*

[486] *Ibid.*

[487] *Ibid*.

into a United States extradition treaty in 1843.[488] The political crimes doctrine was eventually included in other United States' extradition treaties as well as those of other states' like England during the nineteenth century as it was "deemed necessary to protect those people who justly fought back against their government oppressors to secure political change."[489]

b. Political Crimes in Extradition Law

It was through British jurisprudence that one of the first and most enduring political crimes tests developed. In *In Re Castioni*, the court held that a crime was political if it was "incidental to *and* formed a part of political disturbances."[490] In order to narrow the scope of what constituted a political crime, the court developed the stated test so as to require a clear nexus between the putative political criminal act and the political disturbances. In so doing, the court rejected a broader definition proposed by John Stuart Mill in Parliament that a political crime is "[a]ny offence committed in the course of or furthering of civil war, insurrection, or political commotion."[491] Mills' definition they feared would permit any act borne out of personal malice to be excused just because it happened to transpire during the course of an uprising.[492]

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[488] See *Ordinola*, *supra* note 481 at 596.

[489] *Ibid*.

[490] *In Re Castioni*, [1891] 1 QB 149 at 153, 166 [emphasis added].

[491] *Ibid* at 153.

[492] *Ibid* at 154.

Commensurate with the ethos that inspired the concept of political crimes in the first place, that is, protecting those engaged in revolutionary acts against their government, violence has been a signal feature of the test. Indeed some United States courts have inserted the words uprising in addition to "violent" to modify the terms "political disturbances" to emphasize the minimum conditions necessary to qualify under the doctrine.[493] Yet, even without the modifier "violent", there has nevertheless been recognition that "political disturbances" must essentially be violent in nature. As the United States 7th Circuit Federal Court of Appeal asserted in *Eain v Wilkes*, the definition of political disturbances included organized forms of aggression "such as war, rebellion and revolution," and were "aimed at acts that disrupt the political structure of a State."[494] The 9th Circuit has also asserted that in order to constitute an uprising, "a conflict must involve either some short period of intense bloodshed or an accumulation of violent incidents over a long period of time."[495]

Given that a context of a violent political disturbance or uprising has been deemed to be a necessary minimum to satisfying the test,[496] courts have sought to

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[493] See *Ordinola*, *supra* note 481 at 597.

[494] 641 F 2d 504 at 520-521 (7th Cir 1981).

[495] See e.g. *Vo v Benov*, 447 F 3d 1235 at 1242 (9th Cir 2006).

[496] In *Schtracks v Government of Israel and Others*, [1964] AC 556, [1962] 3 All ER 529 at 535-536, [1962] 3 WLR 1013, Lord Justice Reid, in concurrence posited two criticisms with respect to the necessity of showing a violent political disturbance or uprising. Lord Reid contended that a crime committed may be political even if there is no insurrection taking place. An underground resistance movement may engage in a violent act before the insurrection has broken out and taken foot, but this does not remove it of its political character. Lord Reid observed, "An underground resistance movement may be attempting to overthrow a government, and it could hardly be that an offence, committed the day before open disturbances broke out, would be treated as non-political, while a precisely similar offence committed two days later would be of a political character." *Ibid* at 535. With respect to the second criticism, he argued against the notion that a person should be

place checks and limits. Courts have stated that there must be a corresponding and demonstrable need to ensure that the putative political crimes are targeted at state actors (or those violently opposing the state) and not civilians.[497] Furthermore, as an added check, courts have applied a geographic limitation where by the crime must take place "within the country or territory in which those rising up reside,"[498] or that the political crime must be aimed at the state requesting extradition and not merely take place on its soil.[499] To illustrate, in *Vo v Benov*, the defendant was charged with the attempted bombing of the Vietnamese embassy in Thailand (the state seeking extradition). His opposition was to the policies of the Vietnamese government. The court held that the political crimes doctrine did not apply. The stated basis for this geographic restriction is that "it ensures that the political offense exception is not used to allow international

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denied refuge on the basis that the criminal act was non-violent in nature if it was aimed at inducing or compelling an autocratic regime to grant a measure of civil or religious liberty. *Ibid*.

[497] Attacks on civilians are not tolerated under the test. See e.g. *In Re Meunier*, [1894] 2 QB 415; *Ornelas v Ruiz*, 161 US 502, 16 S Ct 689 (1896) (holding that an attack and kidnapping of civilians as well destruction of property taking place amidst an attack on government soldiers was non-political); *Eain*, *supra* 494 (holding that planting a bomb in a teeming market killing two and maiming many others did not constitute a political crime); *Matter of Extradition of Atta*, 706 F Supp 1032 (EDNY 1989) affirmed by *Ahmad v Wigen* 910 F 2d 1063 (2nd Cir 1990) (holding that an attack on a civilian bus did not constitute a political crime); *Gil*, *supra* note 426 (holding that there is "no objective rational connection between injuring the commercial interests of certain wealthy supporters of the [Iranian] regime and any realistic goal of forcing the regime itself to fall or to change its ways or its policies" at para 80); *Arambasic v Ashcroft*, 403 F Supp 2d 951 (DSD 2005) (war crimes committed against civilians amidst civil war in Croatia were not political crimes); *Ordinola v Hackman*, 478 F 3d 588 (4th Cir. 2007) (State officer killing civilians who were unconnected with violent rebellion against the state not a political crime).

[498] *Vo, supra* note 495 at 1243-1245. See also *Quinn v Robinson*, 783 F 2d 776 at 807-808, 812-814.

[499] *Tzu-Tsai Cheng v Governor of Pentonville Prison,* [1973] AC 931, [1973] 2 All ER 204, [1973] 2 WLR 746.

terrorists to escape prosecution or to encourage the spread of civil insurrections to neighboring states."[500]

Although the *Castioni* political incidence test has produced a fair amount of jurisprudence, it was not the only test formulated in the extradition context for political crimes. Swiss courts have developed their own test. In order to qualify as a political crime, it has to be proven that a common crime had "a *predominantly* political character as a result of the circumstances in which they are committed, in particular as a result of the motives inspiring them and the purpose sought to be achieved."[501] The court in *Ktir* asserted that such offences presuppose that the act is committed out of political passion and committed either in the framework of a

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[500] *Vo*, *supra* note 495 at 1244. The geographical limitation however has not been without criticism from other jurists. In *Quinn*, Judge Duniway, writing in concurrence doubted the necessity of this limitation. He asserted that "genuinely revolutionary activities can take place outside the geographic boundaries of the requesting state." *Quinn*, *supra* note 498 at 818. To illustrate he provided the following example: "Suppose that, today, a citizen of Nicaragua, active in the so-called contras, were to sink a vessel owned by the Sandinista government on the high seas, and flee to this country. Would we grant extradition because his act did not take place within the territorial waters of Nicaragua?" *Ibid*. Judge Duniway's decision that Quinn should not receive the benefit of the political crimes, is that Quinn dispatched a letter bomb to an innocent, albeit influential, civilian who had no direct connection to the troubles in Northern Ireland. Furthermore, although Quinn killed an undercover police officer in the midst of escaping, Quinn was not aware that the individual was not a state actor. *Ibid* at 819.

Lord Simon of Glaisdale also mounted a similar disagreement in *Cheng*, *supra* note 499 at 219-220. In that case, the United States sought Cheng's extradition for the attempted murder of the purported head of the Taiwanese Secret Police and Vice-Premier of Taiwan while the latter was visiting the United States. Cheng was committed to the overthrow of the Taiwanese government headed by Chiang Kaishek. The intended victim was also Chiang's son. The House of Lords held that Cheng was ineligible for the political crimes doctrine for the reason that the political crime was not aimed at the state requesting extradition. Lord Simon assailed the notion that the crime was not one of a political character by virtue of its geographic location. He provided an illustration of how the geographic limitation might lead to absurd results. Lord Simon hypothesized that had the attack been on the Vice-President of the United States in opposition to the United States government's support of Taiwan and that an attempted assassination took place on the American side of the Niagara Bridge such crime might be considered an offence of a political nature. Yet if the assassin were to follow the Vice-President to the Canadian side (and thus outside of the United States' jurisdiction) it would then not be considered a political crime. *Ibid* at 219.

[501] *Ktir v Ministère Public Fédéral*, [1961] 34 ILR 143 at 144.

struggle for power or for the purpose of escaping a dictatorial authority.[502] Just as important, the court posited however that the damage caused by the crime had to be proportionate to the aim sought.[503] Furthermore, the interests at stake must be significant enough to excuse if not justify the infringement of private legal rights that are normally implicated in common crimes (in contrast to pure political crimes).[504] In cases of murder, it had to be shown that the homicide was the "sole means of safeguarding more important interests and attaining the political aim."[505] Thus while murder is not explicitly excluded, the Swiss tribunals have determined that there must be some compelling justification for it.

Ktir concerned a member of the Algerian Liberation Movement (ALM) who was ordered by superiors to execute another member suspected of treason against the ALM. Following the murder, Ktir fled France (where the murder took place) to Switzerland. Although not invoking a geographical limitation specifically as illustrated in Anglo-American case law, the Swiss court observed that the ALM's cause for freedom in Algeria places them at odds with France and the colonial government in Algeria. The court acknowledged that the ALM was a political organization and that Ktir as a member was ordered to commit the murder. However, the court determined that the crime itself was not "predominantly political" in character. The test was not satisfied because the murder was not necessary as the sole means of safeguarding the more important

[502] *Ibid*.

[503] *Ibid*.

[504] *Ibid*.

[505] *Ibid*.

interests if the ALM and of achieving its aims. The court stated that the interests were not "so gravely compromised" by the treason that murder was necessary. It concluded that the act was too loosely connected to the political aims and in the circumstances of the case was thus ultimately an act of "terror and vengeance."[506]

The Swiss Federal Tribunal's jurisprudence indicates that this approach is also stringent with respect to non-homicide offences such as robbery to secure financial resources to accomplish the overthrow of a state. In *In Re Nappi*, the defendant was a member of a neo-fascist group which sought to overthrow the government.[507] The court held that the political character of the offence was not the predominant aspect of the offence because it was not in direct relation to the end sought.[508] In order to show this direct relationship, the offence in question must be a "really efficacious method of achieving" the ends sought.[509]

This jurisprudence strongly suggests a judiciary, at least within these states, that is alive to concerns about limits placed on the manner in which crimes are committed, those targeted by the crimes and the necessary nexus between the crimes and the alleged political objectives. While the refugee law jurisprudence is not as extensive as the extradition jurisprudence, it becomes evident that the

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[506] In an earlier decision, the Swiss Federal Tribunal determined that complicity in the killing of an Italian national characterized as a "dangerous fascist" was a non-political offence because at the time of the offence in December 1945, Italy had a Post-War government of National Unity capable of dealing with such dangerous individuals if necessary. The court observed that there was no struggle for power or real concern of fascists recapturing power. See *In Re Peruzzo*, [1952] 19 ILR 369 (Swiss Federal Tribunal, 1951). However as discussed below in this chapter, revenge is not antithetical to the notion of political crimes. See text accompanying *infra* notes 589 to 591 inclusive.

[507] [1952] 19 ILR 375 (Swiss Federal Tribunal, 1951).

[508] *Ibid*.

[509] *Ibid* at 376.

judiciary interpreting political crimes in connection with Article 1F(b) has similarly maintained a rigorous standard. I discuss this in the next section.

c. Political Crimes under Article 1F(b)

Refugee jurisprudence interpreting Article 1F(b) of the *Convention* has demonstrated the ability of courts to formulate tests that examine context and distinguish between legitimate and illegitimate targets and uses of violence. This includes decisions by the British House of Lords, the High Court of Australia[510] and the New Zealand Supreme Court.[511] For instance, in *T v Secretary of State for the Home Department*, Lord Lloyd of Berwick, writing for the majority of the House of Lords, articulated the following test for determining whether a crime could be considered "political" under Article 1F(b).[512] He posited that courts must examine two key factors. First, jurists must determine whether a crime was committed for a political purpose which he identifies as the overthrow, subversion or changing of the government of a state or inducing it to change its policies.[513]

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[510] *Singh*, *supra* note 424. Similar to the factors discussed below in the House of Lords' decision in *T v Secretary of State*, three concurring justices of the High Court of Australia writing individual opinions emphasized the following criteria. First, there needed to proof of the existence of a political objective(s) or purpose(s), or objectives that could be described as political. Second, there must be a sufficiently close and direct connection between the crime and the political objective(s) or purpose(s) in question such that that political objective must be the substantial purpose of the criminal act. A close link would be assessed by examining the choice and proportionality of the means used and the whether the targets selected are civilian or government actors. See *ibid* at paras 21-25, 44-48, 141.

[511] *Attorney-General v Tamil X*, [2010] NZSC 107. The Court articulated its test as follows: "the context, methods, motivation and proportionality of a crime relate to a claimant's political objectives are accordingly all important in [the] determination of whether a serious crime committed by a claimant was of a political nature. This requires an exercise of judgment on whether, in all the circumstances, the character of the offending [act] is predominantly political or is rather that of an ordinary common law crime." *Ibid* at para 90.

[512] *T v Secretary of State*, *supra* note 426 at 899.

[513] *Ibid*.

Second, there must be a "sufficiently close and direct link between the crime and the alleged political purpose."[514]

In order to conclude the existence of such a nexus, Lord Lloyd indicates that courts will need to further examine the means used to achieve the political end and will have particular regard to whether the crime was aimed at a military or governmental target or a civilian target.[515] The majority identified as well that even where the government was the target, it must also be examined whether the means used were likely to involve indiscriminate killings or injuries sustained by members of the public.[516]

The majority applied these factors to the case before it and came to the correct conclusion that the asylum-seeker should be excluded. The claimant was a member of an Algerian political party, the Front Islamique du Salut (FIS). The FIS was dedicated to the installation of Sharia law. Following the first round of the legislative elections in Algeria in 1991, the FIS performed exceedingly well amidst a multi-party election. Before a second round of elections could take place, the Algerian military stepped in to prevent this from taking place. A civil war ensued between the government and resistance groups. As part of the FIS's resistance efforts against the government, the claimant participated in the bombing of a civilian airport resulting in numerous civilian casualties.[517]

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[514] *Ibid*.

[515] *Ibid*.

[516] *Ibid*.

[517] What is of course striking in this hypocrisy is that Western European and North American states that decry violence against civilian populations had little problem engaging in violence against civilian populations when it suited their purposes, either during the effort to quell anti-

Lord Lloyd asserted that based on the facts, the FIS was a political organization and the claimant's role was certainly political in that "he was attempting to overthrow the government by what he regarded as the only remaining available means."[518] Yet, while the attack on the airport was an attack on government property, the means used were indiscriminate, and were thus bound to kill members of the public and did so. The majority concluded that the link between the means employed and the objective were too remote.[519]

United States courts have adopted the following test for the political crimes doctrine as applied under the *Immigration and Nationality Act*. A crime under United States law will be considered a political crime if "the political aspect of the offense outweigh[s] its common-law character. This would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature."[520] Under this standard established by the BIA, United States court and tribunal decisions have examined the status of the victims and the means employed to determine whether a crime is political or not.[521] In *INS v Aguirre-Aguirre*, the Supreme Court unanimously affirmed the Board of Immigration Appeals' decision that the asylum-seeker committed a serious non-

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colonial resistance (even those that were non-violent – e.g. the Jallianwallabagh Massacre) or during periods of armed conflict – e.g. Allied bombing of civilian targets in Germany and Japan. This is what Michael Walzer referred to as "war terrorism" – "the effort to kill civilians in such large numbers that their government is forced to surrender." Michael Walzer, "Five Questions About Terrorism" *Dissent* (Winter, 2002), online: Dissent <www.dissentmagazine.org>.

[518] *T v Secretary of State*, *supra* note 426 at 899.

[519] *Ibid*.

[520] *Matter of McMullen*, 19 I & N Dec 90 at 97-98, Interim Decision 2967, 1984 WL 48589 (BIA).

[521] See *INS v Aguirre-Aguirre*, 526 US 415, 119 S Ct 1439 (1999).

political crime when, in protesting governmental policies in Guatemala, he participated in the burning of buses, assaulted passengers, vandalized and destroyed property in private shops after forcing customers out.[522] Aguirre-Aguirre's stated objective was to protest high bus fares and the government's failure to investigate disappearances and murders.[523]

Even in circumstances where violence is targeted against the state, jurists may nevertheless readily split on the appropriateness of using such violence. In *Berhane v. Holder*, the applicant was a member of a pro-democracy political group in Ethiopia.[524] Following elections in 2005, there were allegations and evidence of electoral fraud and voter intimidation resulting in the incumbent government retaining power.[525] Berhane and many other opposition political activists took to the streets to protest the government's actions. The government responded through arbitrary detentions, beatings and killings of opposition members, ethnic minorities, NGO workers and members of the press.[526] The government furthermore imposed restrictions on the freedom of the press and the right to peacefully assemble.[527] In response to demonstrations, reports indicated

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[522] *Ibid* at 418.

[523] *Aguirre-Aguirre v INS*, 121 F 3d 521 at 525 (9th Cir 1997), Kleinfeld J (dissenting), rev'd 526 US 415, 119 S Ct 1439 (1999). Judge Kleinfeld observes that during Aguirre-Aguirre's testimony, the latter emphasized high bus fares as the objective and "sometimes forgot to mention that his group was also upset about disappearances." *Ibid* at 526.

[524] *Berhane v Holder*, 606 F 3d 819 (6th Cir 2010).

[525] *Ibid* at 820, 827-828. See also "Ethiopian Election Fraud Arrests" *BBC News* (28 March 2005), online: BBC News <news.bbc.co.uk>.

[526] *Berhane*, *supra* note 524 at 828.

[527] *Ibid*.

that police fired at peaceful protestors killing many.[528] Given these circumstances, when confronted by the police during demonstrations, Berhane and other protestors began to throw rocks at the police, many of whom wielded shields.[529] The intent of these acts according to Berhane was to send a message to the police that he was in favour of democracy and for equality amongst Ethiopians.[530] Berhane however had to flee Ethiopia and sought refugee status in the United States when government officers began to look for him and as well, after his brother who had been taken into custody never returned.

The immigration judge found that Berhane engaged in serious non-political crimes when he threw rocks at the police.[531] Applying the test for political crimes under United States immigration law, the immigration court held that the criminal nature of Berhane's actions (including rock throwing) outweighed the political aspects of his acts.[532] The court stated that it

> would understand if [Berhane] took part in a peaceful demonstration or took part in a demonstration calling to international attention the actions of the Ethiopian government in its possible intimidation of voters and electoral leaders. Instead, [Berhane] testified that he took part in at least 20 demonstrations in which rocks were thrown, tires burned, and boulders placed in such a way that the police would be impeded in their activities. By throwing these rocks, the demonstrators damaged or destroyed public and private property and probably injured police officers as well.[533]

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[528] *Ibid*.

[529] *Ibid*.

[530] *Ibid* at 823.

[531] *Ibid* at 821.

[532] *Ibid*.

[533] *Ibid* at 824.

The Board of Immigration Appeals (BIA) affirmed the decision of the immigration court and referred to the quote above in support of its decision.[534] A unanimous panel of the United States Sixth Circuit Federal Court of Appeals held that the case should be reversed, but were split on the reasons. The majority posited that the immigration judge's discussion made it unclear as to whether the immigration judge or the BIA were claiming that rock throwing by itself constituted a serious non-political offence or that what made Berhane's conduct problematic was the frequency of his involvement in the violent protests and the use of rock throwing in combination with tires being burnt and boulders being placed in the streets to impede the ingress of the police.[535] The majority focused on the first assumption and held on more narrow grounds that the immigration judge and the Board of Immigration Appeals failed to properly consider Berhane's argument that his rock-throwing were acts of self-defence and never directed at civilians.[536] Berhane testified that he would only throw rocks when police were themselves violent against protestors.[537] The majority asserted that while a theory of self-defence did not necessarily show that Berhane's acts were political, it may diminish the criminal nature of his actions.[538] This in turn would have an impact in weighing whether the political aspects outweighed the criminal

[534] *Ibid* at 821.

