

Tough on Terror, Short on Nuance: Identifying the Use of Force as a Basis for Excluding Resisters Seeking Refugee Status

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The use of force has been a significant feature of many political struggles and resistance movements. The consequences for its participants may include the possibility of persecution, if not death. Some will flee and seek protection under the auspices of the 1951 Convention Relating to the Status of Refugees. Since the attacks of September 11th 2001, governments in Australia, Canada and the United States have passed broad national security legislation that effectively renders such persons inadmissible or excluded for the purposes of acquiring refugee status. Regardless of context, the targeting of government actors and the use of proportionate means, all political violence under such legislation becomes invalid. In this article, the author takes the position that such legislation should be repealed. In its place, Article 1F(b) of the Convention can be used to exclude those who engage in serious non-political crimes while allowing those who perpetrate legitimate political crimes to obtain refugee status. Article 1F(b) is the perfect tool as the purpose of the provision was to protect political resisters while excluding those who failed to observe the distinction between civilians and legitimate targets or who adopted disproportionate means and methods. Prevailing political crimes jurisprudence demonstrates that courts and tribunals possess the capability to differentiate between uses of force that are legitimate while rejecting those that are not. They have done so by engaging in nuanced and contextual analyses.

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L'utilisation de la force est l'une des caractéristiques principales des mouvements de résistance politique. Les membres de ces mouvements de résistance risquent la persécution, voire la mort. Certains d'entre eux décident de fuir et demandent la protection conférée par la Convention de 1951 relative au statut des réfugiés. Depuis les attaques du 11 septembre 2001, les gouvernements en Australie, au Canada et aux États-Unis ont adopté des lois en matière de sécurité nationale qui, de fait, résultent en l'interdiction de territoire de ces personnes ou en leur exclusion du statut de réfugié. Indépendamment du contexte, du ciblage des acteurs gouvernementaux, ou de l'utilisation de moyens proportionnés, toute violence politique perpétrée devient invalide en vertu de ces lois. Dans le présent article, l'auteur considère que ces lois devraient être abrogées. À sa place, l'article 1F(b) de la Convention relative au statut des réfugiés peut être utilisé afin d'exclure ceux qui commettent de graves crimes non politiques, tout en permettant à ceux qui commettraient des crimes politiques légitimes d'obtenir le statut de réfugié. L'article 1F(b) est l'outil tout indiqué, car son objectif était de protéger les membres de mouvements de résistance politique, exception faite des personnes qui ne font pas de distinction entre cibles civiles et militaires, ou qui ont adopté des moyens et des méthodes disproportionnés. La jurisprudence prédominante portant sur les crimes politiques démontre que les tribunaux possèdent la capacité de distinguer les recours à la force qui sont légitimes et de rejeter ceux qui ne le sont pas. Ils y sont parvenus en effectuant des analyses nuancées et contextuelles.

I. Introduction

Al-Qaeda's cataclysmic attacks on the United States on September 11th, 2001 ("9/11 attacks") were unprecedented and their impact has been far-reaching. This article addresses one of the more striking ramifications that has ensued within the framework of refugee law in response to the attacks: the deemed exclusion or inadmissibility of almost any person seeking asylum who has engaged in violence against a state or its actors, regardless of the context, circumstances or nature of the government being opposed.² However, before discussing these legal developments, I first set out two important provisions that define who qualifies as a refugee under international law.

The 1951 *Convention Relating to the Status of Refugees*³ (as modified by the 1967 *Protocol Relating to the Status of Refugees*⁴) defines a refugee as one who, "owing to [a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ...".⁵ However, neither this definition nor the benefits of the *Convention* extend, pursuant to Article 1F(b), "to any person with respect to whom there are serious reasons for considering that ... [h]e has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee".⁶ Implicit from this language and absent any other disqualifying criteria, a person who has committed a political crime (e.g. an act of resistance involving the use of force against a violent totalitarian regime) may still qualify as a refugee. That is, until several legislatures reacting to the 9/11 attacks intervened.

In the months following the 9/11 attacks, legislatures in Australia, Canada and the United States took swift and significant steps to curtail the availability of refugee status to individuals who engaged in violent political acts, and did so regardless of context or justification.⁷ For instance, Canadian

² As Geoff Gilbert asserts, following the 9/11 attacks, there was significant international concern that terrorists would exploit refugee protection mechanisms. Geoff Gilbert, "Running Scared Since 9/11: Refugees, UNHCR, and the Purposive Approach to Treaty Interpretation" in James C Simeon, ed, *Critical Issues in International Refugee Law: Strategies Toward Interpretative Harmony* (New York: Cambridge University Press, 2010) 85 at 85-88.

³ *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) [*Convention*].

⁴ *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967). The *Convention* originally only applied to events that took place prior to January 1, 1951, and at the election of the State Party, only to events that took place in Europe. Article 1 of the *Protocol* removed the temporal and geographic limitation stated in the *Convention*.

⁵ *Convention*, *supra* note 3, art 1A(2).

⁶ *Ibid*, art 1F(b).

⁷ Gilbert, *supra* note 2 ("after 11 September 2001 states brought in new legislation that emphasised exclusion from refugee status" at 92); James C Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd ed (New York: Cambridge University Press, 2014) ("states have adopted definitions of terrorist acts in the context

law since early 2002 has rendered inadmissible foreign nationals (including asylum-seekers) who engage in or instigate “the subversion⁸ by force⁹ of any government”.¹⁰ By referencing governments as the targets of such activities, it is clear that those who engage in political crimes are deemed inadmissible. The breadth of the provision is also striking; it does not limit itself to attacks on democratic governments (as prior legislation did) but extends to literally any (form of) government that exists – even a violent totalitarian regime.¹¹ To illustrate the impact of such a broadly worded provision, one Federal Court of Canada justice observed that there is no doubt that had such a provision been in force at the relevant times, it “could have had [a] 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.”¹²

The Australian and United States governments similarly passed far reaching legislation that limited the scope of Article 1F(b) either directly or by necessary implication. The Australian government redefined “political offence” as referenced in Article 1F(b) of the *Convention* above to exclude “an offence that involves an act of violence against a person’s life or liberty”.¹³ United States immigration law excludes individuals who are part of a “terrorist organization” or engage in “terrorist activity”.¹⁴ 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 as set out

of refugee and related immigration law that are startlingly broad, a concern perhaps most strikingly exemplified by legislation adopted in the United States” at 560 [footnotes omitted].

⁸ 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”. *Maleki v Canada (Minister of Citizenship and Immigration)*, 2012 FC 131 at para 8, [2012] 211 ACWS (3d) 172 [*Maleki*].

⁹ The phrasing “by force” has been interpreted by courts to include “coercion or compulsion by violent means, coercion or compulsion by threats to use violent means, and... reasonably perceived potential for the use of coercion by violent means.” *Oremade v Canada (Minister of Citizenship & Immigration)*, 2005 FC 1077 at para 27, [2006] 1 FCR 393 [*Oremade*].

¹⁰ *Immigration and Refugee Protection Act*, SC 2001, c 27, s 34(1)(b) [*IRPA*] [emphasis added]. This provision applies to refugees. In *Maleki*, *supra* note 8, the applicant sought refugee status in Canada. However, based on statements she made about being a member of an organization in Iran that opposed the government by force, a report was prepared by a delegate of the Minister of Citizenship and Immigration indicating that she was inadmissible on the basis of s 34(1)(b) (and s 34(1)(f) for being a member of an organization that engaged in acts prohibited under s 34(1)(b)) of the *IRPA*. Under this process, inadmissibility hearings take place before the Immigration Division of the Immigration and Refugee Board rather than the Refugee Protection Division. See also *Tjizeza v Canada (Citizenship and Immigration)*, 2009 FC 1260, [2009] 184 ACWS (3d) 479.

¹¹ See *Immigration Act*, 1976–77, c 52, ss 19 (e)–(f). 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” (*ibid*, s 19(f)(i)).

¹² *Oremade*, *supra* note 9 at para 17.

¹³ *Extradition Act 1988* (Cth), s 5; *Migration Act 1958* (Cth), s 5, 91T.

¹⁴ 8 USC § 1182 (a)(3)(B).

in the *Immigration and Nationality Act* [INA].¹⁵ “Terrorist activity” is in turn 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)...”.¹⁶ Notably this includes, amongst other acts,¹⁷ 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.”¹⁸

These provisions are extensive in their scope, as there is no distinction made as to whether the persons or individuals who are the object of the violent attacks are government or military actors. The person or individual in question whose safety may be endangered, or whose life or liberty is impacted, can range from a child to a dictator or a member of his or her security personnel.¹⁹ Gilbert makes the astute point that “[l]abelling something as terrorism is a matter of political choice rather than legal analysis, distinguishing it in some indecipherable way from the more ‘acceptable’ conduct of the so-called freedom fighter.”²⁰ Terrorism effectively becomes “a buzz word, a blanket term for violent crimes and, as such, too imprecise to assist critical analysis.”²¹

¹⁵ *Ibid.*, § 1182 (a)(3)(B)(vi)(III). The terrorist activities in question are set out in (*ibid.*, § 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 (*ibid.*, § 1182 (a)(3)(B)(vi)(I) and (II)).

¹⁶ *Ibid.*, § 1182(a)(3)(B)(vi)(III).

¹⁷ *Ibid.*, § 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) hijacking or sabotage of any conveyance; (b) taking an individual 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.

¹⁸ *Ibid.*

¹⁹ As an illustration of this, a refugee claimant was excluded for providing “material support” as a form of “terrorist activity” to a terrorist organization. This organization was a national liberation group that employed armed resistance against the military government of Myanmar that was known to persecute opponents and minority groups. Juan Osuna, a member of the United States Board of Immigration Appeals criticized the broad language of this legislation. Osuna asserted: “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 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.” See *Re SK*, 23 I & N Dec 936 at 950, 2006 WL 1976710 (BIA) [emphasis added].

²⁰ Geoff Gilbert, “Current Issues in the Application of the Exclusion Clauses” in Erika Feller et al, eds, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (New York: Cambridge University Press, 2003) 425 at 440.

²¹ *Ibid.* However, this is not always the case. Indeed, United States law elsewhere defines terrorism much

As Judge Richard Posner of the United States Seventh Circuit Federal Court of Appeals acknowledged, the definitions of terrorist activity and terrorist organization in the *INA* stretch and deform these common definitions of terrorist or terrorism, found in other legislation, that associates it with the achievement of political ends and the targeting of non-combatants.²² In illustrating the breadth and seeming lack of limitation, Judge Posner observed that the statutory definition of “terrorist organization” is broad enough to encompass a pair of kidnapers.²³

In this article, I argue that states such as Australia, Canada and the United States need to seriously reconsider the necessity of such sweeping legislative provisions in its refugee legislation. As I shall argue, they are not vital to the goal of excluding unworthy asylum-seekers who have engaged in unwarranted political (or politically motivated) violence. Rather, I posit that Article 1F(b) and the concept of “serious non-political crimes” and its counterpart “political crimes” as developed by courts and tribunals in a number of jurisdictions provide more than an ample basis to differentiate between those who should be excluded from the protections of the *Convention* and those who should not be.²⁴ As shall be demonstrated through an examination of the political crimes jurisprudence, the various legal tests constructed by courts to determine whether a crime is political allows jurists to engage in a nuanced and contextually sensitive analysis without automatically excluding every individual who employs the use of force, no matter how legitimate and proportionate.²⁵ As part of this examination of the jurisprudence, I draw upon both the political crimes jurisprudence in refugee law as well as in the extradition context. The political crimes doctrine first originated in extradition law and came to influence the creation and development of political crimes under Article 1F(b). Although the legal tests in the refugee law and extradition

more narrowly as “premeditated, *politically motivated violence perpetrated against noncombatant* targets by subnational groups or clandestine agents”. 22 USC § 2656f (d)(2) [emphasis added].

²² *Hussain v Mukasey*, 518 F 3d 534 at 537–38 (7th Cir 2008).

²³ *Ibid* at 538.

²⁴ Though this is not to suggest that all political crimes analyses are unproblematic either. As Catherine Dauvergne and Asha Kaushal have pointed out, an examination of the political crimes doctrine in Canadian jurisprudence reveals some problematic trends as well. They argue that the interpretation of Article 1F(b) in Canadian law has in many instances identified violent acts as non-political acts. They assert that the “political” in effect has been redefined to exclude any acts of violence. They contend that “[t]he political is reserved for civilly disobedient individuals whose circumstances are free from complexity and thus clearly reside on the side of good.” Furthermore, “[v]iolence is increasingly cast as irrational and disproportionate, rendering it non-political regardless of motive. The result is that it is nearly impossible to commit a political crime of violent resistance within the terms of Article 1F(b).” Asha Kaushal & Catherine Dauvergne, “The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions” (2011) 23:1 Intl J Refugee L 54 at 72–74.

²⁵ As Gilbert rightly articulates, the *Convention* is international law but its implementation depends on domestic legislation and national judges. Therefore, examining the national jurisprudence is important given the absence of an international refugee court or tribunal to oversee treaty interpretation. Gilbert, *supra* note 2 at 92–93.

contexts differ to a certain degree, the central point is that they demonstrate that judges are capable of distinguishing between legitimate and illegitimate political crimes without the need for such legislative “add-ons”.

The article is divided into three main parts. The first part will examine the purposes of Article 1F(b) and why it is sufficiently suited for and designed to carry out the task of excluding unworthy candidates for refugee status. Furthermore, it will examine the intersections between extradition law and the creation of Article 1F(b), justifying the incorporation and examination of extradition jurisprudence on political crimes in this analysis. In the second part, I will examine the political crimes jurisprudence in both refugee law and extradition law with particular attention to the legal tests. In doing so, I will focus on decisions of various courts and tribunals in the Global North that have a developed jurisprudence on political crimes. I shall demonstrate that courts and tribunals have been adept at fashioning tests which have enabled them to exclude, in most cases, individuals unworthy of benefitting from the political crimes doctrine, thus rendering the legislative provisions noted above unnecessary. Most importantly, however, I will demonstrate that they have shown their ability to engage in nuanced context-based analysis in ways that current legislation does not permit or intend courts to engage in. In the third part, I will argue that it is not enough to have flexible legal tests that allow judges and tribunals to engage in contextual analyses if judicial and quasi-judicial decision makers pre-judge otherwise valid political crimes as presumptively illegitimate. After providing examples of such judgmental attitudes against political crimes that employ the use of force, I will discuss two particular Australian and New Zealand decisions that reflect a more sophisticated and nuanced approach to dealing with refugee cases relating to political violence. Specifically, they illustrate how courts may and should approach political crimes cases without slipping into simplistic labels that naively characterize all political violence as either acts of terrorism or as idealized and noble fights for freedom.

II. Examining Article 1F(b)

A. The Purpose of Article 1F

It is well recognized that the *Convention* is governed by strong humanitarian concerns that focus on the human rights of those who have a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion.²⁶ Refugee status has been extended

²⁶ The preamble to the *Convention* states that “human beings shall enjoy fundamental rights and freedoms without discrimination” and “that the United Nations has, on various occasions, manifested its

to individuals who have engaged in armed resistance against the state or who have conspired to do so.²⁷ Despite the protections and benefits afforded by the *Convention* to those who qualify as refugees, there are still serious and important limitations as to who may access them. Article 1F provides one such set of limitations. It articulates that the provisions of the *Convention* shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) 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;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; [or]
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.²⁸

The general purpose of Article 1F is to exclude individuals who have committed particularly serious crimes and whose designation as a refugee or access to the protections afforded by the *Convention* would undermine its legitimacy.²⁹ Geoff Gilbert adds that a second overall goal of Article 1F was to ensure that any individual who has committed an Article 1F crime did not escape prosecution.³⁰ This would include those who have committed “serious non-political crimes” under Article 1F(b). The pivotal reference to the political nature of the crime(s) noted in Article 1F(b) is crucial as those who have committed political crimes³¹ were clearly not to be barred from accessing the protections of the *Convention* absent other considerations, such as their having

profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms”. *Convention*, *supra* note 3, Preamble. See e.g. *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 at para 27, [2014] 3 SCR 431 [Febles]; *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 at para 32, [2013] 2 SCR 678; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 57, 160 DLR (4th) 193 [Pushpanathan].

²⁷ See *Ahmed v Canada (Minister of Employment and Immigration)*, [1988] 5 Imm LR (2d) 219, 1988 CarswellNat 42 (WL Can); *Dwomoh v Savah*, 696 F Supp 970 (SDNY 1988); *Matter of Izatula*, 20 I & N, Dec 149, 1990 WL 385750 (BIA 1990); Refugee Appeal No 1222/93, *Re KN* at 8–9 (NZ Refugee Status App Auth 1994). See also Amar Khoday, “Protecting Those Who Go Beyond The Law: Contemplating Refugee Status for Individuals Who Challenge Oppression Through Resistance” (2011) 25 Geo Immigr LJ 571.