[535] *Ibid* at 824.

[536] *Ibid* at 825.

[537] *Ibid*.

[538] *Ibid*.

aspects of the offence.[539] The majority vacated the decision and remanded to the BIA to make a determination on this matter.

Judge Karen Moore, writing in concurrence, took a broader contextual perspective on assessing the means and methods Berhane employed. First, based on the lack of a negative credibility assessment by the immigration judge, and assuming the truth of Berhane's assertions that the attacks on police were defensive, the Board failed to consider the impact of Berhane's self-defence claim on the criminal-political balancing as required under the US political crimes test.[540]

Second, Judge Moore argued that Berhane's actions were not egregious in light of two key considerations. In examining the specific context surrounding Berhane's rock throwing, there was no evidence that he did anything but throw rocks, some of which may have caused unintentional damage to civilian vehicles.[541] She argued that there was no evidence that Berhane participated in the burning of tires or the placing boulders in the street, of which the latter Judge Moore characterized as a clearly defensive act.[542] Judge Moore furthermore distinguished Berhane's case to previous United States political crimes decisions where courts identified the civilian nature of the targets as being a considerable basis for determining that the crimes in questions were serious and non-

[539] *Ibid*.

[540] *Ibid* at 826.

[541] *Ibid*.

[542] *Ibid*.

political.[543] Although Judge Moore employed the government-civilian distinction identified in early decisions, she also declares that there needs to be caution about drawing a sharp legal line according to which relief turns on the identity of the victim – as civilian or government.[544]

Last, Judge Moore criticized the BIA for failing to give the political context of the rock-throwing sufficient consideration in their analysis. She noted here Berhane's patent involvement in the political movement opposing the government as well as the violent and unwarranted behaviour of the government and its actors.[545] She concluded that "Berhane's rock-throwing was not egregious, may not even have been criminal at times, and was thoroughly political."[546] Judge Moore observed that had the BIA looked at the full picture, "the evidence would have compelled it to conclude that a pro-democracy activist who throws rocks at political demonstrations in self-defense and to protest election fraud by a regime that had silenced the press, banned free assembly, rounded up the opposition, and killed unarmed civilians did not commit a "serious nonpolitical crime.""[547]

There is much that is compelling about Judge Moore's analysis, including her emphasis on examining the context in which the putative political crimes take place. She analyzes the relationship between the means and methods in relationship to the targets, weighs the proportionality of rock throwing against the

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[543] *Ibid*. at 827.

[544] *Ibid*.

[545] *Ibid at* 827-828.

[546] *Ibid* at 829.

[547] *Ibid*.

actions of the state, and the relationship of the means and methods with the political objectives. A question that is left open from Judge Moore's decision however is whether the use of violent means is considered justifiable when not done in strict "self-defence". For instance, given the government's action in Ethiopia as demonstrated in Berhane's case, should resisters like Berhane have to wait until the government officers (who happen to be the violent oppressors in this case) take aggressive actions first? Would it be justifiable for resisters to engage in affirmative acts of violent resistance (rather than responsive acts of self-defence) such as ambushes or other assaults given the overall actions of the government and its enforcers in previous encounters?

It is clear from the judgment of the immigration judge and the BIA that such a position would be too radical when even acts taken in reasonable self-defence were deemed serious non-political crimes. I argue that to impose a requirement of self-defence to an imminent threat to the life of oneself or others would unreasonably restrict the tools available to resisters. When dominant authorities regularly engage in violent and unwarranted actions, resisters should not be forced to wait for such violence to be directed against them or others around them specifically. This is tantamount to partisans during World War Two being required to wait for Nazis to attack them first, rather than engage in affirmative clandestine attacks.

What this section demonstrates is that courts and tribunals have been more than capable of formulating legal tests to differentiate between political crimes and those that fall short. To the extent that there are flaws in the decisions, it may

be in taking too cautious an approach as exemplified in *Berhane*. This illustrates that the use of broad legislative provisions of the kind displayed in the first part of this chapter were unnecessary to exclude those engaging illegitimate political violence that included attacks on civilians and/or disproportionate means.

While this part focused largely on unsuccessful applications of the political crimes doctrine in both extradition and refugee contexts, do the relatively few instances where crime have been designated as "political crimes" suggest some form of judicial leniency which political systems needed to address?

IV. Successful Applications of the Political Crimes Doctrine

In this section, I shall now demonstrate through a discussion of the relatively small number of successful applications of the political crimes test over the past few decades in particular that courts have taken a rather reasoned and contextual approach to recognizing the circumstances in which the crimes have taken place, the nature/identity of the targets and/or the means employed. In all the cases discussed below, violence played a role in the acts of resistance involved and those directly impacted were clear and patent state actors. More controversial however is the fact that the individuals invoking the political crimes doctrine were members of groups/organizations considered, by some states at least, to be terrorist organizations. What this suggests is that courts should not be swayed by mere labels such as "terrorists" or "terrorism" and should assess the nature of the crime itself to determine whether exclusion is proper.

a. The Factual Circumstances

The facts of these cases are not complicated. I shall briefly set out the facts in each case before addressing the respective courts' decisions. *In the Matter of Extradition of Doherty*, a 1984 extradition case, the United States Federal Court for the southern district of New York determined that a member of the Provisional Irish Republican Army (PIRA) qualified for the political crimes doctrine under the political incidence test discussed above.[548] As part of a PIRA unit, Doherty engaged and attacked a convoy of British soldiers in Belfast.[549] An exchange of gunfire ensued with the soldiers resulting in the death of a British officer.[550] Doherty was subsequently arrested and prosecuted for several crimes including murder.[551] Before the trial was over, he escaped (to the United States) but was convicted *in absentia*.[552] England sought his extradition.

In *Minister for Immigration and Multicultural Affairs v Singh*, a 2002 decision of the High Court of Australia, the asylum-seeker was a member of the Khalistani Liberation Force (KLF), a political organization seeking, *inter alia*, the establishment of an independent Sikh state.[553] Singh was in charge of acquiring information about a police officer who tortured a member of the KLF.[554] The plan

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[548] *In the Matter of Extradition of Doherty*, 599 F Supp 270 at 275, 277 (SDNY 1984).

[549] *Ibid* at 272.

[550] *Ibid*.

[551] *Ibid*.

[552] *Ibid*.

[553] *Singh*, *supra* note 424 at paras 7, 32, 68.

[554] *Ibid* at paras 8, 34.

was to kill the officer. Singh also organized the procurement of weapons and transportation for the operation.[555] The information was thereafter used to capture the officer and kill him as an act of political retribution.[556] The Australian Administrative Appeals Tribunal (AAT) concluded that the killing of the police officer was essentially a non-political crime because it determined that the act was motivated by vengeance. Consequently, the AAT determined that there could be no close causal link between the act and the KLF's objectives in such cases.[557] The majority of the High Court of Australia, writing in three separate concurring opinions held that the AAT committed a fundamental legal error by assuming that a crime could not be political solely by reason of its view that violent retribution was the antithesis of political action. In remanding, the concurring judgments set out the appropriate factors that must go into determining whether a crime was a political or non-political crime.[558]

Lastly, in a more recent 2010 decision, *Attorney-General v. Tamil X*, the New Zealand Supreme Court reviewed the applicability of Article 1F(b) to a Tamil applicant from Sri Lanka who assisted the Liberation Tigers of Tamil Eelam (LTTE).[559] The applicant was a marine engineer who accompanied the transportation of weapons and munitions by ship to be used by the LTTE in efforts to forcibly secure a Tamil homeland in the north and east sections of Sri

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[555] *Ibid* at para 34.

[556] *Ibid* at paras 8, 34, 36.

[557] *Ibid* at paras 37, 38, 73.

[558] See supra note 510.

[559] *Tamil X*, *supra* note 511.

Lanka.[560] The ship was stopped by the Indian Navy and was ordered to bring the ship to Chennai in southeast India.[561] Rather than surrendering the weapons and ship to the Indian Navy, the crew scuttled the ship and its contents.[562] The applicant was accused of setting fire to the ship thus endangering other crew members and members of the Indian Navy.[563] The New Zealand Refugee Status Appeals Authority (RSAA) held that the crime which the applicant committed, the scuttling of the ship was a serious non-political crime.[564] The New Zealand Supreme Court reversed holding that the crime was political in nature as it was done to prevent the munitions and arms aboard the shop from falling into the hands of the Indian government which was unsympathetic to the LTTE's cause.[565] It concluded that the LTTE's cause of achieving an independent homeland was undoubtedly political in nature.[566]

b. Judicial Contextualizing

The decisions and the manner in which the judges approach their conclusions indicate an importance placed on the examination of the factual context of the case before them and principles rooted in international law and humanitarian law in particular. As discussed below, the Australian and New

[560] *Ibid* at paras 4-11.

[561] *Ibid*.

[562] *Ibid*.

[563] *Ibid*.

[564] *Ibid* at para 21.

[565] *Ibid* at para 96.

[566] *Ibid* at paras 92-96.

Zealand decisions which deal with political crimes under Article 1F(b) stress the importance of understanding that political change and power dynamics may operate differently than in states unaccustomed to such processes. The decisions also reflect a degree of sensitivity to the issue of terrorism committed by political organizations but also recognize that not every act committed by such groups constitutes a breach of international law, including acts of terrorism. After all, Article 1F(b) excludes on the basis of committing serious non-political crimes, not mere membership in organizations that commit serious non-political crimes. Just as even democratic states cannot be solely defined by their international criminal acts (e.g. torture and violations of the law of war) neither should political organizations necessarily be characterized solely by their crimes.

The *Doherty* court distinguished the case before it from acts of terrorism. While acknowledging that "paramilitary terrorism […] has become the plague of the modern age", there was a clear distinction in connection with Doherty's crime which was incidental to and in furtherance of violent political disturbances.[567] Drawing from international law, the court observed that his crimes did not involve the taking of hostages and/or their execution.[568] The court stressed that those targeted by PIRA in this particular instance were military actors and not civilian targets.[569] It asserted:

> We are not faced here with a situation in which a bomb was detonated in a department store, public tavern, or a resort hotel,

[567] *Doherty*, *supra* note 548 at 274-275.

[568] *Ibid* at 275-276.

[569] *Ibid*.

> causing indiscriminate personal injury, death, and property damage. Such conduct would clearly be well beyond the parameters of what and should properly be regarded as encompassed by the political offense exception to the Treaty. Whatever the precise contours of that elusive concept may be, it was in its inception an outgrowth of the notion that a person should not be persecuted for political beliefs and was not designed to protect a person from the consequences of acts that transcend the limits of international law.[570]

The court emphasized that by contrast to the targeting of civilians and civilian objects, the facts indicated a political crime in its most "classical" form.[571] Stressing once again the military nature of the encounter, the court posited that had the killing and attack taken place during the "course of more traditional military hostilities there could be little doubt that it would fall within the political offense exception."[572]

The New Zealand Supreme Court similarly drew on international humanitarian law concepts when concluding that the scuttling of an LTTE ship carrying munitions constituted a political crime under the *Refugee Convention*. The Court determined that scuttling the ship so as to avoid seizure by the Indian Navy, "did not involve and cannot be equated to indiscriminate violence against civilians which would make the link between the criminal conduct and any overall political purpose too remote."[573] It posited that the identified purpose of transporting the munitions and weapons should be properly viewed as directed

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[570] *Ibid* at 275.

[571] *Ibid* at 276.

[572] *Ibid*.

[573] *Tamil X*, *supra* note 511 at para 95.

toward securing the political aims of the LTTE, the creation of an independent state.[574] Thus according to the Court, being a party to prevent the seizure of the munitions by Indian authorities who were unsympathetic to the LTTE had to be seen as sufficiently connected to such political aims.[575] It concluded that "the scuttling was not an act of an indiscriminate kind such as should be regarded as separating that link."[576]

The Supreme Court's decision in *Tamil X* makes an even further contribution however in its discussion and characterization of the LTTE. Various states and courts in the Global North and South have designated or labelled the LTTE as a terrorist organization.[577] By contrast, the Supreme Court spoke, unanimously, about the LTTE, in the following way:

> At all relevant times the Tamil Tigers was an organisation having the goals of self-determination for Tamils and securing an independent Tamil state in northeast Sri Lanka. The principal objective was to induce the government of Sri Lanka to concede such political change. *These characteristics made the Tamil Tigers a political organisation* notwithstanding its use, at times, of proscribed methods of advancing its cause. That much is not in dispute.[578]

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[574] *Ibid* at para 96.

[575] *Ibid*.

[576] *Ibid*.

[577] See e.g. "Canada Adds Tamil Tigers To List of Terrorist Groups" CBC (10 April 2006), online: CBC <http://www.cbc.ca>; The LTTE is still currently designated a foreign terrorist organization by the United States State Department. See Bureau of Counterterrorism, "Foreign Terrorist Organizations" (27 January 2012), online: US Department of State <http://www.state.gov>; Home Office, "Proscribed Terrorist Organisations" (11 November 2011), online: British Home Office <http://www.homeoffice.gov.uk>.

[578] *Tamil X, supra* note 511at para 92 [emphasis added].

There are a number of things that are significant about this passage in particular and about the decision more generally. With respect to this quoted passage specifically, there is a clear absence of references to "terrorism". What the Court does in a very "matter of fact" way is to clearly identify the political objective of the organization (namely, the creation of an independent Tamil state). It is important to emphasize too that the Court did not perceive the LTTE through a romantic or naïve lens either. It was not blind to the violence perpetrated by the LTTE, and indeed acknowledged that the LTTE had committed crimes against humanity in other circumstances.[579] Notwithstanding this however, the Court correctly identified the LTTE as a "political organization". In so doing, the Court recognized the capacity of political organizations to be seen as political organizations (rather than reducing them to merely terrorist organizations) while perpetrating at times (or even many times) proscribed activities under international law. Furthermore, the Court's analysis does not foreclose the possibility of deeming other acts/crimes as falling outside of the purview of the political crimes exception. The key feature here is to look at the specific crimes and their relationship to the political objectives.

There is thus an importance in courts and legislatures not succumbing to simplistic labels. Relying on such broad and overly simplified labels renders the judicial role limited where an examination of context is vital. In their concurring opinions in *Singh*, both Justices Kirby and Gaudron stressed the importance of not coming to conclusions about what constitutes a political crime based on such labels. Justice Gaudron, for example observed that there was a tendency in the

[579] *Ibid* at para 2.

context of refugee law to impose limits on the notion of political crimes by reference to "atrocious" crimes, "terrorist" crimes, or "unacceptable" means "as though crimes which answered those descriptions were, on that account, incapable of constituting political crimes."[580] She contends that while understandable, such terms are imprecise and involve oversimplification and more importantly do not find expression in the text of the *Refugee Convention*.[581] Justice Kirby more critically posited that judges "have vied with each other to invent new epithets for conduct that will take its perpetrator outside the Convention's protection. The debate about this subject has continued. It is not concluded."[582] He observed as well that epithets such as terrorist or rebel are often applied to those seeking self-determination of peoples and the re-writing of national boundaries until such persons secure their political objectives.[583] The case of Nelson Mandela is probably the clearest about face in recent decades on the transformation of a person once designated as a "terrorist" to a now-respected international statesman and hero.[584]

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[580] *Singh*, *supra* note 424 at para 40.

[581] *Ibid* at para 41.

[582] *Ibid* at para 111.

[583] *Ibid* at para 68.

[584] Anthony Bevins & Michael Streeter, "From "Terrorist" to Tea with the Queen", *The Independent* (9 July 1996) online: The Independent <http:www.independent.co.uk>; Bernd Dubusmann, "America, Terrorists and Mandela", *Reuters* (15 January 2010) online: Reuters <http://blogs.reuters.com/great-debate/2010/01/15/america-terrorists-and-nelson-mandela>; "Mandela Taken Off US Terror List", *BBC News* (1 July 2008) online: BBC News <http://news.bbc.co.uk>. This is of course not to suggest that the African National Congress in using force against the South African government did not kill or injure civilians during its armed struggle. However, there is a difference between groups who as a matter of policy target civilians and those whose actions targets government actors that have collateral consequences for civilians or who on occasion stray from a professed policy of attacking on government and target civilians.

Associated with this more contextual approach, both the New Zealand Supreme Court and the High Court of Australia majority recognized that understanding the concept of political crimes needed to account for the manner in which political dynamics existed in other countries where political change may not be achievable solely through means understood in Northern/Western political cultures. For instance, the Supreme Court recognized the need for decision makers in the adjudicative process in New Zealand to bear "in mind that while politically motivated violent crime is not part of our history, violence has been an incident of political action in many other countries."[585] The Court's drew directly from the following quote by Justice Kirby who observed that:

> The Convention was intended to operate in a wider world. It was adopted to address the realities of "political crimes" in societies quite different from our own. What is a "political crime" must be judged, not in the context of the institutions of the typical "country of refuge" but, on the contrary, in the circumstances of the typical country from which applicants for refugee status derive.[586]

However, it should be noted that Justice Kirby does not recklessly suggest that violence should necessarily be the first course of action either. He observed that judicial and other types of decision-makers (in Australia) will "ordinarily have

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See John D Battersby, "ANC Acts to Halt Civilian Acts" *New York Times* (21 August 1988) online: New York Times <http://www.nytimes.com>.

[585] *Tamil X*, *supra* note 511 at para 91. See also *Singh*, *supra* note 424 (Chief Justice Gleeson stating: "While homicide is foreign to our experience of political conflict, that is because we have been favoured with a relatively peaceful history. At other times, and in other places, the taking of life has been, and is, an incident of political action" at para 16); *Gil*, *supra* note 426 ("The very expression "political crime" rings curiously and indeed offensively to Canadian ears. […] Political motivation or political purpose are for us quite simply irrelevant to the determination of whether a given action is criminal and should be punished. The murders of D'Arcy McGee and Pierre Laporte were viewed by Canadian law as simply murders, no more and no less" at para 1).

[586] *Singh*, *supra* note 424 at para 106.

little exposure to the circumstances that, in other countries, have given rise to political struggles that sometimes involve resort to serious crimes, including of violence, *where other peaceful means of securing longed-for freedom fail*."[587] Thus even accounting for the difference amongst societies, this quote suggests that, at least where possible peaceful means should be employed or explored first before engaging in violent action.[588]

Justice Kirby's observations emerge from the High Court of Australia's decision addressing political crimes under the *Refugee Convention*. As noted above, in *Singh*, the High Court majority did not arrive at any definitive conclusion about whether the asylum-seeker's actions qualified as a political crime. It determined more specifically that the Administrative Appeals Tribunal made a significant legal error by assuming that because vengeance was the reason behind the killing of a police officer, an act based on such reasons could not be considered political. Yet, the three justices writing in three separate concurrences for the majority identified the salient factors to assess whether certain acts qualify as political crimes. This stressed the identification of a political purpose as the significant reason for the crime and whether there was a direct and close link between the crime and the purported goals through an examination of the targets and the proportionality between the means and the objectives. However, its contribution also went to articulate the importance of a broader contextual

[587] *Ibid* at para 127.

[588] This was echoed in Chief Justice Gleeson's concurring opinion in *Singh*. *Singh*, *supra* note 424 ("[…]when courts have endeavoured to state the principles according to which a decision is to be made as to whether a crime which, by hypothesis, has been committed in another country, in circumstances utterly different from those that prevail in the country of refuge, is political, they have taken pains to confine the concept so as to avoid the consequence that all offences committed with a political motivation fall within it" at para 16).

perspective regarding Article 1F(b) analyses, some of which is discussed above.