²⁸ *Convention*, *supra* note 3, art 1F(a)–(c).

²⁹ The United Nations High Commissioner for Refugees (UNHCR) explains that the primary purpose of Article 1F is “to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts.” UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 Sept 2003, HCR/GIP/03/05 at para 2. See Gilbert, *supra* note 20 at 427–28.

³⁰ Gilbert, *supra* note 20 at 427–28.

³¹ *Minister of Immigration and Multicultural Affairs v Singh*, [2002] HCA 7, 209 CLR 533, Gleason CJ, [Singh] (“[a]s one of the exceptions to an international obligation to afford protection on certain grounds, it recognises a state’s interest in declining to receive and shelter those who have demonstrated a propensity to commit serious crime[s]. The qualification to the [political crimes] exception is that the crime must be non-political” at para 15).

committed crimes covered under subsections (a)³² or (c)³³ of Article 1F, or that they posed a threat to the national security of the country of refuge as provided for in Article 33(2).³⁴ The person who committed political crimes was seen, in the fuller sense, as being worthy of protection absent other considerations.

B. The Purpose of Article 1F(b) and Its Connection With Extradition Law

The reference to the political nature of the crimes in Article 1F(b) suggests a nexus between the provision and extradition law, particularly the desire to prevent fugitives from evading legitimate prosecution by obtaining refugee status. Extradition treaties deprive criminals of the ability to evade prosecution by simply fleeing to another jurisdiction. Extradition law, however, does not apply to every crime. During the early to mid-nineteenth century, extradition treaties between states started to include, increasingly, an exception where the offence(s) for which extradition is sought is one of a political character.³⁵ By the time the *Convention* was being drafted in the late 1940s, the political crimes

³² Though Article 1F(b) can sufficiently capture most terrorist attacks perpetrated for political reasons as serious non-political crimes, the other sections of Article 1F can also serve to exclude individuals who have committed acts of terrorism in other contexts. For example, Article 1F(a) excludes those persons about whom there are serious reasons to consider have committed war crimes or crimes against humanity. With respect to war crimes, international humanitarian law prohibits acts of terror against civilian populations. *Additional Protocol I*, which applies in the context of international armed conflicts, states that “[t]he 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.” *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 8 August 1977, 1125 UNTS 3, art 51(2) (entered into force 7 December 1978). Similar language also applies with respect to armed conflicts of a non-international nature. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 August 1977, 1125 UNTS 609, art 13(2) (entered into force 7 December 1978).

³³ Although the text of Article 1F(c) has been far more challenging to interpret, exclusion for acts of terrorism on the basis of Article 1F(c) are nevertheless a strong possibility, even if they would somehow not fall under Article 1F(b). The United Nations has specifically designated that “acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations”. SC Res 1373, UNSC, 2001, UN Doc S/RES/1373 (2001). The Supreme Court of the United Kingdom has recognized this in recent years. However, the use of Article 1F(c) requires close scrutiny lest it be employed as a catch-all category. Under Supreme Court of Canada precedent in *Pushpanathan*, those “responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting” will be excluded under this provision. *Pushpanathan*, *supra* note 26 at para 64. The Supreme Court of the United Kingdom has adopted a more restrictive approach drawing from UNHCR guidelines indicating that “Article 1F(c) is only triggered in extreme circumstances by activity which attacks the very basis of the international community’s coexistence. Such activity must have an international dimension. Crimes capable of affecting international peace, security and peaceful relations between states, as well as serious and sustained violations of human rights would fall under this category.” *Al-Sirri v Secretary of State for the Home Department*, [2012] UKSC 54 at para 38, [2013] 1 All ER 1267.

³⁴ *Convention*, *supra* note 3, art 33(2).

³⁵ The first states to include the political crimes exception included Belgium, France and Switzerland. The Franco-Belgian Treaty of 1834 was the first international instrument to incorporate a political offence exception. A decade later, the United States began to follow suit in their treaties. See *Ordinola v Hackman*, 478 F 3d 588 at 596 (4th Cir 2007) [*Ordinola*]; *Quinn v Robinson*, 783 F 2d 776 at 792 (9th Cir 1986) [*Quinn*].

exception was a well-established doctrine within extradition law.

Given the explicit reference to “serious non-political crimes” in Article 1F(b), some argue that the framework and goals of extradition law have played an important role in the creation of the article. For instance, James Hathaway and Michelle Foster firmly contend that the purpose of Article 1F(b) was to prevent fugitives who were evading extradition from accessing refugee status.³⁶ They posit that “[a]ll of the standards upon which [Article 1F(b)] is based are directed to fugitives from justice.”³⁷ For instance, the *Statute of the Office of the United Nations High Commissioner for Refugees*, which was drafted simultaneously with the *Convention*, excludes from the UNHCR’s competence individuals with respect to whom “there are serious reasons for considering [have] committed a crime covered by the provisions of treaties of extradition”.³⁸ Hathaway and Foster also observe that the drafting of Article 1F(b) was most closely connected to Article 14 of the *Universal Declaration of Human Rights (UDHR)*.³⁹ Article 14(1) states that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.”⁴⁰ This was limited by Article 14(2), which provides that this “right may not be invoked in the case of prosecutions genuinely arising from non-political crimes”.⁴¹ Hathaway and Foster explain that the drafting history of Article 1F(b) illustrated certain tensions surrounding Article 14(2) of the *UDHR*’s use of “non-political crimes”. The British delegate, in particular, objected to the broad number of persons who might be incorporated into this category for having committed even minor crimes.⁴² Meanwhile, other delegates were firm that refugee status not be extended to fugitives who committed serious common crimes.⁴³ Hathaway and Foster posit that the final text of Article 1F(b) reflects the consensus that fugitives from justice who had committed serious non-political crimes should be excluded from the definition of refugee.⁴⁴

While Article 1F(b) does not explicitly reference extradition treaties, courts have nevertheless identified a strong linkage between Article 1F(b) and extradition law. The Supreme Court of Canada articulated that “it is quite clear that Article 1F(b) is generally meant to prevent ordinary criminals extraditable

³⁶ Hathaway & Foster, *supra* note 7 at 541.

³⁷ *Ibid.*

³⁸ *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 Dec 1950, UN Doc A/1775, art 7(d) [UNHCR *Statute*]. See also Andreas Zimmerman & Philipp Wennholz, “Article 1F (Definition of the Term ‘Refugee’ / Définition du Terme ‘Réfugié’)” in Andreas Zimmerman, ed, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (New York: Oxford University Press, 2011) 579 at 591.

³⁹ Hathaway & Foster, *supra* note 7 at 541.

⁴⁰ *Universal Declaration of Human Rights*, GA Res 217A(III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

⁴¹ *Ibid.*

⁴² Hathaway & Foster, *supra* note 7 at 541–42.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

by treaty from seeking refugee status".⁴⁵ The Court elaborated that there was a concern amongst the framers "that common criminals should not be able to avoid extradition and prosecution by claiming refugee status."⁴⁶

Other judges have also made explicit connections between refugee law and extradition processes when interpreting the meaning of Article 1F(b). Lord Mustill of the House of Lords posited that the reference to serious non-political crimes in Article 1F(b) "must surely be an echo of the political exception which had been a feature of extradition treaties for nearly a century, and one may hope that decisions on the political exception would provide a comprehensive framework for the few and scattered decisions on asylum."⁴⁷ Similarly, Justice Kirby of the High Court of Australia posited:

When the Convention came into force, it was natural that lawyers, familiar with this body of jurisprudence, should turn to it to give meaning to Art 1F(b). There was a recognition of the overlap between the exemption from extradition and the exception from refugee status. Each was concerned with serious crimes. Each was motivated by the (usually unexpressed) fear that the accused might not receive a fair trial if returned to the place where the crimes had allegedly been committed, or might be in mortal danger if so returned. The need for congruence between extradition law and the law of the Convention was therefore emphasised.⁴⁸

In addition to such statements connecting the political crimes doctrine existing in both spheres of law, Hathaway and Foster observe that courts adjudicating Article 1F(b) cases have substantially referred to, if not relied upon, extradition decisions regarding the political crimes doctrine.⁴⁹ For example, in *Gil v Canada*, an Article 1F(b) decision, the Canadian Federal Court of Appeal not only relied heavily on extradition jurisprudence, it adopted the same legal test as employed in Anglo-American extradition cases on political crimes.⁵⁰

Still, the strong (contextual) connection between Article 1F(b) and extradition processes is not fully accepted in all quarters. Some emphasize the conspicuous absence of explicit textual references to extradition law and the exclusion of those fleeing prosecution of offences covered under extradition treaties as evidence of this lack of connection.⁵¹ For instance, Guy S Goodwin-

⁴⁵ *Pushpanathan*, *supra* note 26 at para 73.

⁴⁶ *Ibid.* The Supreme Court of Canada recently held that the exclusion is not limited to just fugitives from justice, but even those who may have been convicted and have served time as punishment for said crimes. See *Febles*, *supra* note 26 at para 35.

⁴⁷ *T v Secretary of State for the Home Department*, [1996] AC 742, [1996] 2 All ER 865 at 878 [*T v Secretary of State*]. See Hathaway & Foster, *supra* note 7 at 555.

⁴⁸ *Singh*, *supra* note 31 at para 104.

⁴⁹ See Hathaway & Foster, *supra* note 7 at 555; Walter Kälin & Jörg Künzli, "Article 1F(b): Freedom Fighters, Terrorists, and the Notion of Serious Non-Political Crimes" (2000) 12 Intl J Refugee L 46 at 70 (Special Supplementary Issue).

⁵⁰ *Gil v Canada (Minister of Employment & Immigration)*, [1995] 1 FC 508, 119 DLR (4th) 497 [*Gil* cited to FC].

⁵¹ Indeed, given that the *UNHCR Statute* and the *UDHR* contained specific references to extradition treaties and prosecution respectively, it was open to the *Convention's* framers to incorporate similarly explicit language. The decision not to do so undermines the argument that the goal of Article 1F(b) was to exclude access to those who were fugitives from justice under extradition treaties.

Gill and Jane McAdam assert that it is unclear “whether the ‘doctrine’ of extradition was to play some role in the interpretation of the Convention.”⁵² The Supreme Court of New Zealand also observed that “[t]here is nothing in the text of the Convention that refers to extradition law or indicates an intention that a non-political crime under [Article] 1F(b) is the same concept.”⁵³ It posited that one of the main purposes of Article 1F(b) was to ensure that “those who commit serious non-political crimes do not avoid legitimate prosecution by availing themselves of Convention protection.”⁵⁴ The Court asserted that the “focus of the Convention is on the seriousness of the crime as well as whether it was of a non-political nature. It is not on whether particular conduct could be the subject of extradition proceedings.”⁵⁵

Between the two polar positions articulated, there is a middle ground that recognizes some connection between Article 1F(b) and extradition law that suggests principles of extradition law may reasonably influence Article 1F(b)’s interpretation while acknowledging the lack of a direct and explicit link. Walter Kälin and Jörg Künzli posit that Article 1F(b)

historically was introduced as an interface with extradition law and its concepts of ‘political crimes’. Thus, principles of extradition law may provide *guidance* to authorities when taking their decisions as to whether an offence is a common (non-political) crime within the meaning of Article 1F(b) ... or whether, as a political offence, it prevents exclusion from the protection afforded by the Convention.⁵⁶

Consequently, they conclude “it makes sense for authorities to *refer* to extradition when applying Article 1F(b).”⁵⁷ Gilbert argues that there cannot be a direct link between Article 1F(b) and extradition law.⁵⁸ He posits that had the framers sought to make the direct connection, they could have framed Article 1F(b) as excluding an individual on the basis of the state of asylum’s extradition laws which could then effectively incorporate the political crimes exception.⁵⁹ However, Gilbert also advances that Article 1F(b) “should be ‘related to’, although not limited by, the jurisprudence developed with respect to the political offence exemption.”⁶⁰ He bases this on the fact that the extradition jurisprudence is only 160 years old and the interpretation of Article 1F(b) must be dynamic.

⁵² Guy S Goodwin-Gill & Jane McAdam, *The Refugee in International Law*, 3rd ed (Toronto: Oxford University Press, 2007) at 173.

⁵³ *The Attorney-General (Minister of Immigration) v Tamil X and Anor*, [2010] NZSC 107 at para 87, [2011] NZLR 721 [Tamil X].

⁵⁴ *Ibid* at para 82.

⁵⁵ *Ibid* at para 87.

⁵⁶ Kälin & Künzli, *supra* note 49 at 69 [emphasis added] [footnotes omitted].

⁵⁷ *Ibid* [emphasis added].

⁵⁸ Gilbert, *supra* note 20 at 448.

⁵⁹ *Ibid*.

⁶⁰ *Ibid*.

Given the contextual link between Article 1F(b) and extradition law, the purposes articulated for Article 1F generally and 1F(b) specifically, and accounting for the lack of direct textual reference to extradition law, it is fair to conclude that extradition jurisprudence surrounding the political crimes doctrine should have some persuasive influence on Article 1F(b)'s development. Furthermore, in the context of this article and the discussion in the next part, the extradition jurisprudence is intended to demonstrate that judges have the capability to develop legal tests that account for the context in which the crimes take place. It is not to suggest that Article 1F(b) decisions should follow extradition jurisprudence "hand in glove".

C. Article 1F(b), *Non-Refoulement* and National Security

In recent years, there has been some articulation that another purpose of Article 1F(b) is to provide safety and security to the country of refuge. The Supreme Court of New Zealand, for example, has been a proponent of this position.⁶¹ Undoubtedly, excluding someone who has engaged in serious non-political crimes will likely have the ancillary benefit of providing such security. However, courts such as the Supreme Court of Canada, and some scholars, have stated that national security of the host society is not the purpose of Article 1F(b).⁶² Instead, the role of Article 33(2) of the *Convention* serves this purpose. Article 33(2) provides that the benefit of *non-refoulement* "may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."⁶³ The protection of *non-refoulement* is established in Article 33(1) which states that "[n]o Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political

⁶¹ *Tamil X*, *supra* note 53 ("The language of the provision cannot, however, be read as confining exclusion to those who are fugitives from justice. A further purpose is to protect the security of states in which refuge is sought by providing an exception from Convention obligations in respect of those with a propensity to commit serious non-political crimes" at para 82).

⁶² *Pushpanathan*, *supra* note 26 ("Article 1F ... establishes categories of persons who are specifically excluded from that definition. The purpose of Article 33 of the Convention, by contrast, is not to define who is and who is not a refugee, but rather to allow for the *refoulement* of a *bona fide* refugee to his or her native country where he or she poses a danger to the security of the country of refuge, or to the safety of the community. ... [T]he general purpose of Article 1F is not the protection of the society of refuge from dangerous refugees, whether because of acts committed before or after the presentation of a refugee claim; that purpose is served by Article 33 of the Convention" at para 58). See Hathaway & Foster, *supra* note 7 ("[t]here is a clear division of labor between the duty to exclude fugitives from justice under Art. 1(F) (b) and the right of states concerned about danger to their community to expel even recognized refugees convicted of particularly serious crimes" at 539).

⁶³ *Convention*, *supra* note 3, art 33.

opinion.”⁶⁴ What is notable here is that *non-refoulement* operates not just where someone has a well-founded fear of persecution, but where that individual “would be threatened”. Despite the mandatory language of Article 33(1), this may be superseded if the terms of Article 33(2) are satisfied.⁶⁵ A premium is therefore placed on protecting host societies from threats, even when they are posed by *bona fide* refugees. As such, even where there is a likelihood (rather than just a well-founded fear as provided under Article 1A(2)) that someone may face persecution for race, religion, nationality, membership in a particular social group or political opinion, Article 33(2) permits their expulsion from the country of refuge.

As illustrated, Article 1F(b) was created to exclude those who are unworthy of protection. To determine whether someone qualified for the political crimes doctrine and thus remained worthy of the protections afforded by the *Convention*, courts have applied certain legal tests. What will become evident in the next part is that under both extradition and refugee jurisprudence, judges and tribunals have examined the overall circumstances and various relevant factors to determine whether an individual qualified for the political crimes doctrine.

III. The Political Crimes Jurisprudence

A. Political Crimes in Extradition Law

The political crimes doctrine originated in the context of extradition law. Conceptually, the political crimes doctrine is rooted in the upheavals of the late eighteenth century, namely the American and French Revolutions,⁶⁶ during which officials validated the notion of protecting resisters fleeing persecution or who had been banished. During 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.⁶⁷

While the *Declaration of Independence* firmly declared the right of individuals to resist tyrannical governments within the American legal and political context, there was a clear absence of any commensurate legal or political commitment to granting asylum to those fleeing persecution or banishment for

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ See *Ordinola*, *supra* note 35 at 595.