In addition, and returning to the issue of revenge within the context of political crimes, the justices also sought to de-romanticize the notion that political crimes should be viewed as dispassionate acts that only flow from ennobled objectives absent more base human emotions or motives. To recall, the AAT's decision that Singh was excluded from obtaining refugee status was based on the presumption that revenge was antithetical to the commission of political crimes. All three judges comprising the majority rejected this and there are sound reasons for their conclusions. Chief Justice Gleeson observed that people who are "engaged in any kind of prolonged conflict, including military battle, and ordinary democratic politics, will have scores to settle with adversaries."[589] Thus given the natural inclination to engage in some form of retribution, it is "difficult to imagine serious conflict of any kind without the possibility that parties to the conflict will seek retribution for past wrongs, real or imagined. Revenge is not the antithesis of political struggle; it is one of its most common features."[590] Justice Kirby similarly posited that "revenge and personal hatred are not, as such, inconsistent with political action. On the contrary, they may be its expression in a particular case."[591]

What these decisions illustrate is a considerable amount of attention to context as well as a realistic and unsentimental appraisal of armed resistance. They show that it is possible to examine acts of political violence without

[589] *Ibid* at para 19.

[590] *Ibid*.

[591] *Ibid* at para 141.

automatically or reductively labelling them as "terrorism". It is also possible, as in *Singh* to recognize that the presence of human emotions which partially motivate the perpetration of a political crime is not necessarily antithetical to such designation. Due to subsequent changes in Australian legislation as discussed earlier in this chapter, it is now highly unlikely that persons like Singh would be successful in asserting their claims in Australia.

V. Conclusion

This chapter has attempted to show that legislative changes of the kind discussed at the beginning of this chapter were drafted in such a broad manner that they will likely if not almost inevitably lead to exclusion or inadmissibility for even the most legitimate acts of armed resistance against authoritarian regimes. Consequently, those who take up arms to confront authoritarian regimes and advance theirs and others' rights under international law are left in a rather enfeebled position. If they need to seek refuge in another state, their ability to obtain asylum in states that have enacted such legislation are highly unlikely. As this chapter has also shown, such enactments were unnecessary since many courts have been able to sufficiently distinguish between legitimate acts of armed resistance and those that were not by examining the objectives of the crime, the targets and the degree of violence employed to carry out their goals.

This chapter has examined how courts and tribunals have responded to violence directed against clearly state actors and when they are not. However, are there arguments to be made that resistance, whether violent or non-violent, can or

should be waged against non-state actors or groups that have no affiliation or nexus to the state? The key to such an examination is to look at the interpretations of the term "political" as it appears in the *Refugee Convention*. I turn to this in the next chapter.

Chapter Five – Non-State Political Actors and Re-Defining the Notion of the "Political" in the Context of 1951 Refugee Convention

I. Introduction

For resisters seeking refugee status, identifying the meaning of the term "political" is crucial for it is featured in two key areas of the 1951 *Convention Relating to the Status of Refugees* that have or may likely have relevance to resisters seeking refugee status.[592] Under Article 1A(2) a person will be eligible for refugee status if they have a well-founded fear of persecution for reasons of, amongst others, their political opinion.[593] Also relevant to those who have committed criminal acts in particular as part of their resistance, Article 1F(b) excludes individuals about whom there are serious reasons to consider have committed "serious non-political crimes".[594] The *Convention* itself provides no definition of "political", "political opinion" and/or "political crime". It has been left to organs of the state or international/regional agencies to formulate – more typically the courts, tribunals, as well as agencies such as the United National High Commissioner for Refugees (UNHCR). However, legislative bodies have also in more recent years engaged themselves in this endeavour. As I illustrate below, they do so in a manner that largely restricts the concept of the political in

[592] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, art 1A(2) (entered into force 22 April 1954) [*Refugee Convention*].

[593] It should of course be understood that a resister may qualify under another ground for asylum however the ground of political opinion may be the only one available in the context of the individual's case.

[594] *Refugee Convention*, *supra* note 592, art 1F(b).

the context of Articles 1A(2) and 1F(b) to matters relating to the state. This poses a significant problem where resistance is waged either through violent or non-violent means against power holders who are not state actors and are unconnected to state power.[595] Even where there is a well-founded fear of persecution, there may be a denial of asylum because their well-founded fear is not considered to be connected to a "political opinion" or they may be excluded on the basis of Article 1F(b) because any crimes committed will be considered "non-political" in nature.

In this chapter, I argue that the definition of what constitutes the "political" within the context of the *Refugee Convention* needs to account for the substantial power held by non-state organizations, groups and/or communities within a given society and that challenges to such power can be considered "political" in their own right. This chapter is divided into three sections. The first section of this chapter sets out the current interpretations of what is considered political with respect to the terms "political opinion" and "political crimes" within the context of the *Refugee Convention*. As I illustrate below, even the most liberal understanding of the term "political" requires some connection to the state. In section two, I posit that the notion of what is "political" in both the context of a "political opinion" and a "political crime" should be understood as being about the exercise of power and that the state does not hold a monopoly on this. As such in connection with Articles 1A(2) and 1F(b), what is "political" may also relate opinions, conduct and/or crimes that are directed at non-state groups or

[595] Refugee law recognizes that non-state actors may be the source of persecution. However, in order to obtain refugee status, it must still be demonstrated that the country of nationality or place of last habitual residence is unable to protect them and there are no internal flight alternatives. In addition, the resister must show that the well-founded fear is connected a *Convention* ground.

organizations that hold and exercise power within a given society. In the third and final section, and as examples of the growing power exercised by certain non-state actors or organization to engage in oppression, I argue that resistance against the power of criminal organizations should be given recognition under the *Convention* as political acts that serve as a manifestation of a political opinion and/or a political crime as the case may be.

II. Assessing the State of the "Political"

a. Political Opinions

A substantial number of courts and refugee tribunals have dealt with cases relating to persecution on the basis of "political opinion" in the context of the *Refugee Convention*. Through the development of this case law, there is a considerable and perhaps an unsurprising consensus that the concept of the political opinion at the very least concerns express or imputed opinions about the state or government. Within the narrow parameters of defining political opinions in relationship with the state, courts have been willing to have a broad definition as to what constitutes the "state" for the purpose of "political opinions". Australian Courts, for example, have explained that such opinions do not have to refer to or fit within the sphere of party politics as understood in parliamentary democracies but can relate to the actions of instrumentalities of the state – including its police and armed forces.[596]

[596] See e.g. *C and Another v Minister for Immigration and Multicultural Affairs*, [1999] FCA 1430, 94 FCR 366, 1999 WL 33122019.

Yet, is there evidence that legal interpretations of "political opinions" can contemplate opinions (or acts through which political opinions are manifested) about the policies and/or conduct of non-state actors, groups or organizations that exercise substantial power within a given a society? Evidence through court and tribunal decisions suggest that while some recognition is given to this possibility any shifts in this direction are still restrained and tentative. As I shall demonstrate, the spectre of the state still looms rather large even under a broad interpretation of what constitutes a political opinion.

The Supreme Court of Canada adopted a liberal interpretation of the concept of the political opinion formulated by Professor Guy S. Goodwin-Gill. The Goodwin-Gill definition recognizes a "political opinion" as "any opinion on any matter in which the machinery of state, government, and policy may be engaged."[597] In adopting this formulation, the Court rejected a narrower definition constructed by Professor Atle Grahl-Madsen who characterized political opinions as those "contrary to or critical of the policies of the government or ruling party."[598] In the Supreme Court of Canada's view, the Goodwin-Gill definition offered more protection, particularly to persons threatened by non-state groups unrelated to and perhaps even opposed to the government because of their real or perceived political perspectives.[599]

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[597] *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 103 DLR (4th) 1, 1993 CarswellNat 90 at para 90 (WL Can).

[598] *Ibid*.

[599] *Ibid*.

Even accounting for the broad nature of this definition, the presence of the state and its association with what is "political" still persists. While the Court's chosen definition does not require that a political opinion concern the state directly, it must still be on a matter in which the state, government and policy may be engaged. Thus a political opinion can be directed at the actions or policies of a non-state entity provided it is at least on a matter in which the state may be engaged. The facts of the *Ward* case illustrate this state-centric approach even where the opinion directly relates to the conduct of non-state actors.

In *Ward*, the asylum applicant (a national of both Britain and Ireland) was a former member of and deserter from the Irish National Liberation Army (INLA).[600] The INLA was a paramilitary group that was dedicated to the re-unification of Northern Ireland with the Republic of Ireland.[601] Ward voluntarily joined the INLA and was assigned soon after to guard two hostages kidnapped by the group.[602] However, after being ordered to execute these hostages, Ward disobeyed the orders as an act of conscience and furthermore helped these hostages to escape.[603] After the police informed an INLA operative that one of its members helped the hostages escape, the group suspected Ward of being this member.[604] Subsequent to torturing him, the INLA "prosecuted" Ward in a "court

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[600] *Ibid* at paras 2-6.

[601] *Ibid* at para 87.

[602] *Ibid* at paras 3.

[603] *Ibid* at para 3. Ward stated in *viva voce* testimony, "They were innocent people ... I could not live with my own conscience if I permitted this to go on. The decision I came to in my own mind was to try to release him." *Ward*, *supra* note 597 at para 93.

[604] *Ibid* at para 4.

proceeding" and finally sentenced him to death.[605] Ward however managed to escape and sought police protection.[606] The government then prosecuted Ward for his role in the kidnapping of the two British hostages while his wife and children were themselves taken hostage by the INLA to ensure that Ward did not reveal information.[607] After being released, Ward fled to Canada fearing persecution by the INLA.

The Court held that Ward may be eligible for refugee status on the basis of a well-founded fear of persecution in connection with his political opinion.[608] It determined that Ireland, by its own acknowledgement, lacked the capability to protect Ward.[609] The case was to be remanded in order to determine whether Britain was capable of providing state protection.[610] In recognizing his potential eligibility for refugee status, the Court observed that from his act of helping the hostages to escape, "a political opinion related to the proper limits to means used for the achievement of political change can be imputed."[611] While Ward's political opinion was directly related to the INLA's activities and policies in seeking such political change, it was still inexorably connected to matters in

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[605] *Ibid*.

[606] *Ibid*.

[607] *Ibid* at paras 5-6.

[608] *Ibid* at paras 89-95.

[609] *Ibid* at para 53.

[610] *Ibid* at paras 103-106.

[611] *Ibid* at para 93.

which both Great Britain and the Republic of Ireland were engaged.[612] Although the Court never identified what these matters were, they would reasonably include the matter of Northern Ireland's secession from Britain and re-unification with the Republic of Ireland[613] as well as matters of national security and public safety posed by the actions of the INLA and other groups like the Provisional Irish Republican Army.

In maintaining a conceptual nexus between the state and what is "political" the *Ward* Court sought to emphasize that not "just any dissent to any organization will unlock the gates to Canadian asylum; the disagreement has to be rooted in a political conviction."[614] The Court articulated that this emphasis on political conviction as applied in *Ward* case "would preclude a former Mafia member, for example, from invoking it as precedent."[615] By using the Mafia metaphor, it signals the Court's refusal to accord opposition to criminal entities that are unconnected to the state or the exercise of state power as falling within the parameters of the "political".[616] Lower court decisions handed down after

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[612] Both countries were identified as countries of nationality since Ward held citizenship in both Britain and Ireland. *Ibid* at para 97.

[613] The Federal Court of Appeal in *Klinko* would later identify secession as a matter in which the British and Irish governments may have been engaged for the purposes of the Goodwin-Gill definition. See *Klinko v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 327, 184 DLR (4th) 14, 2000 CarswellNat 283 at para 26 (WL Can).

[614] *Ward*, *supra* note 597 at para 95.

[615] *Ibid*.

[616] That the Goodwin-Gill definition does not extend to all non-state actors has been observed by other jurists. See e.g. *Gomez v Secretary of State for the Home Department*, No HX/52680/2000, [2000] INLR 549 (IAT) [*Gomez v Secretary of State*] ("the Tribunal has doubts[…] that even Goodwin-Gill's definition, which places focus on the machinery of state or government, is in fact broad enough to encompass every type of situation relating to non state actors of persecution" at para 33). Others strongly reject the idea of even formulating a definition of "political opinion". See

Ward affirm the crucial tie that needs to exist between what is political resistance and the state or state power.[617] Thus while violence or threats of violence in response to whistleblowing against state actors engaged in corruption will be encompassed within the rubric of a political opinion, the same reaction garnered by whistleblowing on criminals with no connection to the state will not – regardless of the extent of the actual power they may exercise.

British refugee case law also indicates some reluctance toward recognizing persecution by non-state actors against an asylum-seeker as rooted in a political opinion about such actors. In *Gomez v Secretary of State*, a "starred decision" by the UK Immigration Appeals Tribunal,[618] the panel clarified that in order to qualify as political, the opinion must "relate to the major power transactions taking place in that particular society."[619] While this suggests a broader contextual approach to the concept of what is political, the Tribunal then re-emphasized that "it is difficult to see how a political opinion can be imputed by a non state actor

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Refugee Appeal No 763, 23 April 2010 (NZ Refugee Status Appeals Authority), online: Refworld <http://www.refworld.org/docid/4bf156002.html>.

[617] See e.g. Re *X*, 2003 CanLII 55294 (IRB) (holding that it was a manifestation of political opinion when Tamil Sri Lankan asylum-seeker refused to give information to Liberation Tigers of Tamil Eelam regarding arms sales to the Sri Lankan government); *Yoli v Canada (Minister of Citizenship & Immigration)*, 2002 FCT 1329, 226 FTR 48, 2002 CarswellNat 3714 at paras 26-28 (WL Can); *Bencic v Canada (Minister of Citizenship & Immigration)*, 2002 FCT 476, 2002 CarswellNat 930 (WL Can); *Soto v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1183, 95 Imm LR (3d) 200, 2010 CarswellNat 5116 (WL Can). For an example of an American case, see *Gonzales-Neyra v INS*, 122 F 3d 1293 (9th Cir 1997).

[618] A starred decision is one which is designated as having precedential value for refugee tribunals deciding cases in the first instance. See *Suarez v Secretary of State for the Home Department*, [2002] EWCA Civ 722 at para 39, [2002] 1 WLR 2663.

[619] *Gomez*, *supra* note 616 at para 73.

who (or which) is not itself a political entity."[620] The panel seems to suggest that a political entity must assume state-like characteristics.

The IAT's case concerned alleged persecution perpetrated by the *Fuerzas Armadas Revolucionarias de Colombia* (FARC) on the basis of a political opinion imputed to the asylum-seeker.[621] The IAT recognized that groups like FARC exercised considerable power and carried out (in parts of the country) state-like functions.[622] Given this, the IAT posited that there would be less difficulty than in cases of other groups in establishing that a possible political opinion that such groups would impute to those who stand in their way.[623] Yet, the IAT panel cautiously advised that many such groups may act out of purely economic or financial motives and as such one could not assume that they persecute others on the basis of a political opinion while in pursuit of these motives.[624] The panel concluded that in Gomez's case, there was no well-founded fear of persecution.

The IAT's reflections on the nature of what constitutes a political opinion, in this case, are important as they serve as a binding framework for future adjudicators.[625] While the IAT's observations that a political opinion needs to be

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[620] *Ibid*.

[621] *Ibid* at paras 65-72.

[622] *Ibid* at para 66. The German Federal Constitutional Court has also emphasized the connection between non-state groups and the exercise of state-like functions while engaged in political persecution. It has determined that in cases where the state has been displaced and control has effectively been assumed by "state-like" organizations, persecution by such organizations can be considered political. *Case Nos 2 BvR 260 and 1353/98*, (2007) 130 ILR 687 at 692.

[623] *Gomez*, *supra* note 616 at para 66.

[624] *Ibid* at para 67.

[625] *Supra* note 618.

seen in the context of the major power transactions of a given society, the nexus between power and the state and/or state-like functions performed by non-state entities nevertheless remains. The IAT's attempt to then limit FARC or other such group's persecution to economic or financial reasons rather than recognize their political nature misses an important point. FARC's decision to extract money from the population in order to finance its operations against the government of Columbia is as much an exercise of "political" power as a state's attempts to tax the population to sustain its own military and operate the general machinery of government. Refusal to pay for FARC's financing of its operations is no less political than if it were an individual refusing to pay taxes to the state in disagreement with its policies or operations or a refusal to pay bribes to a government entity.[626] Resistance to the exercise of a group's power to advance its economic agenda is a political one. When a person refuses to acquiesce to that power (and the agenda for which it is being advanced) persecution may very well flow from an imputed political opinion about the group's unlawful exercise of power and/or the entity's economic agenda.

What emerges from this jurisprudence is the recognition that where persecution by non-state actors ensues for reasons of the asylum-seeker's express or implied political opinion, there needs to be some connection between the state and the non-state group. The group must exercise control or perform state-like functions, be in opposition to the state seeking to displace it, or act as agents or affiliates of formal state actors. If in the context of a political opinion analysis, there is such demonstrated judicial reluctance to recognize political opinion

[626] See e.g. *Desir v Ilchert*, 840 F 2d 723 (9th Cir 1988).

against non-state actors as being "political", one may ask whether crimes committed against such powerful non-state actors or entities will fare any better?

b. Political Crimes

The nexus between the state and what is deemed "political" has been just as pronounced in connection with political crimes, under extradition law and Article 1F(b) of the *Refugee Convention*, as it has been in the case of political opinions under article 1A(2). For instance, as an express statement of this connection, the Supreme Court of India proclaims that "politics are about Government and therefore, a political offence is one committed with the object of changing the Government of a State or inducing it to change its policy."[627] Similarly, the British House of Lords has asserted that a crime is political if, amongst other factors, "it is committed for a political purpose, that is to say, with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy."[628] As part of the overall evaluation, the majority posited that an examination must be made as to whether the targets were government or military targets on one hand or civilian in nature. Canadian judicial authorities have adopted this test as well.[629]

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[627] *Rajendra Kumar Jain and others v State Through Special Police Establishment and others*, 1980 AIR 1510, 1980 SCR (3) 982 at 998-999.

[628] *T v Secretary of State for the Home Department*, [1996] AC 742, [1996] 2 All ER 865 at 899, [1996] 2 WLR 766.

[629] See *Sing v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125 at para 162, 253 DLR (4th) 606, 2005 CarswellNat 886 (WL Can); *Zrig v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1043, [2002] 1 FC 559, 2001 CarswellNat 2228 (WL Can) (FCTD).

With respect to the conceptual nexus between the "political" and the state in the context of political crimes, the connection dates back to its earliest inception. Throughout the history of the political crimes doctrine within both refugee law and extradition law, the concept of political crimes has been strongly tied to protecting individuals opposing their own governments.[630] Of course it is not just any government. As one United States federal court posited, the political crimes doctrine was specifically designed "to protect the right of citizens to rebel against unjust or oppressive government."[631]

As further evidence of the connection, courts have identified certain crimes as "pure" political offences – specifically treason, sedition and espionage. All three crimes target the state or state actors.[632] Few, if any, would dispute that, as per a traditional understanding, treason, sedition and espionage are political in nature given their relation to the state as the main target. Where the greatest amount of litigation has transpired is with respect to what are called "relative political crimes". These involve common law crimes, such as murder that are committed with a political objective in mind. In cases of relative political crimes, whether in the context of extradition law (the legal context where it first originated) or with respect to Article 1F(b) under the *Refugee Convention*, courts have only accepted the application of the political crimes doctrine where the

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[630] The political crimes exception was first incorporated into extradition treaties. When the *Refugee Convention* was being drafted, it was felt that refugee protection should not be extended to ordinary criminals but should extend to those who have engaged in political crimes.

[631] *United States v Pitawanakwat*, 120 F Supp 2d 921 at 929 (D Oregon 2000). However, in applying the political crimes doctrine to a case of a First Nations Canadian challenging extradition, the court signalled that this did not exclude democratic states.

[632] I discuss these crimes in greater detail below in chapter six.

factual circumstances relate to where the government was being challenged or state actors or those challenging the state were the object of the attack.[633]

In one of the first cases dealing with the political crimes doctrine, a British court denied Switzerland's request for the extradition of a man who was part of an attack on the local government's headquarters.[634] Those involved in the attack were angry that local officials denied their request for a vote to modify the local government's constitution.[635] Castioni and others subsequently launched an armed attack on government buildings which resulted in the death of a local official.[636] In deciding that the request for extradition should be denied, the court held that Castioni's killing of the local official was incidental to and formed part of political disturbances.[637]

A subsequent British case decided within three years after *Castioni* also established the inherent connection between "political crimes" and the state. In *In Re Meunier*, an individual placed explosives at a café in Paris and French military barracks.[638] He fled to England and France sought his extradition. The court held the crimes were clearly non-political. It observed, that in order to constitute a political crime, "there must be two or more parties in the State, each seeking to

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[633] See *In Re Matter of Extradition of Doherty*, 599 F Supp 270 (SDNY 1984); *Pitawanakwat*, *supra* note 631; *Minister for Immigration and Multicultural Affairs v Singh*, [2002] HCA 7, 209 CLR 533, 2002 WL 342793 [citing to WL]; *Attorney-General v Tamil X*, [2010] NZSC 107.