⁶⁷ *Acte Constitutionnel du 24 juin 1793* [France]. In the *Constitution of 1958*, this was further modified to state that “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.” *Acte Constitutionnel du 4 octobre 1958* [France] art 53-1, online: <<http://www2.assemblee-nationale.fr/langues/welcome-to-the-english-website-of-the-french-national-assembly>>.

such actions.⁶⁸ Still, the idea of extending some legal protection to resisters was not wholly absent. 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 avoid returning political fugitives fighting against the oppressions of their government.⁶⁹ Jefferson observed that where “real” treason existed, such conduct deserved the highest punishment.⁷⁰ Yet he also noted that there was a distinction between acts waged against a government and acts carried out against the oppressions of government.⁷¹ 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.”⁷²

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 into a United States extradition treaty in 1843.⁷³ The political crimes doctrine was eventually included in other United States extradition treaties as well as those of most other states.⁷⁴ During the nineteenth century, it was “deemed necessary to protect those people who justly fought back against their government oppressors to secure political change.”⁷⁵ It was in the late nineteenth century that courts first started to construct legal tests to give it shape.

i. The Anglo-American Incidence Test

The political crimes doctrine as it has developed in Anglo-American extradition law has had a certain pronounced tolerance, if not acceptance, of violence as a means to effect political change. This acceptance, as noted earlier, likely emerged from a revolutionary ethos that privileged violence

⁶⁸ See *The Declaration of Independence* (US 1776).

⁶⁹ Letter from Thomas Jefferson to William Carmichael and William Short (24 April 1792) in Thomas Jefferson Randolph, ed, *Memoir, Correspondence, And Miscellanies, From The Papers Of Thomas Jefferson*, 2nd ed, vol 3 (Boston: Gray and Bowen, 1830), online: <www.gutenberg.org/files/16783/16783-h/16783-h.htm#link2H_4_0108>.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ See *Ordinola*, *supra* note 35 at 596.

⁷⁴ See *Quinn*, *supra* note 35 (“It was not until the early nineteenth century that the political offense exception, now almost universally accepted in extradition law, was incorporated into treaties” at 792). However not all states incorporated the political crimes exception into their extradition treaties. See Anne Warner La Forest, *La Forest’s Extradition To And From Canada*, 3rd ed (Aurora, Ontario: Canada Law Book, 1991) (“Note that the treaties between Eastern European countries do not provide for a political offence exception” at 82, n 7).

⁷⁵ *Ordinola*, *supra* note 35 at 596.

against authoritarian regimes. The legal test developed in Anglo-American law was first established in *Re Castioni* in 1891. The Queen's Bench court held that a crime was political in nature if it was "incidental to and formed a part of political disturbances."⁷⁶ 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.⁷⁷ While the word "violence" is not explicitly employed in the legal test, it may be implied from the use of the word "disturbances". Some United States courts have nevertheless inserted the words "uprising" in addition to "violent", modifying the term "political disturbances" to emphasize the minimum conditions necessary to qualify under the doctrine.⁷⁸ Even without the modifier "violent", there has nevertheless been judicial recognition that "political disturbances" must essentially be violent in nature. As the United States Seventh Circuit Federal Court of Appeals 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".⁷⁹ The United States Ninth Circuit Federal Court of Appeals has also posited 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."⁸⁰

Despite the violent and sanguinary imagery that emerges from these statements, and the seeming legitimization of political violence and bloodshed, such legitimization is not unqualified or unrestrained.⁸¹ Courts have placed limits on the scope of the doctrine. Not every act of politically motivated violence has been tolerated; there must be a corresponding and demonstrable need to ensure that the putative political crimes are targeted against state actors (or those violently opposing the state) and not civilians. As such, engaging in

⁷⁶ *Re Castioni*, [1886-90] All ER Rep 640, [1891] 1 QB 149 at 153, 166 [emphasis added].

⁷⁷ In so doing, the court rejected a broader definition proposed by John Stuart Mill in the British Parliament that a political crime is "[a]ny offence committed in the course of or furthering of civil war, insurrection, or political commotion." *Ibid* at 153. The *Castioni* court feared Mills' definition would permit any act borne out of personal malice to be excused just because it happened to transpire during the course of an uprising (*ibid* at 154).

⁷⁸ See *Ordinola*, *supra* note 35 at 597.

⁷⁹ *Eain v Wilkes*, 641 F 2d 504 at 520-21 (7th Cir 1981).

⁸⁰ See e.g. *Vo v Benov*, 447 F 3d 1235 at 1242 (9th Cir 2006) [Vo].

⁸¹ In *Schtraks v Government of Israel and Others*, [1964] AC 556, [1962] 3 All ER 529 at 535-36, Lord Justice Reid, in his concurring opinion, 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 that "[a]n 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 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.

violence that is either targeted at civilians, or likely to kill civilians, has been deemed to fall outside of the parameters of the political crimes doctrine.⁸² Such crimes are likely to be designated as acts of terrorism.

Connected to the theme of differentiating between political crimes and acts of terrorism is the geographic limitation that courts have applied to the scope of the political crimes doctrine. Through this limitation, the crime must take place “within the country or territory in which those rising up reside,”⁸³ or that it must be aimed at the state requesting extradition and not merely take place on its soil.⁸⁴ The stated basis for this geographic restriction is that “it ensures that the political offense exception is not used to allow international terrorists to escape prosecution or to encourage the spread of civil insurrections to neighboring states.”⁸⁵ To illustrate, in *Vo*, the defendant was charged with the attempted bombing of the Vietnamese embassy in Thailand (the state seeking extradition). *Vo*’s opposition was to the policies of the Vietnamese

⁸² Attacks on civilians are not tolerated under the test. See e.g. *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 as destruction of property taking place amidst an attack on government soldiers, was non-political); *Eain*, *supra* note 79 (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) aff’d *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 50 (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*, *supra* note 35 (state officer killing civilians who were unconnected with violent rebellion against the state not a political crime).

⁸³ *Vo*, *supra* note 80 at 1243–45. See *Quinn*, *supra* note 35 at 807–08, 812–14.

⁸⁴ *Tzu-Tsai Cheng v Governor of Pentonville Prison*, [1973] AC 931, 2 All ER 204 [*Cheng* cited to All ER].

⁸⁵ *Vo*, *supra* note 80 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 35 at 818. To illustrate he provided the following example: “[s]uppose 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 reason that *Quinn* should not receive the benefit of the political crimes doctrine was 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 a state actor (*ibid* at 819).

Lord Simon of Glaisdale also expressed a similar disagreement in *Cheng*, *supra* note 84 at 219–20. There, 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 *Cheng*’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).

government. Thailand made a formal request for his extradition from the United States where Vo was living. The court held that the political crimes doctrine did not apply because of the location where the crime took place, and held that Vo could be extradited. Accordingly, had Vo committed a similar crime in Vietnam, the act might have qualified as a political crime provided other elements were satisfied – that the target was not a civilian and that the act took place incident to a violent political disturbance or uprising.

In recent decades, there are relatively few individuals who have successfully managed to benefit from the political crimes doctrine in Anglo-American jurisprudence. When courts have recognized that an individual's actions were incidental to, or formed part of, a violent political uprising, they have been very cautious in justifying their conclusion. An example of this can be found in the 1984 extradition case, *In the Matter of Extradition of Doherty*, where 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 *Castioni* test.⁸⁶ As part of a PIRA unit, Doherty attacked a convoy of British soldiers in Belfast.⁸⁷ An exchange of gunfire ensued between the unit and the soldiers, resulting in the death of a British military officer.⁸⁸ Doherty was subsequently arrested and prosecuted for several crimes, including the officer's murder.⁸⁹ Before the trial was over, he escaped to the United States and was convicted *in absentia*.⁹⁰ England sought his extradition from the United States, but the court denied its request.

The *Doherty* court designated it a political crime, and 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.⁹¹ Drawing from international law, the court observed that Doherty's crimes did not involve the taking of hostages or their execution.⁹² The court stressed that those targeted by the PIRA in this particular instance were strictly military actors and not civilian targets.⁹³ 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, causing indiscriminate personal injury, death, and property damage. Such conduct would clearly be well beyond the parameters

⁸⁶ *In the Matter of Extradition of Doherty*, 599 F Supp 270 at 275, 277 (SDNY 1984).

⁸⁷ *Ibid* at 272.

⁸⁸ *Ibid*.

⁸⁹ *Ibid*.

⁹⁰ *Ibid*.

⁹¹ *Ibid* at 274–75.

⁹² *Ibid* at 275–76.

⁹³ *Ibid*.

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.⁹⁴

The court emphasized that in contrast to the targeting of civilians and civilian objects, the facts illustrated a political crime in its most “classical” form.⁹⁵ Stressing once again the military nature of the encounter, the court stated 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.”⁹⁶

The test established in Anglo-American extradition law demonstrates a sufficient concern that the political crimes doctrine should not be deployed to protect those who intentionally or recklessly target civilians. Furthermore, the protection has been limited to those engaged in political violence where the “uprising” is taking place. Although the *Castioni* test has produced a fair amount of jurisprudence, it was not the only test formulated in the extradition context for political crimes. I next look at the test articulated in Swiss extradition law.

ii. *The Swiss Proportionality Test*

Under Swiss extradition law, there is an emphasis on the proportionality of the means and methods employed relative to the political objectives. 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.”⁹⁷ The court in *Ktir* asserted that such offences presuppose that the act is committed out of political passion and is committed either in the framework of a struggle for power or for the purpose of escaping a dictatorial authority.⁹⁸ Just as important, however, is that the court stated that the damage caused by the crime had to be proportional to the aim sought.⁹⁹

Swiss courts have also articulated that 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).¹⁰⁰ As such, in cases of murder, it has to be shown that homicide

⁹⁴ *Ibid* at 275.

⁹⁵ *Ibid* at 276.

⁹⁶ *Ibid*.

⁹⁷ *Ktir v Ministère Public Fédéral*, [1961] 34 ILR 143 at 144 [emphasis in original].

⁹⁸ *Ibid*.

⁹⁹ *Ibid*.

¹⁰⁰ *Ibid*.

was the “sole means of safeguarding more important interests and attaining the political aim.”¹⁰¹ Thus, while murder is not explicitly excluded, Swiss tribunals have determined that there must be some compelling justification for it. In *Ktir*, a member of the Algerian Liberation Movement (ALM) was ordered by superiors to execute another member who was 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 tribunal 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 interests of 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, and 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 “vengeance and terror.”¹⁰²

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 *Re Nappi*, the defendant was a member of a neo-fascist group which sought to overthrow the government.¹⁰³ 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.¹⁰⁴ In order to show this direct relationship, the offence in question must be a “really efficacious method of achieving” the ends sought.¹⁰⁵

What the Anglo-American and Swiss extradition jurisprudence indicate are that courts have formulated tests that sufficiently allow them to engage in a contextual analysis, rather than cut out or exclude those who engage in any violence altogether. They have done this in a manner that has excluded those who have targeted civilians, and those who have engaged in disproportionate violence. As shall be evident in the following section, there has been a similar

¹⁰¹ *Ibid.*

¹⁰² *Ibid* at 145. 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 *Re Peruzzo*, [1952] 19 ILR 369 (Swiss Federal Tribunal, 1951).

¹⁰³ *Re Nappi*, [1952] 19 ILR 375 (Swiss Federal Tribunal, 1951).

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid* at 376.

pattern in the Article 1F(b) jurisprudence.

B. The Political Crimes Tests and Jurisprudence Under Article 1F(b)

There are several tests used to interpret whether a crime qualifies as political under Article 1F(b) of the *Convention*. While various national courts employ different phrasings to articulate the applicable test, they are substantially focused on a relatively common set of factors in making their assessments. All of the tests discussed below examine the context in which the crimes transpire and the totality of the circumstances.

Unlike the *Castioni* test in Anglo-American extradition law, United States courts have adopted a differently articulated test for political crimes within the refugee law context that emphasizes proportionality. A crime will be considered a political crime under United States law 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.”¹⁰⁶ Employing this standard first created by the United States Board of Immigration Appeals (BIA), United States federal court and administrative tribunal decisions have examined the status of the victims and the means employed to determine whether a crime is political or not.¹⁰⁷ For example, in *Immigration and Naturalization Service v Aguirre-Aguirre*, the United States Supreme Court unanimously affirmed the BIA’s decision that the asylum-seeker committed a serious non-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.¹⁰⁸ Aguirre-Aguirre’s stated objective was to protest high bus fares and the government’s failure to investigate disappearances and murders.¹⁰⁹ The act of destroying private property and assaulting civilians travelling on buses was disproportionate to achieving the stated objectives.

Like their American counterparts, British courts have not imported the *Castioni* test into the Article 1F(b) context. Instead, the appellate committee of the House of Lords crafted a different test for Article 1F(b).¹¹⁰ In *T v Secretary of State for the Home Department*, Lord Lloyd of Berwick, writing for the majority, posited that courts must examine two main factors.¹¹¹ First, jurists must

¹⁰⁶ *Matter of McMullen*, 19 I & N Dec 90 at 97–98, Interim Decision 2967, 1984 WL 48589 (BIA).

¹⁰⁷ See *Immigration and Naturalization Service v Aguirre-Aguirre*, 526 US 415 (1999).

¹⁰⁸ *Ibid* at 418.

¹⁰⁹ *Aguirre-Aguirre v Immigration and Naturalization Service*, 121 F 3d 521 at 525 (9th Cir 1997), Kleinfeld J, dissenting, rev’d 526 US 415 (1999). Judge Kleinfeld observed 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).

¹¹⁰ *T v Secretary of State*, *supra* note 47 at 899.

¹¹¹ *Ibid*.

determine whether a crime was committed for a political purpose, which he identified as the overthrow, subversion or changing of the government of a state, or the inducement of a state to change its policies.¹¹² Second, there must be a “sufficiently close and direct link between the crime and the alleged political purpose.”¹¹³

In order to conclude the existence of such a nexus, Lord Lloyd indicated that courts will need to examine further the means used to achieve the political objectives, giving particular regard to whether the crime was aimed at a military, governmental or civilian target.¹¹⁴ Furthermore, the majority identified that even where the government is the target, it must also be examined whether the means used were likely to involve indiscriminate killings or injuries to members of the public.¹¹⁵

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). As part of the FIS’ resistance efforts against the military government, the claimant participated in the bombing of a civilian airport resulting in numerous civilian casualties.¹¹⁶ Lord Lloyd observed that 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.”¹¹⁷ Yet, while the attack on the airport was clearly an assault against government property, the means employed were indiscriminate; they were bound to kill members of the public, and in fact did so. The majority concluded that the link between the means employed and the objective was too remote.¹¹⁸

Similar to the factors discussed by the House of Lords, in *Minister for Immigration and Multicultural Affairs v Singh*, three concurring justices of the High Court of Australia wrote individual opinions emphasizing the following criteria for assessing whether a crime was political for the purposes of Article 1F(b).¹¹⁹ First, there needed to be proof of the existence of a political objective(s)

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ 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-colonial resistance (even those that were non-violent – e.g. the Jallianwalla Bagh Massacre) or during periods of armed conflict – i.e. 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: <www.dissentmagazine.org>.

¹¹⁷ *T v Secretary of State*, *supra* note 47 at 899.

¹¹⁸ *Ibid.*

¹¹⁹ *Singh*, *supra* note 31 at paras 21–25, 44–48, 141.

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 the 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 whether the targets selected were civilian or government actors. The Court further elaborated on these factors by holding that a crime which involved revenge as a feature of the crime could still qualify as a political crime. A crime need not be dispassionately committed in order to qualify as a political crime. Singh was a member of the Khalistani Liberation Force who participated in the revenge killing of a police officer by procuring weapons and transportation in order to carry out the offence. The High Court concluded that the tribunal incorrectly disqualified Singh on the theory that the presence of revenge as a motive could not qualify as a political crime. It is worth noting that changes to the definition of political crimes in the *Migration Act* discussed above impact on the Court's political crimes test in *Singh*. The test articulated by the Court would naturally be affected by the legislative changes that went into effect after *Singh*.

Lastly, in the 2010 decision *Attorney-General v Tamil X*, the Supreme Court of New Zealand articulated the relevant considerations for determining whether a crime was political for the purposes of Article 1F(b).¹²⁰ The Court emphasized that "the context, methods, motivation and proportionality of a crime" and their relationship "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."¹²¹ What is required to make such determinations is "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."¹²²

In *Tamil X*, the applicant was a marine engineer who accompanied the transportation of weapons and munitions by ship to be used by the Liberation Tigers of Tamil Eelam (LTTE) in its efforts to forcibly secure a Tamil homeland in the north and east sections of Sri Lanka.¹²³ The Indian Navy stopped the ship and its crew was ordered to bring the vessel to Chennai in southeast India.¹²⁴ Rather than surrendering the weapons and ship to the Indian Navy, the crew scuttled the ship and its contents.¹²⁵ The applicant was accused of setting fire to the ship thus endangering other crew members and members

¹²⁰ *Tamil X*, *supra* note 53 at para 90.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid* at paras 4–7.

¹²⁴ *Ibid* at para 8.