[634] *In Re Castioni*, [1891] 1 QB 149 at 150-151.

[635] *Ibid* at 150.

[636] *Ibid* at 150-151.

[637] *Ibid* at 153.

[638] *In re Meunier*, [1894] 2 QB 415 at 416.

impose the Government of their own choice on the other, and that, if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not."[639] The court identified Meunier as an anarchist whose main target was not the state but the general body of civilians.[640]

Drawing from the facts of *Castioni*, violent attacks on government (including state actors and institutions) by resisters are eligible to be considered political crimes.[641] Indeed to target government and military has been deemed to carry a certain exalted meaning. As one panel of the Immigration and Refugee Board of Canada asserted, the "freedom fighter, or the resistance fighter, attempts to achieve his aim by going after military and government targets […]."[642] Conversely, crimes directed against non-state actors are generally deemed to fall outside of the political crimes exception.[643] Attacks on non-state actors are not considered political but mere common law crimes, and sometimes characterized by courts as acts of anarchy or terrorism.[644]

There appears to be two discernible exceptions to this when the targets are non-state actors. First, where the particular non-state actors are part of an active and violent political uprising against the government and are killed in the process

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[639] *Ibid* at 419.

[640] *Ibid*.

[641] See cases cited above *supra* note 633.

[642] *Gil v Canada (Minister of Employment & Immigration)*, [1995] 1 FC 508, 119 DLR (4th) 497, 1994 CarswellNat 165 (WL Can).

[643] *Meunier*, *supra* note 639; *Eain v Wilkes*, 641 F 2d 504 (7th Cir 1981); *In Re Extradition of Atta*, 706 F Supp 1032 (EDNY, 1989); *Gil*, supra note 642; *T v Secretary of State for the Home Department*, *supra* note 628.

[644] *Meunier*, *supra* note 643; and *Gil*, supra note 642.

of its suppression, this may be considered a political crime.[645] In *Ezeta*, the government of Salvador sought extradition of an individual who led a revolution that overthrew a former government of Salvador.[646] After overthrowing the government, Ezeta was then faced with having to combat an effort to in turn overthrow his new regime.[647] In the course of doing so he committed or ordered the commission of certain crimes against non-state actors engaged in the uprising against him and his new government.[648] The court held that Ezeta's crimes fell within the scope of the political crimes exception.[649]

The second instance is where the political crimes are committed against non-state actors closely tied to, but not formal members of the government. In *In the Matter of Barapind*, India sought extradition of a Sikh nationalist who engaged in violent actions against the governments of India and Punjab in order to establish a Sikh state.[650] Although the United States district court granted extradition in respect to certain crimes that were deemed to be of a non-political nature, it denied extradition with respect to several others.[651] Of those actions designated to be political crimes, the court held that Barapind's separate attacks on a former elected member of the legislature (an attack which also included

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[645] *In Re Ezeta*, 62 F 972 (ND Cal, 1894).

[646] *Ibid* at 976-978.

[647] *Ibid*.

[648] *Ibid.*

[649] *Ibid* at 1004-1005.

[650] 2005 WL 3030819 (ED Cal, 2005).

[651] *Ibid* at 59-65.

killings of his police security detail) and three paramilitaries who were not formal members of the government or agency but connected with and supportive of the government were deemed political crimes.[652] The court notably emphasized that the former legislator was a "well known pro-India figure, who was a known enemy and persecutor of Sikh militants, acting in support of anti-Sikh government actions after he left political office."[653] While Barapind had been involved in crimes against other former state politicians or agents, in those instances there was no evidence of their continued involvement in politics at the time of the crimes or existence of a police escort. As such extradition was granted in such circumstances.[654]

What these few cases suggest are that where courts may be willing to recognize a violent attack on non-state actors as political crimes, the victims must be persons themselves seeking to overthrow or challenge the state through violence as in *Ezeta* or have strong ties and involvement with the state as in *Barapind*. It is rather unlikely that this would extend to recognizing political crimes against criminal non-state actors who exercise substantial power in a given country.

Having established that courts and tribunals tend to identify what is "political" with the state, I shall next argue for an expanded definition of what constitutes the "political" in the context of international refugee jurisprudence.

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[652] *Ibid* at 61-62.

[653] *Ibid* at 61.

[654] See e.g. *ibid* at 65.

III. Power as the Central Feature of the "Political"

Notwithstanding the traditional bias within refugee (and extradition) law for defining or associating what is "political" to the state or those opposing the state, the notion of what is political should not be limited to institutions or actors that hold or seek to hold government power. The narrow focus on defining political opinions or crimes as those solely directed at government actors or institutions or those seeking to displace them fails to account for deeper transformations of our understandings of what qualifies as "political" and for that matter the different types of power transactions that can take place in different societies.

Instead, for the purposes of understanding the "political", a consistent theory of refugee protection should be based on the best possible interpretations of human rights aspirations. Thus, through such interpretations, one should ultimately focus on the "political" as being concentrated on the exercise of power and those who use it to regulate the conduct of individuals and of civil society; this impacts on their social, economic, cultural, as well as legal and/or political rights and interests. Certainly, governments continue to be substantial bastions of power that regulate society and should continue to be recognized as such. However, they do not hold a monopoly over the ways in which power is experienced and used to oppress. Indeed domestic human rights regimes recognize the power of private actors to discriminate on various grounds which impact on the dignity of individuals. As such, these human rights regimes prohibit private and public abuses of power through discrimination particularly in the areas

of employment, accommodation and access to services and facilities.[655] Just as private actors are capable of discriminating, they are also capable of committing persecution. In connection with refugee law, it is rightly understood that mere discrimination on the basis of a *Convention* ground is not enough to constitute persecution.[656] Yet, when discrimination by private actors escalates to the level of persecution, the response of refugee law jurists should not be to apply a limited state-centric notion of what constitutes the "political". To do so renders many vulnerable to persecution for engaging in challenges to such power.

Numerous non-state actors exercise considerable power and in ways that are oppressive to vulnerable groups and civil society in general. Such oppression can be exacted through traditional political processes and in ways that are substantially mediated through the public sphere. For example, this can include citizens engaging in legitimate political activity such as voting, but with the specific goal of depriving discrete minorities of their human rights.[657] It may also

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[655] See e.g. *Human Rights Code*, RSO 1990, CHAPTER H 19.

[656] However a number of discriminatory actions viewed in their aggregate may give rise to a well-founded fear of persecution. See e.g. *Tetik v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1240, 86 Imm LR (3d) 154, 2009 CarswellNat 4194 (WL Can); *Suleiman & Rehman v Canada (Minister of Citizenship and Immigration)*, 2009 FC 768, 348 FTR 69, 2009 CarswellNat 2487 (WL Can).

[657] In 2008, voters in California voted to deny same-sex couples the constitutional right to marry under California law despite a previous ruling by the California Supreme Court. In the earlier decision, the court held that same-sex couples held this right under the authority of the state constitution. Proposition 8 provided that the state constitution would be amended to overturn the court's decision and enshrine discrimination into the constitution. This state constitutional amendment has since been stricken down by a federal court judge as violating the federal constitution. See *Perry v Schwarzenegger*, 704 F Supp 2d 921 (ND California, 2010). The United States Supreme Court later upheld the decision although in such a way as to ensure that it only applied to the facts of the case rather than as a broad constitutional guarantee. After the original trial court decision, the state of California decided not to appeal the decision and the Supreme Court determined that those who had been allowed to appeal by the Ninth Circuit Federal Court of Appeal ultimately lacked constitutional standing to do so. *Hollingsworth v Perry*, 133 S Ct 2652 (2013).

involve corporate actors who influence politicians through substantial campaign contributions to pass laws or act in a manner that is beneficial to their own interests, but detrimental to others.[658] However there may also be little involvement of the state where private citizens or communities engage in practices which undermine the rights and interests of other individuals directly. Similarly, an otherwise legitimate corporate entity may engage in actions in foreign states that work to the detriment of local populations.[659] Lastly, there are instances where non-state actors in the form of criminal organizations exercise substantial (and rivalling) power in a given territory, imposing their own form of oppressive political power.

In recent years the UNCHR has recognized that non-state actors may engage in persecution for reasons of the asylum-seeker`s political opinion that are not related to the government but to other sections of society. In its guidelines on gender-related persecution, the UNCHR articulates that a "political opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of state, government, ***society***, or policy may be

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[658] A key example of this includes instances where legislators and/or regulatory bodies loosen regulations and fail to oversee key industries, and as a result leads to *inter alia*, industrial disasters and/or economic crises.

[659] *Nyamu v Holder*, 490 Fed Appx 39, 2012 WL 3013932 (9th Cir 2012); *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414, 116 OR (3d) 674, 2013 CarswellOnt 10514 (WL Can). See also Stephanie Nolen, "Activist Nun Who Fought Indian Mining Companies Brutally Murdered" The Globe and Mail (17 November 2011), online: The Globe and Mail <http://www.theglobeandmail.com>. See also Madelaine Drohan, *Making a Killing: How Corporations Use Armed Force To Do Business* (Guilford, CT: The Lyons Press, 2004); Dean Kovalik, "War and Human Rights Abuses: Columbia & the Corporate Support for Anti-Union Suppression" (2003) 2 Seattle J Soc Just 393; Lesley Gill, "Labor and Human Rights: The "Real Thing" in Colombia" (2005) 13 Transforming Anthropology 110.

engaged."[660] This definition largely replicates the Goodwin-Gill definition discussed above.[661] Yet, the UNCHR injects an additional and crucial component – the role of society in shaping and imposing policies and norms, even if the state is formally opposed to such conduct but otherwise condones or validates such behaviour.[662] The UNCHR *Guidelines* furthermore articulate that a claim of persecution based on one's political opinion, presupposes that

> the claimant holds or is assumed to hold opinions not tolerated by the authorities ***or*** society, which are critical of their policies, traditions or methods. It also presupposes that such opinions have come or could come to the notice of the authorities *or relevant parts of the society*, or are attributed by them to the claimant.[663]

The use of the disjunctive "or" indicates a position that society itself operates as the source of "policy" making and certainly the norms that arise from such policies. For instance, this could include women who may be subjected to threats of "honour killings" for failing to abide by or resisting the dictates of those with power within their family, kinship or clan group. The role of societal actors in this expanded definition of political opinion also explicitly recognizes that non-state

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[660] United Nations High Commissioner for Refugees, *Guidelines on International Protection*: *Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01 at para 32 [*Guidelines*] [emphasis added]. There are good reasons for approaching persecution through a gender-specific approach as the refugee definition has been interpreted through the framework of male experiences. *Ibid* at para 5. This male-centric approach probably accounts for why gender was not specifically included in the definition of the *Refugee Convention*.

[661] *Ward*, *supra* note 597 at para 90.

[662] *Guidelines on Gender-Related Persecution*, *supra* note 660 at para 11. This may be the case in situations involving female genital mutilation.

[663] *Ibid* at para 32.

actors may be agents of persecution for perceived violations of a society or a portion of that society's policies or norms.[664]

The UNHCR's broadened definition of "political opinion" appears to have been implicitly incorporated into European Union law. Evidence of further recognition toward recognizing opposition to non-state actors as expressions of a political opinion may be found in the 2004 and 2011 European Union Qualification Directives on interpreting the *Refugee Convention* and *Protocol*.[665] The Directives provide that the concept of political opinion shall include the holding of opinions, thoughts, or beliefs on matters related to "potential actors of persecution mentioned in Article 6 and to their policies or methods […]."[666] Article 6 in turn identifies that "actors of persecution or serious harm" include the state, as well as parties or organizations controlling the state or a substantial portion of the territory of a state.[667] Importantly the directive includes as a separate and third category, non-state actors, if it can be demonstrated that the state or parties or organizations controlling the state, (including international

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[664] *Ibid* at para 19.

[665] EC, *Council Directive 2011/95/EU of 13 December 2011 standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted* (Recast), [2011] OJ, L 337/9 at 15-16 [*EC Council Directive 2011*]; EC, Council Directive 2004/83/EC *of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, [2004] OJ, L 304/12 at 16-17.

[666] *EC Council Directive 2011*, *supra* note 665 at 15-16.

[667] *Ibid*.

organizations) are unable or unwilling to provide protection against persecution or serious harm.[668]

The Directive is significant as the political opinion must concern matters related to the "agents of persecution" including non-state actors and to their policies and methods. This does not then inherently, as in the jurisprudence discussed earlier in this chapter, require that the opinion be related solely to a matter on which the machinery of state, government and policy may be engaged. In addition, it does not appear that the non-state actor about whom/which the opinion is expressed must be vying for control or be in opposition to the state either.

The only apparent "limitation" with respect to which a political opinion be expressed about non-state actors is that it must be demonstrable that a state or those controlling it must be unable or unwilling to protect the asylum-seeker. This limitation does not alter the concept of what is a "political opinion" but merely restates a minimum requirement of international refugee protection. As the Supreme Court of Canada has posited, international refugee law is intended to protect only where there is a failure of national protection.[669] It is well recognized that non-state actors may be agents of persecution in connection with one of the four other grounds – race, religion, nationality or member of a particular social group. In those cases, what is required is to show the inability or unwillingness of the state to protect. The EU Directive ensures that the political opinion ground not

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[668] *Ibid*.

[669] *Ward*, *supra* note 597 at para 25.

require that there be an added state-related component when asserting persecution for reasons of a "political opinion".

Although the UNHCR asserts an interpretation about "political opinion" in the particular context of gender-related persecution, and the EU Directive about "political opinion" more broadly, there is no reason not to apply this larger understanding of the "political" within the notion of "political opinion" to the concept of "political crimes" under an Article 1F(b) analysis. Indeed non-state actors may persecute individuals even if gender is not a component of the persecution and may do so with the tolerance or indifference of the state.[670] As such if individuals, as part of an expression of their political opinion engage in political crimes against oppressive and powerful non-state actors, courts and refugee tribunals should recognize them as such, for reasons articulated above.

That the concept of political crimes should also be subject to a broader reading is supported by Justice Gaudron of the High Court of Australia. In writing a concurring opinion in the context of a political crimes decision under the *Refugee Convention*, Justice Gaudron argued that one ought to "consider a crime to be political if a significant purpose of the act or acts involved is to alter the practices or policies of those *who exercise power or political influence* in the country in which the crime is committed."[671] More importantly, Justice Gaudron

[670] As I discuss further below, the UNCHR in a recent guidance note on refugee claims relating to victims of organized gangs applies this broader definition of political opinion to gang-related persecution. United Nations High Commissioner for Refugees, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* (Geneva: UNHCR, 2010) [*Guidance Note on Gangs*].

[671] *Singh*, *supra* note 633 at para 45.

does not limit those who exercise political power or influence to those within government. She explains that in

> some, perhaps many countries, power and political influence are exercised by bodies and organisations that are not organs of government. They may exercise power and influence with the tacit consent of the government concerned. On the other hand, they may do so because the government is unable to assert its own authority. And with increasing globalisation, the organisations or bodies in question are not necessarily confined to those that operate solely within national boundaries.[672]

Drawing from these statements, the concept of a political crime should be understood as any act, the primary objective of which is to resist or otherwise challenge those working within the government, state and/or society who: (a) hold and exercise substantial power; or (b) influence those who hold and exercise such power.[673] Several objectives may govern the conduct of those challenging those with power. They include (1) depriving those who hold and exercise power from continuing to do so; (2) forcing or pressuring those with power to change policies, legal norms, practices, and/or personnel; or (3) refusing to be subject to the control of those who exercise power.[674] Under this articulation, political crimes are not defined solely by the means and methods employed but focus on the primary objectives of those invoking the exception. Furthermore, this articulation recognizes that power is not lodged exclusively within the government but it is

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[672] *Ibid*.

[673] As I shall develop in the next chapter, in order for a political crime to be legitimate, the resistance in question must be waged against an oppressive power that adversely impacts the human rights of others. The conduct in question must also be subject to scrutiny with an inquiry focused on the target(s) of the crime, the means and methods employed and the political objectives(s) that underlay the conduct.

[674] See *R v Governor of Brixton Prison Ex Parte Kolczynski*, [1955] 1 QB 540, [1955] 2 WLR 116; *In re Kavic, Bjelanovic and Arsenijevic*, (1952) ILR 371.

exercised as well by non-state actors in substantial ways, and, as such, certain non-state actors should be considered legitimate targets of political crimes.

Invoking non-state actors or entities as recognized power holders, against whom political crimes may be waged remains a controversial notion. This is perhaps based on two interrelated ideas. First, one often associates "political crimes" with violent conduct, and the manner in which it has developed in extradition and refugee law indicates that the association is not without some foundation. Second, there is the dichotomy that resisters or freedom fighters are believed to primarily target government actors, while "terrorists" target civilians, i.e. non-state targets.[675] This simple dichotomy fails to recognize the serious harm that certain "civilians" or otherwise non-government actors can inflict through their power which substantially impacts on the rights and interests of other civilians. Resistance to such power, even though it may seem to superficially "target civilians", should not simply be seen as apolitical when it is demonstrably and profoundly political. Examples of such non-state power include organized criminal organizations, cartels and/or gangs that illustrate themselves by brutal exercises and forms of non-state oppressive power.

Building from this discussion, in the next section, I shall examine how, criminal organizations such as drug cartels and gangs may qualify and be considered political actors. The consequence of so doing is that persons who have a well-founded fear can claim refugee status on the basis of a political opinion. In

[675] See *Gil*, *supra* note 642.

addition, crimes committed against such actors may also be considered "political" and as a result may not be excluded under Article 1F(b).

IV. Criminal Organizations as Oppressive Political Actors

Criminal organizations, particularly drug cartels and criminal gangs exercise significant power and control in certain countries. They pose serious threats to civil societies and to political, legal, economic and social systems.[676] In the case of criminal gangs, many have fled persecution due to the fear of harm that criminal gangs may perpetrate on them, particularly in Central America. Consequently, the UNHCR has published a special Guidance Note on Refugee Claims Relating to Victims of Organized Gangs.[677] In the case of Mexico, drug cartels have been engaged in considerable violence not only against each other, or the Mexican government, but also the civilian population. Substantial claims for refugee status have been made by those fleeing persecution as a result. I first deal with the subject of drug cartels in Mexico followed by a discussion of criminal gangs in other areas of Central America. Through these discussions, I contend that the establishment of such control by these criminal organizations challenges the notion that legitimate resistance to power can only be considered as political when it is solely waged against a state. It also fails to countenance what can be considered "political" in today's world.

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[676] John P Sullivan & Robert J Bunker, "Drug Cartels, Street Gangs, and Warlords" (2002) 13 Small Wars and Insurgencies 40 at 41.

[677] *Guidance Note on Gangs*, *supra* note 670.

The situation of Mexico provides a particularly stark illustration of the increasing power of criminal organizations. Mexico, amongst other states in recent years has become a violent and sanguinary cauldron; a battleground between drug cartels engaging in violence against one another, the government and with those in civil society who challenge them.[678] Although formal power in Mexico is shared between 31 subnational jurisdictions (states) and one federal district, eight large drug-trafficking organisations informally exert control over large parts of the country.[679] Such cartels battle one another other as well as the Mexican government for control of multi-billion dollar drug-trafficking routes to the United States.[680] Despite attempts by the Mexican federal government to suppress drug-related violence and overall activity, the death toll has nevertheless increased.[681] In some locations, drug cartels have established parallel tax systems where citizens are subjected to perilous circumstances for failing to pay.[682] The reach of the cartels extends to purchasing the loyalties of government officials and

[678] In 2008, roughly six thousand people died in drug-related violence. David Luhnow and José de Cordoba, "The Perilous State of Mexico" *The Wall Street Journal* (21 February 2009) W1. See also Jens Glüsing, "The Mafia's Shadow Kingdom" *Der Spiegel International* (22 May 2006) online: <http://www.spiegel.de>.