¹²⁵ *Ibid.*

of the Indian Navy.¹²⁶ The New Zealand Refugee Status Appeals Authority (RSAA) held that the crime that the applicant committed, the scuttling of the ship, was a serious non-political crime.¹²⁷

The Supreme Court of New Zealand unanimously reversed the RSAA's decision, holding that the crime was indeed political in nature. The Court concluded that the acts were committed to prevent the munitions and arms aboard the ship from falling into the hands of the Indian government, which was unsympathetic to the LTTE's cause.¹²⁸ It observed that the LTTE's cause of achieving an independent homeland was undoubtedly political in nature.¹²⁹ 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."¹³⁰ It posited that the identified purpose of transporting the munitions and weapons should be properly viewed as directed toward securing the political aims of the LTTE, which was the creation of an independent state.¹³¹ 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.¹³² It concluded that "the scuttling was not an act of an indiscriminate kind such as should be regarded as separating that link."¹³³

What emerges from these various legal tests and holdings is that, similar to the political crimes doctrine in extradition law, courts are capable of formulating legal tests that consider a variety of material factors to determine whether exclusion is appropriate or if an applicant is eligible for the political crimes doctrine. Many of these centre on the civilian or military status of the target(s) and whether the crime is proportionate to the stated political objective(s). Unlike the sweeping legislative provisions mentioned in the introduction, the legal tests articulated here can adequately assist a court or tribunal to exclude those who have taken actions that kill or harm civilians or employ violent means that are disproportionate to the political objectives. This includes bombing a civilian airport where one knows it is likely to cause death or serious harm to civilians, or intentionally targeting civilians on a bus. However, these tests do so while recognizing that the use of force may be legitimate to advance political goals, and protection may be afforded to those who respect the lives of civilians while engaging in violence against specific

¹²⁶ *Ibid* at paras 9–11.

¹²⁷ *Ibid* at para 21.

¹²⁸ *Ibid* at para 96.

¹²⁹ *Ibid* at paras 92–96.

¹³⁰ *Ibid* at para 95.

¹³¹ *Ibid* at para 96.

¹³² *Ibid*.

¹³³ *Ibid*.

legitimate targets for clearly political reasons.

While I argue that using the political crimes doctrine in Article 1F(b) offers a more suitable and better approach to excluding those unworthy of refugee status, in contrast to the sweeping legislative provisions discussed in the introduction, this is not the end of the story. The reality is that the way in which jurists perceive political violence, particularly its role and legitimacy, may play a role in how they apply these legal tests. In the next section, I will examine the importance of approaching the issue of political violence from a more open-minded perspective.

IV. Toward a Culture of Nuanced Decision Making

There are two problems associated with the legislative provisions discussed in the introduction. The first problem, addressed above, is the breadth and encompassing nature of the legislative language. As argued in the previous section, the political crimes doctrine and legal tests created by courts allow them to undertake contextual analyses concerning a person's crime. Perhaps more fundamentally, though, the second problem concerns underlying cultural attitudes that some legislators and judges may hold regarding political violence, either more generally or with respect to specific groups that employ it. As Catherine Dauvergne and Asha Kaushal articulate, particularly in connection with the Canadian political crimes jurisprudence, there is an identifiable culture of exclusion that has relegated political crimes to mostly non-violent political actions and reflect attitudes against even legitimate violent political actions.¹³⁴ A proper perspective relating to political crimes is not merely about the legal tests employed, though they are an important part of the equation, but also about the attitudes that judges and adjudicators may bring to an individual's case. In this part, I set out some perspectives that reflect a closed or restrictive mindset. I then contrasted them with more purposive approaches and attitudes about political violence and their place in today's world as represented in decisions by the High Court of Australia and the Supreme Court of New Zealand.

Those who employ political violence and seek refugee status may encounter a variety of attitudes ranging from (seemingly) neutral to unsympathetic to openly hostile. In many societies in the Global North, political violence can be cast as utterly foreign and uncharacteristic of their own societies. For instance, in *Singh*, Chief Justice Gleason posited that “[w]hile 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

¹³⁴ See Kaushal & Dauvergne, *supra* note 24.

has been, and is, an incident of political action."¹³⁵ The foreignness of political crimes and murder is not always just a matter of fact, but expressed with an unsympathetic and perhaps judgmental tinge. In *Gil*, the Canadian Federal Court of Appeal asserted that the "very expression 'political crime' rings curiously and indeed offensively to Canadian ears."¹³⁶ Reflecting the more general attitude about the role of motives in connection with the elements of crimes, the court observed that "[p]olitical 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."¹³⁷ For other jurists, there may be a more open hostility to the continued existence of the political crimes doctrine as a legal anachronism that no longer applies to today's political struggles and conflicts. Representative of such perspectives, Lord Mustill of the House of Lords provided the following opening thoughts at the beginning of his concurring opinion:

My Lords, during the nineteenth century those who used violence to challenge despotic regimes often occupied the high moral ground, and were welcomed in foreign countries as true patriots and democrats. Now, much has changed. The authors of violence are more ruthless, their methods more destructive and indiscriminating; their targets are no longer ministers and heads of state but the populace at large; and their aims and ideals are frequently no more congenial to the countries in which they take refuge than those of the regimes whom they seek to displace. The unsympathetic call them terrorists, and their presence is seen as both an affront and a danger. These fundamental changes in method and perception have not been matched by changes in the parallel, although not identical, laws of extradition and asylum. These laws were conceived at a time when political struggles could be painted in clear primary colours largely inappropriate today; and the so-called 'political exception' which forms part of these laws, and which is the subject of this appeal, was a product of Western European and North American liberal democratic ideals which no longer give a full account of political struggles in the modern world. What I regard as the exceptional difficulty of this appeal is that the courts here, as in other legal systems, must struggle to apply a concept which is out of date.¹³⁸

From this account, *bona fide* political criminals are constructed as morally upright freedom fighters who confronted totalitarian regimes with the goal of bringing democracy to their countries (leaving aside that many were not quite

¹³⁵ *Singh*, *supra* note 31 at para 16 [emphasis added]. Of course, this discourse tends to ignore the violence exacted upon indigenous populations through colonialism and/or the resistance offered in response. See e.g. Asafa Jalata, "The Impacts of English Colonial Terrorism and Genocide on Indigenous/Black Australians" (2013) Sage Open 1, DOI: <10.1177/2158244013499143>.

¹³⁶ *Gil*, *supra* note 50 at 512.

¹³⁷ *Ibid*. However, more recent Canadian criminal legislation recognizes the role of political motives. See the *Criminal Code*, RSC 1985, c C-46, s 83.01(1)(b)(i)(A): "'terrorist activity' means an act or omission, in or outside Canada, that is committed, in whole or in part for a political, religious or ideological purpose, objective or cause".

¹³⁸ *T v Secretary of State*, *supra* note 47 at 867-68.

so benevolent with respect to slavery or colonialism). Today's proponents of political violence are however different; in Lord Mustill's construction, they do not subscribe to Western ideals and are more aptly constructed as terrorists. In other words, those employing political violence today are not the products of an idealized Northern society, nor are their goals to become democratic. The political crimes doctrine is thus out of date.

Not all jurists share these perspectives. Others, particularly those on the High Court of Australia and the Supreme Court of New Zealand have expressed perspectives that reject such reified and simplistic views of the political crimes doctrine and those who seek to take advantage of them. Justice Kirby, writing in *Singh*, articulated 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.¹³⁹

He further observed that judicial and other types of decision makers will "ordinarily have 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*."¹⁴⁰

Building from the recognition that legitimate political struggles can conceivably take place outside the typical country of refuge, Justices Kirby and Gaudron criticize the use of crude labels to describe political violence. 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 arriving at conclusions as to what constitutes a political crime based on such labels. Justice Gaudron, for example, observed that there was a tendency in the 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."¹⁴¹ She contends that while understandable, such terms are imprecise and involve oversimplification, and more importantly do not find expression in the text of the *Convention*.¹⁴² 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

¹³⁹ *Singh*, *supra* note 31 at para 106. The Supreme Court of New Zealand quoted this passage favourably. See *Tamil X*, *supra* note 53 at para 91.

¹⁴⁰ *Singh*, *supra* note 31 at para 127 [emphasis added].

¹⁴¹ *Ibid* at para 40.

¹⁴² *Ibid* at para 41.