[679] "Drugs in Mexico: Kicking the Hornet's Nest" *The Economist* (12 January 2011) online: The Economist <http://www.economist.com>.

[680] *Ibid*.

[681] Stephanie Hanson, "Mexico's Drug War" Council on Foreign Relations (20 November 2008), online: <http://www.cfr.org>. Indeed the authorities have, in their own right, engaged in human rights abuses and criminal activity while prosecuting this war. See Human Rights Watch, *Neither Rights Nor Security: Killings, Torture, and Disappearances in Mexico's "War on Drugs* (New York: Human Rights Watch, 2011) online: Human Rights Watch <http://www.hrw.org>.

[682] Luhnow & de Cordoba, *supra* note 678.

murdering those that defy them.[683] Thus in addition to demanding and collecting "taxes", they impose their own brutal law and enforce it. As one Mexican elected official asserts, "I have no doubt that organized crime rules…there are whole neighborhoods controlled by criminals. Every day, there are more luxury homes built where we know they live without fear."[684] Their power and influence in some cases is believed to rival recognized heads of state or government[685] and are recognized as leading individuals with power, however illegitimately derived.[686] The power of the cartels also has an impact on the manner in which formal political power is exercised.[687] Aware of the cartels' power, some politicians will seek to protect and or be seen with them while others are targeted for opposing the cartels.[688] Given the power of the cartels, voters may end up being skeptical as to whether voting has any meaningful impact.[689] From a military standpoint, the cartels' access to weaponry has helped to solidify their capacity to outgun

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[683] See Myles Estey, "Mexico's Messenger Angels Amid the Drug War Violence" *The Toronto Star* (19 February 2012), online: The Toronto Star <http://www.thestar.com> ("Juarez, a city of 1.3 million, saw 1,200 murders in the first nine months of 2011 and more than 3,000 in 2010. Competing cartels and corrupt security forces ensure that dissenters and critics stay silent in the culture of fear"); Daniel Hernandez, "In Monterey, Mexico, a culture of fear is evident" *The Los Angeles Times* (3 April 2012), online: LA Times <http://www.latimes.com>.

[684] Alexandra Olson and Martha Mendoza, "El Chapo, Mexican Drug Lord, Gains Power As Cartels Fall" The Associated Press (18 January 2011) online: Huffington Post <http://www.huffingtonpost.com>.

[685] *Ibid*.

[686] Tim Padgett, "Joaqín Guzmán" *Time* (30 April 2009), online: Time Magazine <http://www.time.com>.

[687] Olga R Rodriguez, "Drug cartels make many Mexicans afraid to vote" *The Associated Press* (4 July 2010) online: SF Gate <http://articles.sfgate.com>.

[688] *Ibid*.

[689] *Ibid*.

government forces – including the use of grenade launchers and antitank rockets.[690]

In addition to the power and violence exercised by the drug cartels, there are also numerous organized criminal gangs who similarly exercise substantial control over local populations. The UNHCR posits that in Central America, powerful gangs such as the Maras may "directly control society and *de facto* exercise power in the area which they operate."[691] Although there is considered to be diversity amongst the different gangs, a common feature is their shared intolerance for opposition and "signs of disrespect" to their power.[692] The UNHCR observes that any refusals to succumb to a gang's demands and/or actions that challenge them are subject to harsh reprisals.[693] Such demands include efforts at recruitment as well as, like drug cartels, the imposition of local taxes called "renta".[694] The criminal activities of the gangs are varied and include murder, extortion, robbery, kidnapping, smuggling and human trafficking.[695]

Despite the power of the drug cartels and the criminal gangs in Central America, in addition to the activities of organized crime in other parts of the world, many people have resisted such entities through various means. A rather

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[690] Ken Ellingwood and Tracy Wilkinson, "Drug Cartels' New Weaponry Means War" *The Los Angeles Times* (15 March 2009), online: LA Times <http://www.latimes.com>.

[691] *Guidance Note on Gangs*, *supra* note 670 at para 47.

[692] *Ibid* at para 6.

[693] *Ibid*. See also *In the Matter of Orozco-Polanco*, File no: A75-244-012, 18 December 1997 (US Immigration Court) online: Refworld <http://www.refworld.org/docid/4b6beec42.html>.

[694] *Guidance Note on Gangs*, *supra* note 670 at para 10.

[695] *Ibid.*

significant form of resistance is the refusal to be conscripted into the criminal operations of these organizations and/or subsequent desertion.[696] Another is the refusal to pay extortion or other unlawful demands for money or services.[697] A third is the active reporting of criminal activity by these groups to authorities.[698] A fourth way involves direct and armed confrontation with such groups.[699] As indicated above, unless there is state involvement, courts have been largely been reluctant to recognize opposition to criminal organizations as rooted in a political opinion for the purposes of granting asylum even where they recognize a well-founded fear of persecution.

I argue that given the prevalence and increasing power of drug cartels and other criminal organizations, jurists should shift away from the simplistic understanding that what is political is solely about government power. Applying the UNHCR re-definition of "political opinion" to apply to opposition-related persecution cases, where resisters refuse to join criminal gangs, blow the whistle on their criminal activities, or even, however rarely, confront such power through the use of force, or threats of the use of force, such acts should be seen as engaging in a political opinion on a matter in which the machinery of society may be engaged in. The UNHCR posits that gang-related refugee claims may be analysed on the basis of an actual or imputed political opinion with respect to

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[696] *Ibid* at para 12.

[697] *Ibid.*

[698] *Ibid*.

[699] Tracy Wilkinson, "In the Hot Land, Mexicans Just Say No to Drug Cartels" *Los Angeles Times* (11 June 2013) online: LA Times <www.latimes.com>.

gang, and/or the state's policies toward gangs or other segments of society, such as "vigilante" groups which target gangs.[700]

The UNHCR highlighted one case in support of the notion that opposition to criminal activity itself absent the involvement of state actors may constitute a political opinion. The case involved a Guatemalan asylum-seeker who had a well-founded fear of persecution due to his refusal to join a criminal gang.[701] The immigration court judge recognized that his persecution was linked to his political opinion. The political opinion was constituted through his support for the notion of the rule of law, the earning of an honest living in combination with opposing and refusing to be a part of gang life and its accompanying illegal activities. The decision represents a more realistic view of the nature of the political as rooted in power and not being formally wedding to a particular a version of power. Yet, amidst the much larger body of binding jurisprudence to the contrary, the decision is at the moment an outlier.

As a consequence of current interpretations of the political that are limited to the public sphere and the involvement of state actors, were violent crimes to be committed against such cartels and its members, such conduct would not be considered "political crimes" (unless, perhaps if those targeted were somehow connected to the state).[702] This neglects the reality that cartels have sufficient power and resources to counter the power of states without seeking to govern *qua*

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[700] *Guidance Note on Gangs*, *supra* note 670 at para 45.

[701] *Orozco-Polanco*, *supra* note 693.

[702] *In Re Matter of Barapind*, *supra* note 650 at 61.

the state. They merely create and enforce their norms so as to facilitate the smooth running of their commercial enterprises.

What the example of drug cartels and other organized criminal outfits represents is that legal systems must adapt to the fact that individuals cannot always be easily compartmentalized into simplistic categories such as "innocent civilian" (non-political target) or government/military official or agent (political target). There are those who fall somewhere in between – both a non-state actor and a legitimate political target. Furthermore where organized criminals *qua* civilians engage in oppression against others through the use of their superior financial and military power, they are no longer innocent bystanders or ordinary citizens. Were other citizens to challenge such oppressive private power with violence, such actions should not be automatically categorized as a serious non-political crime or an act of terrorism. Nor should courts and tribunals be quick to dismiss non-violent opposition to criminal organizations or gangs as well as drug cartels as falling outside the parameters of a political opinion.

V. Conclusion

In this chapter, I have argued the notion of what constitutes the "political" within the context of the 1951 *Refugee Convention* should be interpreted in a generous manner that expands the meaning of the term to apply to opinions about and crimes against non-state actors. Rather than being exclusively limited to official institutions of the state, or groups seeking to displace or change the policies of the state, the concept of the "political" should refer to the exercise of "power" which goes beyond the state and can include sections within society such

as, but not limited to criminal organizations. Expanding the notion of the "political" would inevitably impact on what constitutes a "political opinion" and "political crime". It should be noted however that expanding what constitutes political crimes does not mean that it becomes legitimate to engage in unrestrained violent conduct against non-state actors who happen to exercise power but do so in non-lethal but nevertheless violent ways. The political crimes tests discussed in chapter four indicate that there are reasonable limits about what individuals may do in challenging power.

Chapter Six – Seen In Its True Light:

Desertion as a Pure Political Crime

I. Introduction

As demonstrated in earlier chapters, soldiers who desert the military as an act of resistance and who then seek asylum in a third party state to avoid prosecution in their countries of nationality are eligible to obtain refugee status under the 1951 *Convention Relating to the Status of Refugees*[703] and/or the 1967 *Protocol Relating to the Status of Refugees*.[704] In this chapter, I address the struggle of deserting soldiers from democratic states, who seek to avoid prosecution for their conduct by seeking refugee status in another democratic state. Particularly, I focus on the primary reason why numerous former United States soldiers have thus far been unsuccessful in obtaining refugee status in Canada for having resisted participation in the Iraq War, and more recently military operations in Afghanistan. Canadian courts have determined that there is a substantial presumption that the United States protects its deserting soldiers by providing fair and impartial trials replete with procedural protections on the basis that the United States is a democratic country.

In this chapter, I make three principal arguments with respect to these cases. First, there should be no presumption of state protection through the provision of judicial fairness and impartiality where the fear of prosecution relates

[703] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) [*Refugee Convention*]

[704] *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

to an offence which is in essence a political crime. Flowing from the underlying rationale for the political crimes exception, there is significant doubt that courts in the prosecuting state can be fair and impartial when the target of the crime is the state itself. Second, assuming that the fear of prosecution for political crimes eliminates the presumption of fairness accorded to courts in countries of nationality, I address whether desertions are ordinary political crimes. I posit that desertions are in essence political crimes given that the main "victim" or target of an act of desertion is the state. Furthermore desertions should be designated as "pure political crimes" akin to offences such as treason, sedition, or espionage. Third, I contend that even as a (pure) political crime, a desertion must still meet the test established in jurisprudence and formulated by the United Nations High Commissioner for Refugees (UNHCR). That is, the desertion is one that is committed to avoid association with military actions that are internationally condemned as contrary to the basic rules of human conduct as set out in paragraph 171 of the UNHCR Handbook.[705] I refer to such desertions in this chapter as "Paragraph 171 Desertions".

II. Military Desertion and State Protection

Soldiers who desert from the military face prosecution and a potentially severe punishment. In some jurisdictions, this includes the possibility of a death

[705] *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/IP/Eng/Rev1 (1992) [*Handbook*].

sentence.[706] It is therefore a serious offence.[707] When such individuals seek refugee status to avoid prosecution and punishment, they must, like all other asylum-seekers prove on a balance of probabilities that they have a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion.[708] Yet, demonstrating a fear of prosecution for desertion may not be easily conducive to showing a well-founded fear of persecution.[709] It is contingent on the proving of certain elements. The asylum-seeker must first show that their country of nationality is unable to provide protection.[710] If sufficient state protection is unavailable, then it must be determined whether the alleged conduct can serve as an objective basis for a well-founded fear of persecution.[711] This persecution must then also have a nexus to one of the above-mentioned *Convention* grounds such a political opinion. The *UNCHR Handbook* provides however that that where a soldier refuses to be associated in a military action that is internationally condemned as contrary to the basic rules of human conduct, punishment for desertion can be viewed as persecution.[712] In this chapter, I focus on the first step: assessing the existence of

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[706] See e.g. *Uniform Code of Military Justice*, 10 USC § 885 [*UCMJ*] ("Any person found guilty of desertion or attempt to desert shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct […] at s 885(c)).

[707] *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 36-37.

[708] *Refugee Convention*, *supra* note 703 at art 1A(2).

[709] *Handbook*, *supra* note 705 at para 171.

[710] *Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at paras 42, 54 & 56, 282 DLR (4th) 413, 2007 CarswellNat 3596 (WL Can).

[711] *Ibid* at para 42.

[712] *Handbook*, *supra* note 705 at para 171.

state protection. This is important as it has been the basis for which many United States soldiers have been denied refugee status.

Underlying the concept of state protection is the belief that states have an obligation to protect their own citizens. Citizens must first seek protection from their own country of nationality before seeking "surrogate" protection from a third party state.[713] Typically the expectation is that one must first seek protection from law enforcement or other branch of the executive charged with enforcing the laws in the jurisdiction. This is particularly relevant where the agents of persecution are non-state actors or minor government actors acting perhaps in an unsanctioned manner. However where the alleged agents of persecution are in fact law enforcement authorities themselves acting in the course of their duties, where is the asylum-seeker to turn to? The jurisprudence indicates that where the fear is of prosecution, one is expected to turn to judicial authorities to ensure that a fair and impartial trial is held. It is perhaps perfectly reasonable to expect that where the prosecution is for the commission of a standard non-political offence, legal systems in democratic states can provide necessary legal guarantees.[714] However when the offence in question is political in nature, the presumption of fairness and impartiality cannot be taken for granted.

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[713] See *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 103 DLR (4th) 1, 1993 CarswellNat 90 at para 58.

[714] While many democratic states share a number of common values, there are nevertheless acute differences and margins of appreciation between them about how to address various issues that arise. This extends to the scope of legal protections afforded to criminal defendants or suspects and potential punishments which may be meted out. What may be legal or constitutional in one democratic state may not be in another. For example with respect to the death penalty, courts in states like Canada or in Europe have refused to extradite individuals to face trial and the death penalty in the United States without assurances that the death penalty would not imposed. See *United States v Burns*, 2001 SCC 7, [2001] 1 SCR 283, 2001 CarswellBC 273 (WL Can); *Soering v United Kingdom*, [1989] ECHR 14, [1989] 11 EHRR 439.

The issue of state protection as a basis for rejecting deserting soldiers' claims for refugee status has been a recurrent issue in recent years. This has specifically been the case for the numerous United States soldiers who have refused to serve in Iraq and more recently includes those refusing to return to fight in Afghanistan. They have sought refugee status in Canada and have faced consistent rejection of their asylum claims.[715] The main basis for the rejection has been the presumption that the United States, as a democratic state provides sufficient state protection through procedural guarantees of fairness during trials, particularly military trials.[716] This then requires the asylum-seeker to provide "clear and convincing confirmation of a state's inability to protect."[717] Because the United States is presumed to be capable of protecting its own citizens, through the existence of an independent judiciary, asylum-seekers from the United States are deemed to bear a heavy burden in attempting to rebut the presumption that the United States is incapable of protecting them.[718]

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[715] See e.g. *Hinzman, Re*, 62 Admin LR (4th) 1, 2005 CarswellNat 6332 (WL Can) (IRB); *Key* (*Re*), 2010 CarswellNat 4288 (WL Can), 2010 CanLII 62705 (IRB). It is not clear whether Iraq war resisters have sought refugee status elsewhere.

[716] As the Canadian Federal Court of Appeal observed, "the United States is a democratic country with a system of checks and balances among its three branches if government, including an independent judiciary and constitutional guarantees of due process." *Hinzman*, *supra* note 710 at para 46. The Court also posited that US military service members who deserted and faced prosecution would have their rights respected within a "sophisticated military justice system." *Ibid* at paras 49 and 57. Yet for all of the extolling of the virtues of the United States' legal system, it is useful to reflect that Canadian and European judicial authorities have forbidden extradition of individuals to the United States to face prosecution where the death penalty was the possible punishment. Over the past decade the United States government has authorized torture and the establishment of trials through special military commissions.

[717] *Ward*, *supra* note 713 at para 57; *Hinzman*, *supra* note 710 at para 44.

[718] *Hinzman*, *supra* note 710 at para 46.

This poses an important question, can a legal system that can otherwise provide procedural safeguards and guarantees of a fair and impartial trial with respect to the prosecution of non-political offences prevent against individual and/or institutional biases that arise when the crime being prosecuted is inherently a political crime? If it could, would it not undermine the rationale and purposes underlying the political crimes doctrine that has developed in extradition and refugee law? To recall, one of the central purposes of the political crimes exception is that individuals should not be returned where they may be subjected to unfair trials and punishments because of their political opinions which form the basis of their actions.[719] This includes instances where the state seeking extradition is a democratic state.[720] The clear assumption underlying the political crimes exception is that states cannot provide fair trials in cases of political crimes.

I argue that where the fear of prosecution is for a political crime, the presumption of state protection should not come into play. The political crimes doctrine was created in part because there were serious doubts that the legal systems wherein the crimes took place could provide fair and impartial trials to political offenders. Where soldiers are involved, the prosecutions take place within the specific context of courts-martial. Such courts are generally not

[719] See *Quinn v Robinson*, 783 F 2d 776 at 792 (9th Cir 1986).

[720] *United States v Pitawanakwat*, 120 F Supp 2d 921 (D Oregon 2000) (refusing to extradite First Nations individual to Canada on the basis of the political crimes exception).

interested in the political motivations of deserting soldiers and antagonistic to (at least) open demonstrations of disobedience and desertion.[721]

There is an institutional bias within the military against desertions and disobedience and it is reflected in legal norms.[722] Even where a military judge may view the conduct of the deserter sympathetically, there may be ramifications to legitimizing an act of desertion. In recent years, federal court of Canada decisions have held that United States military judges lack adequate independence and thus may cater to the actual or perceived attitudes held by superiors toward deserters.[723] Specifically, United States military judges lack security of tenure and sufficient institutional independence.[724] As a general rule, tenure may be secured through fixed appointments and removal only for just cause. Institutional independence is marked by the tribunal's control over the day to day running of its functions. Both of these are missing in the United States military court system and go to the issue of whether state protection exists. However, even assuming United States military judges and courts had the indicia of independence there is

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[721] *US v Huet-Vaughn*, 43 MJ 105 (Armed Forces CA, 1995).

[722] See Mark J Osiel, *Obeying Orders* (London: Transaction Publishers, 1999) at 41-89

[723] *Tindungan v Minister of Citizenship and Immigration*, 2013 FC 115 at paras 144-159, 426 FTR 200, 2013 CarswellNat 141 (WL Can); *Vassey v Minister of Citizenship and Immigration*, 2011 FC 899, [2013] 1 FCR 522, 2011 CarswellNat 2773 (WL Can); *Smith v Canada*, 2009 FC 1194 at paras 85-87, [2011] 1 FCR 36, 2009 CarswellNat 3800 (WL Can) ("It is clear that in the Army reigns an atmosphere of unconditional obedience to the hierarchy" at para 43). However *cf RB (Algeria) (FC) and Another (Appellants) v Secretary of State for the Home Department (Respondent)*, [2009] UKHL 10.

[724] *Tindungan*, *supra* note 723; Eugene R Fidell, "Military Judges and Military Justice: The Path to Judicial Independence" (1990) 74 Judicature 14; Eugene R Fidell, "Military Law" (2011) 140(3) Daedalus 1.

nevertheless the inherent bias against desertion given its political nature and the need to maintain the chain of command and discipline.

The political crimes exception typically comes into play only in the context of extradition proceedings or litigation surrounding the application of Article 1F(b) and whether an individual should be excluded from being considered a refugee. However, it should also be considered when and where the issue of state protection arises when determining if the asylum-seeker has a well-founded fear of persecution under Article 1A(2) of the *Convention*. I am not unmindful here that the processes that trigger such analyses in extradition law or in an analysis under Article 1F(b) may be different than what is taking place with respect to determining persecution under Article 1A(2). The extradition process is initiated by a foreign state formally seeking extradition in order to prosecute. The political crimes doctrine shields the person whose extradition is sought for political prosecution by the requesting state. In refugee law, the country of nationality has not formally sought extradition. Under Article 1F(b), one of the underlying concerns is with granting refugee status to person who poses a danger to the host population.[725] The individual who is designated as having committed "serious non-political crimes" is the person whose exclusion is sought, not the political criminal or someone who has committed a less serious or minor non-political crime.[726]

[725] *Handbook*, *supra* note 705 at para 151.

[726] *Ibid*.

Recognizing desertions *qua* political crimes as a means to negate the presumption (and perhaps even the existence) of state protection when there is a well-founded fear of prosecution for said crimes is not only consistent but flows from such recognized goals. The objective of the political crimes doctrine in extradition law would serve a very similar substantive purpose in the Article 1A(2) context in assessing whether a domestic court could (ever) provide a procedurally fair and unbiased trial. Namely, the political crimes exception protects the individual from an inherently biased political prosecution.[727] It is also worth observing that prior to the formal institutionalization of refugee protection through the *Convention*, the refusal of extradition on the basis of the political crimes doctrine was often seen by courts as an act of granting "asylum" or its functional equivalent.[728] Furthermore, if one of the major reasons behind Article 1F(b) is the negation of protection for common criminals, someone who commits a political crime (in the country of nationality) is not a "common criminal" who will inherently endanger or pose a danger to the host society in the state of refuge.

Certain questions still remain. Even if a prosecution for a political crime should give rise to a negation of the presumption of state protection, is desertion considered a political crime as matter of law?

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[727] See *Gil v Canada*, [1995] 1 FC 508, 119 DLR (4th) 497, 1994 CarswellNat 165 (WL Can) ("Since [art] 1F(*b*) is stated as an exception to the definition of a refugee, the claimant against whom it is invoked is, ex hypothesi, in danger of persecution in the event of his return; if the crime is "political," persecution for political opinion would therefore seem to be almost a foregone conclusion" at para 14).

[728] See *Schtraks v Government of Israel and Others*, [1964] AC 556, [1962] 3 All ER 529, [1962] 3 WLR 1013.

III. Desertion – A Pure Political Crime?

In this section, I articulate why desertions can and should be considered political crimes, specifically pure political crimes. At present they are not considered political crimes at all. As developed in extradition and refugee law, there is a recognized distinction between "pure" and "relative" political crimes. Pure political crimes are offences directly aimed at the state, namely, treason, sedition and espionage.[729] Such offences do not violate the private rights of individuals.[730] By contrast, relative political offences are "common law offences" such as murder (that do impact, by implication, upon individual rights but) which are motivated by political objectives.[731] As desertions do not implicate private rights of other individuals, there cannot be any basis for designating them as relative political crimes.

Desertions should be considered pure political crimes because the main "victim" of the crime is the state. At the heart of the act of desertion is the refusal to (continue to) bear arms for the state (or other entity which allegiance was given). They bear a sufficiently close relationship to acts of treason, sedition and espionage such that they should be considered pure political crimes. An examination of these three offences illustrates this. Definitions of treason, sedition and espionage are not uniformly worded. However the common element is the target of the perpetrator – the state. Treason includes armed attacks on the state or

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[729] *Quinn*, *supra* note 719 at 793.

[730] *Ibid*.

[731] *Ibid* at 794.

the attempt to overthrow the government.[732] Treason is also defined as attacks on the life of the head of state and significant public officials.[733] Sedition is designated as the advocacy to effect any governmental change through the use of force.[734] Espionage involves the disclosure of confidential or secret state information to another government without the permission of the state that holds the secret.[735] There will be instances where deserting soldiers or officials will engage in specifically treasonous or seditious acts as well as espionage after their defection, but the act of desertion itself is not included within the definitions of these specific crimes.

Although these offences are likely to be driven in part if not in substantial measure by the political motivation(s) of the perpetrator, the presence or absence of such motivation(s) is not necessary for an offender to qualify for the "pure" political crimes exception.[736] Feasibly, a paid assassin or mercenary who is not motivated by political objectives can still commit treason, sedition or espionage that advances the cause of political freedom in a totalitarian state. There is nothing illegitimate about such hired persons advancing the goals of resistance to an

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[732] *Criminal Code*, RSC 1985, c C-46 ss 46-47.

[733] *Ibid*.

[734] *National Defence Act*, RSC 1985, c N-5 s 82. See also *Criminal Code Act of 1995* (Cth), s 80.2. In India, it is defined more broadly as exciting disaffection or inciting contempt or hatred against the government. *Indian Penal Code, 1860* s 124A.

[735] Under Canadian law, this is considered an act of treason. *Criminal Code*, *supra* note 732 at s 46(2)(b).

[736] As I discuss below however, the presence of political motivation will be key with respect to relative political crimes.

oppressive government and their being granted protection to avoid a politically motivated and biased trial.

Drawing from the observations above, should desertions qualify as pure political crimes? Like the aforementioned offences, desertion is a crime against the state. A soldier who deserts at a time of armed conflict in particular deprives the government or ruling authority, at minimum, of an asset to fight an opposing force in the said conflict. If the soldier deserts for specific political reasons, for example the refusal to advance the goals of an oppressive and/or illegal military action, it is no less a political crime than that of the "freedom fighter" who seeks to overthrow the government by force, who calls for the overthrow of the state through direct military action or the spy who provides crucial data that will facilitate an attack on the oppressive government's defences or security network. Where the deserting soldier is of a higher rank, the government's interests may be further imperiled by the danger of other soldiers being influenced.[737] This is of particular concern to both governments that rely on voluntary recruitment or conscript their personnel.

As with treason, sedition and espionage, statutes defining desertion do not require that the political motivations of the accused constitute one of the elements of the offence.[738] The subjective fault requirement is that the soldier intended to

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[737] Carol Morello, "For one Syrian officer, a months-long wait for the chance to defect to Turkey" *The Washington Post* (12 January 2013), online: The Washington Post <http://www.washingtonpost.com>; Olga Khazan, "A Defector's Tale: Assad's Reluctant Army" *The Washington Post* (9 January 2013), online: The Washington Post <http://www.washingtonpost.com>.

[738] See Canada's National Defence Act which provides that desertion is the intentional act of being absent from military service without authority. *National Defence Act*, *supra* note 734 at s 88(2). The United States *Uniform Code of Military Justice* establishes that it is: (1) the intentional act of

avoid his or her duties. Nevertheless, they are inherently political acts. One may go so far as to say that regardless of the political reasons for why an individual has deserted, the act of desertion from the military is and should be considered a political one by its very nature and its impact on the state as the "victim" or object of the offence. The Canadian Federal Court of Appeal has affirmed Professor Guy S. Goodwin-Gill's position that: "[m]ilitary service and objection thereto, seen from the point of view of the state, are issues which go to the heart of the body politic. Refusal to bear arms, *however motivated*, reflects an essentially political opinion regarding the permissible limits of state authority, *it is a political act*."[739]

Lastly, another factor which suggests that desertion should be considered a political crime is the fact it has not been considered, to date, as a serious non-political crime. Or, put another way, soldiers seeking asylum have not been excluded from being designated refugees by virtue of their desertion having been construed as a serious non-political crime. To recall, Article 1F(b) of the *Refugee Convention* requires exclusion where there are reasonable grounds to consider an asylum-seeker has committed a serious non-political crime. Desertion is most certainly a serious offence given the considerable penal consequences that may be imposed on a deserting soldier. If desertion is a serious non-political crime, it is curious that this has not been used to exclude soldiers seeking refugee status. It would surely be an easy way to exclude an individual without having to engage in

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being or remaining permanently absent from one's unit, organization or place of duty; or (2) the act of quitting one's unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service. *UCMJ*, *supra* note 706 at §885.

[739] *Zolfagharkhani v Canada (Minister of Employment and Immigration)*, [1993] 3 FC 540, 20 Imm LR (2d) 1, 1993 CarswellNat 89 at para 32 (WL Can) (FCA) [emphasis added].

an analysis of their claim for refugee status under Article 1A(2). It is a technique that decision makers at the Immigration and Refugee Board have employed in other circumstances, namely exclusion under Article 1F(a) of the *Convention*.[740]

Interestingly, and in connection with deserting United States soldiers who have avoided (re)deployment in Iraq, this could avoid the seemingly unnecessary (and potentially) embarrassing determination of whether the United States is a jurisdiction that fails to provide suitable legal protections. It focuses on the fact that the individual in question belongs to an excludable class of persons – criminals due to their act of desertion. I argue that the likely reason that tribunals and courts do not exclude asylum-seekers on the basis of such a designation may well be the fact that they recognize such desertions, as well as others, for what they are, political crimes. This is particularly so when the desertion is the manifestation of a selective conscientious objection in accordance with paragraph 171 of the UNCHR Handbook.[741] All of this stands to reason that if desertion from the military during a time of armed conflict is a political crime (in addition to being designated a military crime too), this should give rise to concerns about the level of protection any state will practically be able to give during a criminal prosecution with respect to such a political criminal.

IV. Paragraph 171 Desertions

It may cause some consternation to regard desertions as "pure" political crimes. Yet in order for deserters to secure refugee status, it must be shown that

[740] See e.g. *Merceron v Canada (Minister of Citizenship & Immigration)*, 2007 FC 265, 2007 CarswellNat 4822.

[741] *Handbook*, *supra* note 705 at para 171.

prosecution and any punishments that arise therefrom amount to persecution. That persecution must also be connected to a *Convention* ground, including political opinion. To recall, paragraph 171 provides that

> Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself he regarded as persecution.[742]

As such even if desertion is to be considered a pure political crime, within the context of an inclusion analysis under Article 1A(2), there is still the necessity to determine whether the well-founded fear of persecution has a nexus to, in this case, a political opinion. That political opinion however must also be connected to such military conduct that is condemned by the international community as contrary to the basic rules of human conduct.

The high standard that paragraph 171 sets however is important. Military organizations must be able to maintain discipline and be able to rely on its personnel to obey orders. However, this requirement is not to be followed blindly in the commission of internationally condemned actions. Paragraph 171 furthers important norms and principles of international law and the recognition that individual soldiers have a responsibility to disobey orders in certain contexts.[743]

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[742] *Handbook*, *supra* note 705 at para 171.

[743] *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, 5 UN GAOR Supp (No. 12) at 11, UN Doc A/1316 (1950). See in particular Principle IV which reads: "The fact that a person acted pursuant to order of his

Once an applicant establishes that s/he has committed a Paragraph 171 desertion, it leads to considerable doubts that the state which perpetrates such internationally condemned conduct will give the deserting soldier a fair and impartial trial. Such states already demonstrate that they are willing to commit internationally condemned breaches of the basic rules of human conduct. It is at least likely that such states will fail to provide basic procedural protections with respect to deserting soldiers.

V. Conclusion

In this chapter, I have argued that deserters who seek refugee status face particular challenges in obtaining refugee status. There has been an operational presumption that such states provide basic guarantees of procedural protections in connection with prosecutions regarding desertion (or for that matter any crimes). I have argued that this presumption should not exist when the prosecution is for desertion, given that desertion is an inherently political crime. This chapter has argued that desertions can be characterized as a pure political crime since the primary victim of the offence is the state. Lastly, even if desertions are considered pure political crimes, it must still be established that the desertion is in accordance with paragraph 171 of the *UNCHR Handbook*.

Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."

Chapter Seven – Mediating Between Heroism and Criminality:

Article 1F(a) and the Exclusion of Imperfect Military Resisters.

I. Introduction

International refugee law jurisprudence recognizes, pursuant to paragraph 171 of the UNHCR Handbook that soldiers who desert in order to avoid association with military actions that are internationally condemned as contrary to the basic rules of human conduct are eligible for refugee status.[744] Such eligibility is not unconditional. Indeed, complications may arise when soldiers, prior to their desertion from the military, commit serious international crimes – namely war crimes and/or crimes against humanity. The commission of these crimes may have been as a consequence of compulsion or threats to their life if they failed to comply or due to other mitigating circumstances. Yet, regardless of any mitigating circumstances surrounding the commission of the crime(s) and despite some subsequent act of resistance, they will likely be denied refugee status by operation of Article 1F(a) of the 1951*Convention Relating to the Status of Refugees*.[745] Article 1F(a) states that:

> the provisions of this Convention *shall not apply* to any person with respect to whom there are serious reasons for considering that

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[744] *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/IP/Eng/Rev 1 (1992) at para 171 [*Handbook*]. This recognition is illustrated in earlier chapters of this thesis.

[745] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, art 1F(a) (entered into force 22 April 1954) [*Refugee Convention*].

> […] he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.[746]

In light of the importance placed on soldiers deserting in the contexts included in Paragraph 171 of the UNHCR *Handbook*, should a military deserter's commission of any of the enumerated crimes in Article 1F(a) lead to his or her absolute bar to obtaining refugee status?

There is an understandable if not perhaps natural inclination to exclude perpetrators of international war crimes or crimes against humanity from obtaining refugee status. Those who have committed these crimes are often associated with having inflicted some of the most flagrant injustices and most tragic and traumatic circumstances on their victims. Yet, the presence of soldiers who may have been forced into committing serious crimes and who have subsequently resisted does not fit neatly into the image of the irredeemable international criminal. When an asylum-seeker embodies both the resister and the international criminal this may strike a rather dissonant chord. International refugee law's response is that once designated an Article 1F(a) criminal, an asylum-seeker's attributes and efforts as a resister are to be completely disregarded. As such Article 1F(a) operates as a blunt and crude instrument which does not allow states to differentiate between those who may still be deserving of protection despite the commission of such crimes and those who do not.

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[746] *Ibid* [emphasis added]. Because liability for crimes against peace are imposed solely on higher ranking officials in a regime and do not apply to lower ranking soldier or officers, crimes against peace will not serve as a basis for exclusion for most asylum-seekers.

In this chapter, I argue that a different approach is warranted. Rather than an automatic and complete exclusion upon determining that the asylum-seeker has committed such crimes, tribunals or courts in states party to the 1951 *Convention Relating to the Status of Refugees*[747] and/or the 1967 *Protocol Relating to the Status of Refugees*[748] should be given the discretionary power to grant refugee status as a matter of law. In order to achieve this revision more broadly, an additional international protocol amending Article 1F(a) should be drafted, signed and ratified. Such an instrument would allow tribunals or courts to first determine whether one of the enumerated crimes has been committed and then consider whether exclusion is appropriate by weighing any mitigating circumstances against any aggravating factors relating to the commission of these crimes. If a tribunal/court determines that the mitigating factors outweigh the aggravating factors, I contend that such bodies should be permitted to grant refugees status unconditionally or subject to certain conditions as indicated below.[749]

This chapter is divided into several sections and articulates a series of rationales as to why such a revision and the proposed options to grant refugee status to Article 1F(a) criminals are justifiable. In the first section, I examine the

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[747] *Ibid* at art 1A(2).

[748] *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) [*Protocol*].

[749] Professor Jennifer Bond advocates for the similar approach of taking into account issues of proportionality as well noting the harsh consequences of exclusion and consideration of substantial mitigating factors that compelled a person to commit one of the prohibited offences. However, she argues that this balancing process should take place under the current wording of Article 1F(a) and should be applied by the UNHCR is situations of mass influx. While I agree that such a process is worthy and desirable given the humanitarian nature of refugee law, the blunt wording of Article 1F(a) suggests that such a process might be problematic. Jennifer Bond, "Excluding Justice: The Dangerous Intersection Between Refugee Claims, Criminal Law, and 'Guilty' Asylum Seekers" (2012) 24 Int'l J Refugee L 37.

text of Article 1F(a) in light of the historical context in which it was formulated in the immediate Post-World War Two era. I argue that Article 1F(a) was originally intended to exclude Nazi and other war criminals from receiving refugee status and prevent them from evading prosecution. Given the temporal limitations that applied to the 1951 *Refugee Convention* and Article 1F(a), the latter was not necessarily intended to apply to all soldiers or officials in all conflicts transpiring after 1950. As such, a revised Article 1F(a) should recognize that some who commit Article 1F(a) under mitigating circumstances may still be worthy of protection.

The second section argues that permitting states the discretion to exclude or consider other options furthers the humanitarian goals of international law. While some soldiers may be able to desert before finding themselves in a position where they are compelled to commit any international crimes, others may not be in a similar position. The consequence of a mandatory exclusion is that it has the potential to dissuade others from deserting if they will be sent back.

In the third section, and drawing from Professor James Hathaway, I contend that there is a utilitarian rationale for considering options other than exclusion. Specifically, such individuals may provide important information about crimes being committed that may not be available or confirmed through other means.

The fourth section argues that the consequence of exclusion, specifically deportation, is a harsh penalty. This is all the more accentuated where the asylum-seeker has a well-founded fear of persecution based on a *Convention* ground.

Consequently, adjudication under Article 1F(a) should be viewed as being a quasi-criminal proceedings given that the potential consequences are so severe and radically atypical of any consequence that would normally arise out of any other civil proceeding.[750] Drawing from processes available in criminal sentencing, adjudicators should be allowed to balance aggravating and mitigating factors to arrive at a proportionate and just result given the totality of an asylum-seeker's circumstances.

In the fifth section, I argue that a balanced and contextual approach as advocated for in this chapter is particularly necessary in cases where soldiers commit Article 1F(a) crimes because of duress or other forms of coercion. While duress may not qualify as a defence in respect of certain crimes, a tribunal or court should be able to consider circumstances of duress that led to the commission of the crime in order to assess whether exclusion is the just and proportionate consequence.

II. The Historical Context of the Drafting of Article 1F(a)

Article 1F(a) establishes an uncompromising standard with respect to exclusion.[751] In accordance with the *Vienna Convention on the Law of Treaties*,[752]

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[750] The proceedings should be viewed as quasi-criminal in nature because they relate to consequences that arise from a determination that the asylum-seeker committed criminal actions but the determinations take place in a civil and administrative context.

[751] To recall, the text of Article 1F(a) articulates the following: "the provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that […] he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes." *Refugee Convention*, *supra* note 745 at art 1F(a).

[752] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ("A treaty shall be interpreted in good faith in accordance with the ordinary

it becomes evident from an ordinary reading of the terms of the text that Article 1F(a) does not allow exemptions to exclusion once it has been established that an individual has committed one of the enumerated crimes.[753] This flows from the use of the operative words, "the provisions of this Convention *shall not apply to any person*" which are unequivocal on their face. By implication, and barring the availability of defences recognized by law, states are not to take circumstances surrounding the commission of the crime into account once it is determined that the criminal acts provided for in the clause have been proven.

In this section, I examine the circumstances surrounding the drafting history of Article 1F(a). I argue that a re-drafting of the clause and shift away from this standard is justified when considering the context surrounding its drafting. I focus on two substantial factors: (1) the drafters' significant hostility to conferring refugee protection to Nazi, other Axis war criminals, as well as collaborators and national traitors; and (2) the *Refugee Convention*'s protection were temporally limited to events transpiring before January 1951. As such, I argue that this absolute exclusion should not be applied for all conflicts outside of the World War Two context and was likely never intended to.

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meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" at art 31(1)).

[753] The concept of "commission" embraces both those who act as principals to an offence as well as those who act as accomplices. In the case of the latter, courts have held that was it required is voluntary and knowing participation. While mere presence at the scene of a crime may be an insufficient basis upon which to exclude, if the individual was a member of an organization that was directed to a limited and brutal purpose, mere membership and presence may serve as a sufficient basis for exclusion. See *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306, 89 DLR (4th) 173, 1992 CarswellNat 94 (WL Can) (FCA); *Moreno v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 298, 107 DLR (4th) 424, 1993 CarswellNat 124 (WL Can) (FCA).

The *Refugee Convention* was drafted within the first five years following World War Two and a substantial number of states party to its drafting suffered most directly from the Axis' crimes. Many countries were occupied, millions of civilians and combatants were killed and property was immeasurably destroyed. Justifiably, numerous criminal trials were convened after the war to prosecute high and lower ranking Axis officials for their crimes, both in Europe and in the Far East.

It is instructive that Article 1F(a) houses the very crimes for which the surviving Nazi high leadership at Nuremberg were prosecuted and convicted in addition to other Nazis in subsequent years.[754] The absolute exclusion established in Article 1F(a) reflects the antipathy felt by its drafters about granting refugee status to those who may have escaped prosecution by the Allies in the years following the War. As the *UNHCR Handbook* articulates, "[a]t the time when the Convention was drafted, the memory of the trials of major war criminals was still very much alive, and there was agreement on the part of states negotiating that war criminals should not be protected."[755] Certainly, even prior to the drafting of the *Convention* and the creation of the UNHCR, the United Nations created the temporary and short-lived International Refugee Organization (IRO) and its

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[754] *Charter of the International Military Tribunal*, 8 August 1945, 82 UNTS 279, art 6; 59 Stat 1544 (entered into force 8 August 1945); *Control Council Law No 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, 20 December 1945, 3 Official Gazette Control Council for Germany 50-55 (1946).

[755] *Handbook*, *supra* note 744 at para 148. It is worth noting that for some, such as the British government under Winston Churchill, the most appropriate course of action for the Nazi high leadership was summary executions without a trial. Ian Cobain, "Britain Favoured Execution Over Nuremberg Trials For Nazi Trials" *The Guardian* (26 October 2012), online: Guardian Unlimited <http://www.guardian.co.uk>.

constitution. Within the IRO's constitution, the UN established who qualified for refugee status and who were barred from obtaining asylum. The constitution explicitly excluded "war criminals, quislings and traitors" and those who aided the "enemy" in persecuting civilian populations of countries, Members of the United Nations […]."[756] Given this historical context, it is understandable why Article 1F(a) was designed to leave no leeway for other considerations, such as any mitigating actions or circumstances of a putative Axis war criminal or collaborator that may militate toward granting refugee status.[757]

Article 1F(a) was also a product of this period in another sense. The framers of the *Refugee Convention* did not seem to contemplate, or perhaps more cynically, may not have cared about the ways in which individuals could become refugees prospectively and by extension be excluded for offences they might have committed. Indeed, under the terms of the *Convention*, its protections applied to individuals who became refugees arising from events prior to January 1, 1951.[758] It is therefore conceivable that the framers opted for an absolute exclusion in light of the temporal limitation agreed upon with respect to Article 1F(a) and its application to those who committed the offences contained therein during World War Two. If the *Convention's* framers did not imagine that future conflicts or circumstances could give rise to forced migrations, it is logical that they did not

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[756] See *1946 Constitution of the International Refugee Organization*, 15 December 1946, 18 UNTS 3, Annexe 1, Part II, paragraph 1 (entered into force 20 August 1948).

[757] James Hathaway observes however that the United States delegation "argued that countries should be allowed to treat war criminals as refugees, although they should not be compelled to do so." Yet this was not agreed to by the majority of other delegations. James C Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 215-216.

[758] *Refugee Convention*, *supra* note 747 at art 1A(2).

see the necessity to reframe the terms of Article 1F(a) to allow for a different set of considerations or circumstances that may arise.

It became abundantly clear to the international community by the 1960s that the *Refugee Convention's* temporal limitation was particularly short sighted when one considers the various instances and events which have given rise to individuals seeking asylum in foreign states after January 1, 1951.[759] The 1967 *Protocol Relating to the Status of Refugees* eventually removed the temporal limitation in the *Refugee Convention*, although it did nothing to modify the strict language of Article 1F(a). Furthermore, nothing in the *Travail Préparatoires* for the 1967 *Protocol* indicates that Article 1F(a) was of concern or that it needed amendments. It suggests that the *Protocol's* framers made the decision to retain the original language of Article 1F(a) and consequently failed to consider other circumstances beyond the Second World War context that may have required a more sophisticated and contextual approach to the issue of asylum-seekers who are not Nazi or Axis war criminals.[760] This would include soldiers who may have committed international crimes before having perpetrated acts of resistance.[761]

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[759] African and Latin American states have also recognized the limitations of basing refugee status on a well-founded fear of persecution to five grounds (which incidentally excludes gender or sex). The African Refugee Convention and the Cartagena Declaration provide a series of other bases for claiming refugee status including civil war and foreign aggression. *OAU Convention Governing the Specific Aspects of Refugee Rights in Africa*, 10 September 1969, OAU Doc No CAB/LEG/24.3 (entered into force 20 June 1974); *Cartagena Declaration on Refugees*, 22 November 1984, OAS Doc OEA/Ser.L/V/II.66/doc 10, rev 1, at 190-93 (1984-1985).

[760] It may be worth stating however that even in the context of those who were culpable for international crimes during World War Two, exclusion may not have been the best solution. Take for example, an individual such as Oscar Schindler who was a businessman and member of the Nazi party who manufactured materials for the war effort. Schindler had knowledge and personal involvement by assisting other war criminals. Yet he also at some stage decided to do what he could to save his Jewish workers from extermination and ensured that his factory produced faulty material. While Schindler certainly was culpable for his role as a manufacturer, his subsequent acts mitigated his previous crimes.

Indeed, there is some contextual evidence that during this period in the mid-1960s, when the *Protocol* was being considered, the language of Article 1F(a) still had resonance to states and the United Nations. This was illustrated in the UN General Assembly's adoption of the 1967 *Declaration on Territorial Asylum*.[762] Although the *Declaration on Territorial Asylum* is not binding, Article 1(2) indicates that the right to seek and to enjoy asylum further to the 1948 UN *Universal Declaration of Human Rights* had limits.[763] The 1967 *Declaration* states that the right in question "may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes."[764] Thus the framers of this declaration consciously adopted language that was identical to that of Article 1F(a) of the *Refugee Convention*. The deployment of this language in the 1967 *Declaration* and the absence of any alteration in the 1967 *Protocol* strongly suggest that the restrictive language in Article 1F(a) remained favoured within the UN despite the passage of over twenty years following World War Two.

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[761] What is also notable is that the drafters of the *Protocol* did not consider including the crime of genocide to the list of crimes articulated in Article 1F(a). At the time the *Refugee Convention* was signed January 1951, the *Genocide Convention* had already been signed in 1948 but had not entered into force until January 1951. However, there is little reason why it should not have been included at the time the *Protocol* was being negotiated and drafted. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

[762] *Declaration on Territorial Asylum*, 14 December 1967, UN Doc A/6716 at art 1(2).

[763] *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 71.

[764] *Declaration on Territorial Asylum*, *supra* note 762.

While the framers of the 1951 *Convention* may have had understandable reasons to adopt the restrictive language employed in Article 1F(a), the continued use and favouring of the language indicates a failure to see beyond the context of the immediate post-War period. The *Protocol's* drafters failed to contemplate situations where a soldier's commission of an international crime and a subsequent desertion may require more subtle analysis rather than a crude and unsophisticated standard which may do little to further a number of objectives underlying humanitarian law and the prevention of international crimes.

III. Advancing the Humanitarian Objectives of International Law

Depending on the circumstances, the granting of refugee status to an individual who has committed an international crime may be justifiable in order to advance other goals within the international legal system. International refugee law's concern is with the safeguarding of persons who have a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion. Yet, it is also a branch of international law and those charged with the responsibility of implementing international refugee law should do so in a way that promotes goals such as the prevention, halting or reporting of international crimes. The goals of international humanitarian law in particular are focused on what the International Court of Justice has identified as the elementary considerations of humanity.[765] They include the protection of

[765] *The Corfu Channel Case*, [1949] ICJ Rep 4 at 22.

civilians, prisoners of war, and other classes of individuals from being harmed as military targets.[766]

Granting refugee status to certain deserters who have committed international crimes under mitigating circumstances is a more than valid exercise since the furtherance of humanitarian goals is an important concern within international refugee law as well as international humanitarian law. An individual who receives refugee status for her refusal to be part of military operations that are contrary to the basic rules of human conduct contributes to the furthering of these stated objectives. As discussed in greater detail in previous chapters, numerous cases interpreting paragraph 171 of the *UNHCR Handbook* indicate that refugee status has been granted soldiers who have deserted in order to resist association with military conduct that is internationally condemned as contrary to the basic rules of human conduct.[767] Paragraph 171 not only sets a high standard for obtaining asylum on the basis of one's desertion, it is also firmly connected to advancing the humanitarian goals of international law. Thus, where a soldier deserts only after participation in international crimes, tribunals should have to specifically account for the asylum-seeker's paragraph 171 desertion in assessing whether exclusion is appropriate.

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[766] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978).

[767] *UNCHR Handbook*, *supra* note 755 at para 171.

Excluding military deserters as a matter of course, without a weighing of mitigating versus aggravating factors does not serve the humanitarian objectives of the international legal system. It gives little incentive to individuals to desert if they know, believe or fear that the ultimate outcome of their seeking asylum will be an automatic denial of refugee status.

IV. Utilitarian Justification

There is a third justification to adopting a contextual (and balanced) approach to an application of Article 1F(a) with respect to deserting soldiers who have committed international crimes. In what Professor James Hathaway describes as a utilitarian approach, a soldier who has committed a serious international crime or crimes can provide important information that may not be obtained or confirmed through alternative or otherwise external sources.[768] Such information could be used by the hosting government, other states and/or the international community to take further action. Hathaway has argued that because the enforcement of international human rights law relied upon publicity and moral approbation, "it may be wise judiciously to exonerate individuals who, though culpable themselves, make it possible to end or curtail crimes against peace and security."[769] I am in agreement with Professor Hathaway that such individuals

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[768] See e.g. *Cruz v Canada (Minister of Employment & Immigration)*, (1988) 10 Imm LR (2d) 47, 1988 CarswellNat 9 (WL Can) (Imm App Bd) (representing an instance where a former Mexican soldier told "the whole world, as it had never been told before, the story of the atrocities committed by officers of the Government of Mexico[…]" at para 37). See also Larry Rohter, "Former Mexican Soldier Describes Executions of Political Prisoners", *The New York Times* (19 February 1989) online: New York Times <www.nytimes.com>. However as I discussed above the case was not unproblematic given the extent Cruz's participation in the crimes.

[769] Hathaway, *supra* note 757 at 219.

play or can play an important role, however, full exoneration may prove to be just as unsuitable as exclusion. This is why a moderated approach that both protects but allows for the possibility of a criminal trial may be more appropriate.

The utilitarian justification has its analog in the area of criminal law. Individuals who have themselves committed crimes may either receive immunity from prosecution or a concession in respect to sentencing in exchange for their assistance.[770] In appropriate cases, it may be justifiable to provide protection through the creation of a new identity and the provision of security by law enforcement officials. In a similar fashion but operating in the refugee law context, tribunals should be able to consider, as a mitigating factor, whether the asylum-seeker will provide information that is of some value to the host government, other governments and/or the international community such that the granting of asylum serves a legitimate exercise in such cases.

V. Consequences of Exclusion and its Proximity to Criminal Punishment

By specifically advocating for a contextual approach that calls upon adjudicators to weigh mitigating circumstances against aggravating factors, I am consciously importing an analytical process that is a staple of sentencing processes in the criminal context. While refugee determination hearings are administrative and civil in nature and not formal criminal proceedings (even when dealing with the application of Article 1F(a)), the potential outcome of such hearings is atypical of what happens in other civil proceedings. Indeed, the

[770] Tony Perry, "Marine Prosecutors Provide Immunity In Exchange For Testimony On Iraq Killings", *Los Angeles Times* (20 April 2007) online: Los Angeles Times <http://www.latimes.com>.

consequences may be more severe than the harm inflicted or may be inflicted as a consequence of convictions and sentencing in criminal trials. Specifically, where a person is recognized as qualifying for refugee status but is deported nevertheless by virtue of Article 1F(a), there is the well-founded possibility of persecution, including physical harm and/or death if excluded and thus deported.[771] As such, where courts or tribunals must determine whether exclusion is the most appropriate course of action, such proceedings should be recognized as being quasi-criminal in nature.

Courts have recognized that the severity of deportation in and of itself is a type of penalty, regardless of the existence of a well-founded fear of persecution.[772] In recent years, appellate courts have intervened where sentencing courts have failed to account for the collateral consequences of sentencing on an individual's immigration status.[773] In other cases, judges have admonished criminal defence counsel for not properly advising clients about the likely adverse impact pleading guilty would have on their immigration status – namely deportation.[774] In such contexts, warnings to criminal defendants about the impact of a guilty plea on their immigration status are necessary even absent a well-founded fear of persecution.

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[771] The threat or experience of persecution, physical violence and/or death by inmates in detention is of course not absent in the criminal justice system. Yet, such experiences are not intended to be part of the punishment or form part of the objectives of incarceration.

[772] See e.g. *Padilla v Kentucky*, 559 US 356, 130 S Ct 1473 (2010).

[773] See e.g. *R v Pham*, 2013 SCC 15, 357 DLR (4th) 1, 2013 CarswellAlta 296 (WL Can).

[774] *Padilla*, *supra* note 772.

As such when there is a well-founded fear of persecution, the stakes for the asylum-seeker are heightened when facing exclusion, rather than just a "mere" deportation where no such fear exists. If deportation absent a well-founded fear of persecution may already be considered a particularly severe penalty, then the existence of such fear justifies empowering courts and tribunals to consider the totality of the circumstances when determining whether it is just to exclude a person who otherwise qualifies for refugee status. Indeed, to draw from another principle of criminal sentencing, mandatory exclusion may very well be a disproportionate response to circumstances that mandate a more tempered approach.

Just as in sentencing, where judges may draw upon a wider range of punishments including incarceration, suspended sentences, fines, probations and confinement in one's own residence, refugee adjudicators should have some options at their disposal when considering the fate of a person who otherwise qualifies for refugee status but who has committed an Article 1F(a) crime. First, if the aggravating factors substantially outweigh any mitigating circumstances, it may be more than appropriate to exclude the asylum-seeker altogether following an Article 1F(a) analysis. Second, where the mitigating circumstances substantially outweigh the aggravating circumstances, asylum-seekers should be eligible for refugee status without any conditions placed on their status and receive indication from the appropriate authority that they will not be prosecuted for commission of the crimes.

A third option may be that the military deserter receives refugee status but it is conditioned on their willingness to accept guilt if charged by the relevant prosecuting authority in the granting state for any Article 1F(a) crimes (at least within a certain period of time). In order to prevent subsequent deportation, legislation would have to permit such persons to remain in the host country after serving whatever sentence is imposed and/or in fulfillment of an agreement to provide information to domestic or international authorities about the crimes which they witnessed. This may not only mitigate the controversial and contentious criticism of granting refugee status to deemed international criminals without any repercussions to them, but may be entirely appropriate. Such an approach recognizes that individuals who have a well-founded fear of persecution are deserving of protection but their involvement in such serious crimes is such that they should still be punished in a manner proportionate to their crime in light of all the circumstances. The following case is perhaps an illustration of an unjust result for which this third option may have been more appropriate had the legal architecture permitted it.

In a decision by the Immigration Appeal Board of Canada in the late 1980s, Zacarias Osario Cruz, a soldier with the Mexican military was granted asylum despite his involvement in the extra-judicial executions of numerous perceived political opponents of the government.[775] During the executions, the bodies (including their heads and faces) were shredded by so many bullets that the victims were rendered unrecognizable. The Board's decision leaves the extent of

[775] *Cruz*, *supra* note 768.

Cruz's involvement unclear. What is revealed is that Cruz was ordered to "bring out prisoners, take them to a shooting range […] and get rid of them."[776] It is not evident whether the order to "get rid of them" entailed Cruz himself firing a weapon and/or partaking in the disposal of the bodies. It is likely however that even the act of taking the prisoners to the firing range itself knowing that they would be executed would be sufficient to attract exclusion under Article 1F(a) on an accomplice theory of liability had it been applied.

After being involved in such executions, Cruz sought a transfer several times but was denied. After hearing about the deaths of a superior officer and another soldier who were killed after expressing a desire to no longer participate in such executions, Cruz managed to desert and flee to the United States before finally coming to stay and claim refugee status in Canada.

The Board concluded that Cruz was entitled to obtain refugee status based on a "well-founded fear of persecution by reason of his political opinions, which prevented him from associating himself with a type of military action that is contrary to the most basic international rules of conduct."[777] Furthermore it observed that in "deserting from the army and telling the whole world, as it had never been told before, the story of the atrocities committed by officers of the Government of Mexico, Mr. Osorio Cruz betrayed oath of obedience, [and] became a traitor in the eyes of some Mexican authorities[…]."[778]

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[776] *Ibid* at para 9.

[777] *Ibid* at para 41.

[778] *Ibid* at para 37.

The *Cruz* decision presents a problematic result and strikingly one which the government of Canada ultimately decided not to appeal.[779] Hathaway, in making his statements about a utilitarian approach observed that Cruz's protracted involvement in crimes against humanity may have been too egregious to warrant refugee status on any basis. He asserted however that in a case of "a less confirmed criminal one might reasonably consider whether the value of disclosure of previously covert inhumane conduct does not offset the general rule against sheltering an admitted criminal."[780]

What is striking about the decision is that there was no application of Article 1F(a) nor any explanation as to why it was not applied. Perhaps seeing the benefits of Cruz's information, the Board decided to conveniently ignore it lest they find themselves in a position where they would have no choice but to exclude him had the clause been applied. As Hathaway correctly observed there is no recognized utilitarian defence which would have excused Cruz's actions. However, it is not clear why a utilitarian rationale should even operate as a "defence" rather than serve as a mitigating factor once it has been determined that the asylum-seeker has committed the crime. In other words, if an asylum-seeker has committed an Article 1F(a) crime (an aggravating factor), the utilitarian rationale in conjunction with any other extenuating considerations should operate as a mitigating factor, rather than as an actual defence.

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[779] Rohter, *supra* note 768.

[780] Hathaway, *supra* note 757 at 219.

Absent a clear defence recognized by law, there is a value in recognizing when an individual who otherwise qualifies for refugee status nevertheless bears responsibility for committing one or more of the serious international crimes enumerated in Article 1F(a). In Cruz's case, a complete exclusion may not have been the best course of action, yet refugee status without any recognition of his responsibility or consequences is utterly problematic in its own right. An individual's well-founded fear of persecution may make them a victim or prospective victim, but this does not erase their responsibility for the criminal act(s) they have committed. A person may be worthy of protection while still recognizing their responsibility in having committed international crimes. Granting refugee status does not have to mean conferring some form of absolution for their crimes or to be wilfully blind to those serious offences. States can fulfill both their commitments to protect individuals who otherwise qualify for refugee status while holding them individually responsible for their breaches of international law.

VI. The Role of Duress in the Commission of a Crime

Once it has been determined that an individual has committed an Article 1F(a) crime, there are a number of relevant factors that should be considered in order to assess whether such person should be excluded or should be eligible for unconditional or conditional refugee status. These would include, *inter alia*, the extent of the individual's role in perpetrating the crime, their rank or position when the crimes were committed, the information that they would be willing to provide about the crimes committed, and their own acts of resistance against the

relevant authorities, including desertion. While it is not my objective to enumerate every possible factor that should be considered, I shall highlight in this section the importance of considering in particular the role of force or duress in compelling a soldier to commit an Article 1F(a) crime.[781] In a number of conflicts, soldiers may find themselves compelled to engage in Article 1F(a) crimes as principals. Such compulsion may not excuse them of their conduct as a matter of law but it should be an important consideration when contemplating whether they should be excluded.

Duress is an important if not compelling factor which should most certainly be incorporated into any analysis regarding exclusion, particularly where there is a threat of imminent death to a soldier who has refused or demonstrated an unambiguous reluctance to carry out a 1F(a) crime.[782] This is especially so in

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[781] There are a number of decisions which employ a series of factors to examine whether a person has committed Article 1F(a) crimes. While some of the factors used are material to such an analysis, others are irrelevant to this process. Indeed amongst the latter category, they are actually relevant to considering mitigating or aggravating circumstances surrounding the commission of the crime. Notably, these factors do not apply to principals to an offence, nor do they consider the circumstances related to compulsion. The factors that are considered include: (1) the nature of the organization to which the asylum-seeker belonged; (2) the Method of the asylum-seeker's recruitment; (3) the asylum-seeker's position/rank in the organization; (4) the asylum-seeker's knowledge of the organization's atrocities; (5) length of time spent in the organization; and (6) the asylum-seeker's opportunity to leave the organization. See e.g. *Petrov v Canada (Citizenship and Immigration)*, 2007 FC 465, 2007 CarswellNat 4114 (WL Can).

While this approach suggests judicial attempts to mitigate against the harsh effects of exclusion, at least with respect to accomplices, there are certain flaws. First, as noted it does not apply to principals to a crime, even where there are circumstances that may indicate compulsion in the commission of the crime. Second, the incorporation of mitigating and aggravating circumstances into a determination of whether a crime has been committed is ill-conceived. Factors that go toward assessing whether there are mitigating or aggravating circumstances are irrelevant to a finding of whether someone has committed a crime.

[782] There is some argument to be made that the defence of duress would be applicable here and thus might serve to excuse a refugee applicant face with exclusion under Article 1F(a). However, there is presently no consensus amongst states that comprise the international community as to whether duress qualifies as a defence in the case of murder. Duress normally applies where an accused carries out an unlawful against another due to a threat posed by a third party. In several common law countries, the defence is not permitted in the case of murder (as well as other serious

view of the fact that international and municipal law has recognized duress as a mitigating factor in sentencing,[783] even though not as an applicable defense for principals to a crime.[784] For some jurists, soldiers should not escape liability for participating in unlawful killings, even if refusal would mean forfeiting their own life in the process.[785] The prosecution of Drazen Erdemovic before the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY) provides an illustration of some of the dilemmas involved.

Erdemovic was a conscripted soldier in the Bosnian military in the early 1990s when massacres of Bosnian Muslims were taking place. He at first refused

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crimes), whereas the defence is permitted in several civil law jurisdictions. However, in the case of Canada, see *R v Ryan*, 2013 SCC 3, [2013] 1 SCR 14, 2013 CarswellNS 31 (WL Can). The *Rome Statute* allows duress as a defence and does not explicitly limit the defence to non-murder cases. See *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90, art 31(1)(d) (entered into force 1 July 2002). But this does not necessarily stand as the definitive statement of the state of international law on this defence, however persuasive. The Appeal Chamber for the International Criminal Tribunal for the Former Yugoslavia held that duress did not serve as a defence to murder. See my discussion below regarding the *Erdemovic* case.

[783] See e.g. *Crimes (Sentencing Procedures) Act 1999* (NSW), s 21A(3)(d); Tenn Stat 40-135-113; NC Stat §15A-1340.16(e)(1); and 42 PA CSA §9711(e)(5). See my discussion below regarding the *Erdemovic* case with respect to how duress is considered a mitigating factor in international criminal law.

[784] Under Canadian criminal law, and particularly s 17 of the *Criminal Code*, duress cannot be used as a defence for various crimes including murder where the accused is charged a principal to the offence. *Criminal Code*, RSC 1985, c C-46, s 17. On the other hand, accomplices to an offence may assert a duress defence under the common law for the very offences excluded under s 17. This is a curious application in particular since the Supreme Court of Canada has held that the difference between a principal and aider to an offence is to be considered irrelevant. *R v Thatcher*, [1987] 1 SCR 652, 39 DLR (4th) 275, 1987 CarswellSask 338 (WL Can).

[785] There has even been some judicial debate as to whether soldiers should even be expected to legally intervene in the face of international violations taking place in front of them, even if they are not forced to participate. As one Canadian judge passionately observed, "To be purposely inflicted with agonizing pain in the presence of other humans who will not come to one's help, is to be doubly tortured, for it creates utter despair. The "mere" watcher is just as culpable a torturer as the actual physical torturer." *Naredo v Canada (Minister of Employment & Immigration)* (1990 11 Imm LR (2d) 92 at 112, 37 FTR 161, 1990 CarswellNat 43 (WL Can) (FCTD). In a subsequent decision by Canada's federal court of appeal, the court rejected this arguing that one "cannot establish a general rule that those who look on are always as guilty as those who act[;] there is no liability on those who watch unless they can themselves be said to be knowing participants." *Ramirez*, *supra* note 753 at para 21.

to take part in a mass killing of such non-combatants. Erdemovic was explicitly threatened that if he refused to participate in the mass killings, he would be forced to join the intended victims and be murdered as well. Consequently, Erdemovic decided to participate in the killings by firing his weapon despite his own moral revulsion. He was subsequently prosecuted by the International Criminal Tribunal for the former Yugoslavia. The ICTY's Appeals Chamber held, in line with the dominant common law rather than civil law approach that a defence of duress did not apply in the case of murder and certainly not in the murder of hundreds of innocent non-combatants. Judges McDonald and Vohrah posited that "soldiers or combatants are expected to exercise fortitude and a greater degree of resistance to a threat than civilians, at least when it is their own lives which are being threatened. Soldiers, by the very nature of their occupation, must have envisaged the possibility of violent death in pursuance of the cause for which they fight."[786] Consequently, "it is unacceptable to allow a trained fighter, whose job necessarily entails the occupational hazard of dying, to avail himself of a complete defence to a crime in which he killed one or more innocent persons."[787]

Judges Vohrah and McDonald's discourse, in a problematic way elevates the concept of the soldier as a noble selfless symbol willing to confront their own demise. This is even where death is inevitable for the intended victims he is supposed to refuse to kill and to do so alone if necessary.[788] This establishes a

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[786] *Prosecutor v Erdemovic*, IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah (7 October 1997) at para 84.

[787] *Ibid*.

[788] The *ZH* case comes closest to this normative expectation, yet even in that case, Z's penultimate act of resistance came with the pre-agreed upon assistance of two other cadets. Refugee Appeal

considerably high normative expectation which relatively few are likely to be able to adhere to in isolation. Vohrah's and McDonald's construction did not go unchallenged however. In his dissenting opinion in *Erdemovic*, Judge Cassese argued that "[l]aw is based on what society can reasonably expect of its members. It should not set intractable standards of behaviour which require mankind to perform acts of martyrdom, and brand as criminal any behaviour falling below those standards."[789] This is particularly so when such resistance would likely have been extremely limited if not futile. As Judge Stephen also observed in his dissenting opinion in *Erdemovic*, it was unlikely that Erdemovic's presence as a Croatian soldier placing himself in the line of fire would have dissuaded his fellow Bosnian Serb soldiers from shooting. This is evidenced by the fact that none of his colleagues supported his protests against the killings when he uttered them and given the presence of others who took immense pleasure in killing and brutalizing the victims.[790]

Thus one can argue that, even though a defense of duress is not recognized under contemporary international criminal law, jurisprudence reveals enough juridical hesitation that at least in cases of extreme threat to soldiers' lives, there are compelling reasons for recognizing that a soldier who has been explicitly

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No 2248/94, *Re ZH* (NZ Refugee Status App Auth 1995). The Milgram studies discussed earlier in this thesis have applicability here. Individuals may be more willing to engage in resistance or disobedience when they know that others are in agreement and are prepared to act accordingly. Where they are alone, many will act in conformity with the expectations imposed on them at the moment. See Herbert C Kelman & V Lee Hamilton, *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility* (New Haven: Yale University Press, 1989) at 148-66.

[789] *Prosecutor v Erdemovic*, IT-96-22-A, Dissenting Opinion of Judge Cassese (7 October 1997) at para 47 [*Cassese Opinion*].

[790] *Prosecutor v Erdemovic*, IT-96-22-A, Dissenting Opinion of Judge Stephen (7 October 1997) at para 19.

forced to commit and participate in mass atrocity should not be summarily excluded from being granted refugee status. Indeed as I have articulated here, it should serve as a compelling mitigating factor against exclusion.

One might conversely have a stronger basis for reservations where a soldier, having already been part of such crimes, participates in further atrocities or other similarly manifest violations of international law involving the loss of human life before finally deserting. It may be understandable in the face of an immediate threat to one's life with little or no time for reflection and no time to escape to carry out an unlawful order. It is another thing for a soldier knowing the nature of the military operations (having been forced to participate in them at least once) and the murderous attitudes of his/her commanding officers to remain without attempting to desert sooner, if there was a viable possibility to do so.[791] It may be arguable as well that even in circumstances that are less than ideal it should be expected of a soldier to attempt to desert even if it poses a serious risk and where there is no immediate threat to their life. This may become more incumbent where the character of the crimes is more serious and involves the greater loss of life.

Such inquiries are not simple endeavours to undertake. But they are or should be considered part and parcel of the challenges of refugee status determinations. Individuals seeking refugee status cannot be seen as simplistic caricatures that come without flaws or serious lapses, nor do all of them come posing as hapless victims of injustice. Some of them are soldiers who have been ordered to do unspeakable things or be complicit in some way and in particular

[791] See *Ramirez*, *supra* note 753 at paras 37-38.

cases compelled to do so under the threat of imminent death. To view soldiers as being worthy of refugee status often conflicts with the imagery of refugees as symbols of victimhood. Soldiers are viewed as agents; refugees are largely viewed as being deprived of agency. Soldiers are often seen as heroic and valorized figures when they fight or for their willingness to fight oppressive actors. They are by contrast perceived as cowards if they desert or refuse to engage in combat. Or, alternatively they are excoriated as war criminals when they engage or are complicit in violations of international law.

A more complex and nuanced view may be that it can be un-heroic to participate in an unlawful war of aggression generally or at the very least specific military operations that entail numerous violations of international norms. Furthermore, it may be heroic to desert and refuse to participate in such an unlawful war, particularly when there are significant social, political, and economic factors that militate toward conformity. Soldiers may participate in international crimes, but the context in which the crimes are committed must be accounted for. There is a difference between the individual who does so continuously and in some cases enthusiastically and the individual who demonstrates reluctance if not a sense of guilt or remorse as it is happening. What emerges is a more complex (and likely traumatized) figure who should not simply be excluded from protection through the operation of legal provisions that cannot account for context and circumstances. It is perhaps worth noting Cassese's observation that "the purpose of criminal law, including international criminal law, is to punish behaviour which is criminal, i.e., morally reprehensible or

injurious to society, not to condemn behaviour which is "the product of coercion that is truly irresistible" or the choice of the lesser of two evils."[792] In a similar way, refugee law should not exclude persons for behavior that is similarly the product of such coercion which may appropriately described as moral involuntariness.

VII. Conclusion

Resistance does not always take place at the most opportune moments. With respect to soldiers who object to the commission of international crimes transpiring around them and perpetrated by members of their own armed forces, an act of desertion may only occur after a certain amount of deliberation and/or opportunity to escape avails itself. Prior to their desertion, the resisting soldier acting under orders may have committed an international crime themselves, either as a principal or accomplice. If the soldier manages to escape and reach a Third Party state and request asylum, an analysis as to whether they should be excluded should be done in a fashion resembling a sentencing hearing which accounts for the mitigating circumstances weighed against aggravating factors. Such an approach, I argue may lead to more just consequences rather than an immediate exclusion. In so doing, States can then further the humanitarian goals of international law, protect an individual who qualifies for refugee protection, and punish them, where appropriate for their participation in criminal acts.

[792] *Cassese opinion*, *supra* note 789 at para 48.

Conclusion

This thesis has sought to provide a thorough examination of the case law produced by courts and refugee tribunals within several states party to the 1951 *Convention Relating to the Status of Refugees* and/or the 1967 *Protocol Relating to the Status of Refugees* with respect to asylum claims by resisters. The first chapters demonstrate that the decisions provided important lessons about the intersections between law and resistance. First, chapter one shows that individuals can act as agents in advancing international legal norms and principles even if holding very limited status as legal subjects. Through the decisions, we have an opportunity to hear, albeit in limited ways, their voices and the reasons for why they have engaged in their acts of resistance. Second, chapter two illustrates how state courts and tribunals legitimized these acts of resistance by allowing them to be subsumed within the rubric of a "political opinion". Through these chapters, resisters can be seen as advancing a number of important international legal norms relating to human rights, humanitarian law as well as international norms against corruption. Chapter three argues that by qualifying such resisters for refugee status, we may also see refugees in a more nuanced way as having attributes of both agency and victimhood. In so doing, they disrupt one of the common stereotypes of refugees as merely passive victims of persecution.

Part two of the thesis however demonstrates that through various limitations, the significance of the cases discussed in the first chapter must also be qualified. I shall offer some thoughts with respect to their significance for each category of resister/resistance.

I. Limiting Armed Resistance

Amongst the three classes of resisters discussed, armed resisters and those who are complicit in their actions are the most susceptible to having their claims for asylum refused. This is certainly the case in countries like Australia, Canada and the United States. As demonstrated in chapter four, such legislation will very likely have a tremendous impact on the claims of armed resisters seeking refugee status. To recall, such legislation is focused solely on the means used – namely the use of violence or force – but fails to account for the actual targets, the proportionality of the violence used, as well as the nature of the political objectives. These are factors that courts and tribunals applying the "political crimes" test under Article 1F(b) of the *Refugee Convention* tend to look to. Such factors represent, at the very least, a reasonable series of considerations. Furthermore, through an examination of the political crimes jurisprudence, the judiciary and tribunals have also demonstrated their ability to produce many rational decisions that culminate in sound conclusions with respect to the exclusion of individuals who have committed "serious non-political crimes" and have where appropriate designated certain offences to constitute "political crimes".

It is perhaps worth recognizing however that the formulation and interpretation of law is at least partly contingent on cultural attitudes toward those engaged in violent actions. In the aftermath of the unprecedented attacks of September 11, 2001, many legislators came to view the use of force for whatever cause as a basis for inadmissibility or exclusion. If cases such as *Singh* (from

Australia), *Dwomoh* and *Izatula* (from the United States) or *Ahmed* (from Canada) were litigated today, the outcomes would likely be far different due to the passage of such legislation. Yet because attitudes can change due to new circumstances and developments, legislatures may revisit the provisions in question and decide to repeal or limit their breadth considerably. This might very well restore the persuasive appeal of such decisions in the jurisdictions from which they emerge. This would be welcome in light of the sensitivity many judges or tribunal decision-makers have demonstrated with respect to cases of resisters that have come before them, Also, in jurisdictions where such broadly worded legislation have not been adopted, these cases may still stand as persuasive foreign authority.

It is also worth observing that in the past two years, governments in the Global North have provided assistance to armed resisters in Middle Eastern and North African states – resisters, who, interestingly, if they sought refugee status in Canada, Australia or the United States would (likely) be excluded or deemed inadmissible. Perhaps this reality may also provide some basis for legislative reform.

What we can discern from the impact of such legislation is that the only forms of resistance some states will recognize as legitimate will largely be non-violent in nature. This therefore comes in the form of desertion, refusal to commit certain actions or the reporting misconduct to the state. Clearly, these are also valid acts of individual agency, but it is difficult to understand why they should be seen as the only legitimate forms of individual agency. To re-iterate the absence of such broadly worded clauses does not give those who adopt the use of force the

right to use any means they feel appropriate. As the political crimes jurisprudence indicates, courts are no less vigilant about who may cross the threshold and gain refugee status.

II. Desertion and Selective Conscientious Objection

The jurisprudence discussed in the first chapters clearly indicate the importance that international refugee law has accorded to deserters who manifest a selective conscientious objection to being associated with military action which is condemned by the international community as contrary to the basic rules of human conduct. This is by no means an easy standard to meet. By either granting refugee status or recognizing their ability to qualify for it, courts and tribunals have demonstrated a certain legitimization toward this form of resistance. Furthermore, it recognizes that soldiers and officers play an important role in combatting violations of humanitarian law by either stopping it (even if temporarily in the case of *ZH*) or as in most other cases, refusing to perpetrate them in some way.

As chapters six and seven discuss, the acceptance of selective conscientious objection has certain limits. In chapter six, I focused on an issue that has arisen within the context of United States soldiers seeking refugee status in Canada on the basis of their objection to the Iraq war. To recall, most Canadian courts, drawing from the federal court of appeal, view the United States' system of military justice as providing adequate safeguards for due process. While recent federal court decisions have impugned this presumption of due process in the United States military court system due to the lack of judicial independence, I

articulated that there is a broader concern that must also be addressed. Specifically, desertion is in essence a political crime and as such there are reasonable grounds to suggest that the ability to secure a fair trial free from political bias is questionable. However, as noted, not all desertions will or should secure an individual refugee status even if undertaken on political grounds. The standard set in paragraph 171 of the *UNCHR Handbook* will ensure that it is only in a limited set of circumstances that desertion will be recognized as a valid act.

In chapter seven, I discussed a further potential problem which may arise in connection with deserters seeking asylum – which is that prior to their desertions, they may have been forced to commit war crimes or crimes against humanity. As indicated in Article 1F(a) of the *Refugee Convention*, persons who commit such crimes are to be excluded and there is nothing to indicate the principles of mitigation are to apply. As I argued, Article 1F(a) should be revised to permit states a certain amount of discretion to account for extenuating circumstances. States should be permitted to grant refugee status and simultaneously contemplate the possibility of initiating criminal proceedings against the claimant to answer for any crimes. States should be permitted to grant conditional status subject to the asylum-seekers agreeing to plead guilty to crimes they committed, assuming such proceedings are initiated within a certain period of time after conditional status has been granted. This will permit states to fulfill their humanitarian obligations by not sending someone who has a well-founded fear of persecution back to their country of nationality while advancing

international criminal law by prosecuting such persons if state (or international) authorities deem it appropriate.

III. Resistance to Corruption and Economic Oppression

While they have received little or no attention by legal scholars, cases concerning resistance to corruption as a form of economic repression mark an important development in international refugee law. As was raised in chapter two, the impact of corruption particularly by state actors cannot be understated for they impact on the enjoyment of human rights, including economic rights. The cases discussed in chapter two affirm a certain importance that the international community has placed on combatting corruption through international law. The ways in which individuals resist such corruption are varied. They can involve the refusal to pay bribes, the reporting of criminal acts of state agents to government authorities, as well as exposing corruption to a wider audience for public scrutiny through newspaper articles or open protests.

Courts and tribunals have placed a significant limit on this. Where the corruption or other forms of economic repression to which they object are perpetrated by non-state actors who have no ties to the state, courts have disallowed refugee claims on the basis that the claimants' well-founded fear of persecution relates to an opinion or objection to criminality, but not about wrongful actions of the state, its actors or even non-state actors tied to the state. This limitation is problematic for as I discussed in chapter five, the notion of what is political needs to be seen more broadly.

IV. Expanding the Boundaries of the "Political"

As I examined in chapter five, one of the limitations that courts and tribunals have imposed in connection with granting refugee status with respect to a well-founded fear of persecution for a political opinion is that the agents of persecution who are non-state actors must have some tie to the state or seek to displace or challenge the state. International refugee law, in this respect, has in many ways failed to see how political resistance can still be political while being waged against such non-state actors. As I illustrated in connection with drug cartels and organized criminal gangs, such groups exercise an enormous amount of power which inflicts harm in substantial ways against affected individuals and communities in civil society.

While resistance to military action that violates international law or resistance to state corruption garners support in refugee jurisprudence, the same concern has not been extended to resistance to non-state actors who also serve as the agents of persecution. Resistance can take the shape of refusing to join or be associated with criminal organizations that in their own right commit human rights violations and criminal actions. It can also take the shape of refusing to acquiesce to other demands such as extortion, or engage (however rarely) in direct action incorporating the use of force.

As I identified in chapter five, the recognition of a broader understanding of what is "political" in the context of the *Refugee Convention* has been recognized by the United Nations High Commissioner for Refugees, the Qualification Directives of the Council of the European Union as well as jurists

like Justice Mary Gaudron of the High Court of Australia. Courts more broadly may too increasingly come to see the value of such an expanded interpretation.

V. Concluding Thoughts

International refugee law as a subset of international law has an important and compelling part to play in protecting resisters. Accordingly it should be mobilized to protect those who engage in actions which in turn advance international norms with respect to human rights, humanitarian law and norms against corruption. If it does not, it will fail in fulfilling its own humanitarian objectives while contributing to the impression that international law is just a body of law that aspires to provide numerous protections but which are largely unenforced.

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