Convention's protection. The debate about this subject has continued. It is not concluded."¹⁴³ 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.¹⁴⁴ 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 well-respected international statesman and hero.¹⁴⁵

Having the vision to see beyond the simple labels and the prevailing constructions of particular individuals, groups or movements is crucial to the analytical process concerning political crimes. The Supreme Court of New Zealand's decision in *Tamil X* provides an important example. Drawing from the High Court of Australia's decision in *Singh*, they show how a court can move beyond such simple epithets to a more nuanced analysis reflecting the goals of the *Convention*. To recall, *Tamil X* involved an individual who was an accomplice on an LTTE ship carrying arms and supplies to Sri Lanka to fight the government. The ship was scuttled when stopped by the Indian Navy. The LTTE, notably, did not carry a sympathetic reputation amongst many governments. Indeed, various states and courts in the Global North and South have designated the LTTE as a terrorist organization.¹⁴⁶ Thus it would be easy to label its activities by extension to be acts of terrorism or acts in support of terrorism – thus falling outside the realm of a political crime. The Court, however, advanced a more nuanced analysis rather than relying on simplistic labels. Writing unanimously, the Court described 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

¹⁴³ *Ibid* at para 111.

¹⁴⁴ *Ibid* at para 68.

¹⁴⁵ Anthony Bevins & Michael Streeter, "Nelson Mandela: From 'terrorist' to tea with the Queen", *The Independent* (9 July 1996), online: <<http://www.independent.co.uk/news/world/from-terrorist-to-tea-with-the-queen-1327902.html>>; Bernd Dubusmann, "America, Terrorists and Mandela", *Reuters* (15 January 2010), online: <<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: <<http://news.bbc.co.uk/2/hi/7484517.stm>>. 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 government and target civilians. See John D Battersby, "ANC Acts to Halt Civilian Attacks", *New York Times* (21 August 1988), online: <<http://www.nytimes.com/1988/08/21/world/anc-acts-to-halt-civilian-attacks.html>>.

¹⁴⁶ See e.g. "Canada adds Tamil Tigers to list of terrorist groups" *CBC* (10 April 2006), online: <<http://www.cbc.ca/news/canada/canada-adds-tamil-tigers-to-list-of-terrorist-groups-1.603477>>; at the time of publication, the LTTE is still currently designated a foreign terrorist organization by the United States State Department and the United Kingdom's Home Office. 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>>.

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.*¹⁴⁷

There are a number of significant aspects concerning this passage in particular and also about the decision more generally. With respect to the quoted passage specifically, there is a clear absence of references to terrorism or to the LTTE as a terrorist organization. What the Court does in a very matter-of-fact way is to clearly identify the legitimate political objective of the organization, namely, the creation of an independent Tamil state. Such an objective is in furtherance of a recognized right at international law concerning the right of peoples to self-determination.¹⁴⁸ It is important to also emphasize that the Court did not perceive the LTTE through a romantic or naive lens. 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.¹⁴⁹ Notwithstanding this, the Court correctly identified the LTTE as a “political organization” rather than a terrorist one. In so doing, the Court recognized the capacity of political organizations to be seen as political organizations (rather than reducing such an organization to being merely a terrorist organization because it used violence) while perpetrating at times (or even many times) proscribed activities under international law. Furthermore, the Court’s analysis did not foreclose the possibility of deeming other acts to be crimes falling outside of the purview of the political crimes doctrine. The key feature here is to look at the specific crimes and their relationship to the political objectives.

Ultimately, *Tamil X* reflects a degree of sensitivity to the real issue of international crimes committed by various political organizations. Yet it also recognizes that not every act committed by such groups constitutes a breach of international law, including crimes against humanity and acts of terrorism. After all, Article 1F(b) excludes individuals on the basis of their committing serious non-political crimes (including as an accomplice), not merely on the basis of membership in organizations which also at times commit serious non-political crimes. Just as even democratic states cannot be solely defined by the international criminal acts committed by their governments and military officials (i.e. including systematic use of torture and violations of the laws of war), neither should political organizations necessarily be characterized solely by their crimes.¹⁵⁰

¹⁴⁷ *Tamil X*, *supra* note 53 at para 92 [emphasis added].

¹⁴⁸ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 art 1 (entered into force 23 March 1976).

¹⁴⁹ *Tamil X*, *supra* note 53 at para 2.

¹⁵⁰ One might ask whether the United States Government as a whole should be characterized as a criminal state given its well-known use of torture (the broader extent to which was revealed recently in a report by

V. Conclusion

Throughout history, resistance has been waged to combat oppression perpetrated by the state as well as by private actors.¹⁵¹ While numerous resisters have adopted non-violent means to achieve their political objectives,¹⁵² many others have relied on the use of force.¹⁵³ Indeed, various philosophical and political traditions have legitimized the use of force to achieve such objectives.¹⁵⁴ The creation of the political crimes doctrine similarly provides evidence that the use of force has some validity within international and domestic law. To assert that the use of force in political struggles may be legitimate is in no way to suggest that all political violence should be glorified or celebrated.¹⁵⁵ Actions that are politically motivated but which target civilians or use illegitimate means or methods should not be legitimized. Rather, the appropriate context and circumstances that give rise to the valid use of force must be present. As discussed earlier in this article, national legislation has, in large measure, made the consideration of context and the circumstances giving rise to one's refugee claim irrelevant when political violence is involved. This is disconcerting, for as the Federal Court of Canada has stated, the "recognition and acknowledgement of the details of an individual or individuals' background, especially in an immigration or refugee case, are essential. The circumstances, situations and events within a narrative must not be overlooked, otherwise, a travesty to justice could be the consequence."¹⁵⁶ Furthermore, the court asserted that it was "necessary

the Senate's Intelligence Committee). "The Senate Committee's Report on the C.I.A.'s Use of Torture", *The New York Times* (9 December 2014), online: <http://www.nytimes.com/interactive/2014/12/09/world/cia-torture-report-document.html?_r=0>.

¹⁵¹ While many acts of resistance are waged against the state, its actors or agencies, the state is not the only target for legitimate resistance. There are numerous private actors who have engaged in oppression against others. These include drug cartels and youth gangs. Some have waged resistance through violent confrontation or have sought to refuse recruitment. Jo Tuckman, "Vigilantes take on drug cartels terrorising south-west Mexico", *The Guardian* (17 January 2014), online: <<http://www.theguardian.com/world/2014/jan/17/vigilantes-take-on-drug-cartels-mexico>>.

¹⁵² Steve Crawshaw & John Jackson, *Small Acts of Resistance: How Courage, Tenacity, and Ingenuity Can Change The World* (New York: Union Square Press, 2010). However there are times when non-violent resistance may not be the most effective or appropriate means to challenge oppression. Arundhati Roy has posited the legitimacy of using violence to counter state oppression, stating, "[n]on-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: <<http://www.theguardian.com/books/2011/jun/05/arundhati-roy-keep-destabilised-danger>>.

¹⁵³ The political upheavals in northern African states and in the Middle East serve as recent and vivid embodiments of the use of armed resistance along with the turmoil and uncertainty that can accompany it.

¹⁵⁴ Kälén & Künzli, *supra* note 49 at 47-50.

¹⁵⁵ As David Apter observes, "political violence not only divides people, it polarizes around affiliations of race, ethnicity, religion, language, class." David E Apter, "Political Violence in Analytical Perspective" in David E Apter, ed, *The Legitimization of Violence* (New York: New York University Press, 1997) 1 at 1.

¹⁵⁶ *Junusmin v Canada (Citizenship and Immigration)*, 2009 FC 673 at para 1, 81 Imm LR (3d) 97.

to demonstrate a grasp of the country conditions to ensure that the setting is acknowledged; without a setting, a narrative cannot be understood in context."¹⁵⁷

As I have argued in this article, the political crimes doctrine allows courts and tribunals the ability to take into account the context and circumstances that give rise to the legitimate use of force to challenge oppression, and to exclude those that are not. The political crimes doctrine established in Article 1F(b) of the *Convention* is the proper instrument to distinguish between legitimate and illegitimate resisters as its purpose is to exclude those unworthy of international protection for engaging in serious non-political crimes. The legal tests created by courts and tribunals have assisted in establishing criteria to exclude those who are unworthy of protection. However, more is needed to ensure that individuals are not unfairly excluded. Jurists must approach an Article 1F(b) analysis with an understanding that violence may be a legitimate, if not necessary, feature of political struggles in other countries. Furthermore, jurists must understand that the use of violence does not automatically transform an individual or an organization into a terrorist or terrorist organization any more than a democratic state becomes a criminal state when it engages in international crimes. A purposive and open-minded approach to the political crimes doctrine is exemplified in the Supreme Court of New Zealand's decision in *Tamil X* and the three concurring decisions of the High Court of Australia in *Singh*. It is not enough to abolish the sweeping legislation that eradicates any real legal analysis in favour of political crimes analyses that replicate the mindset of those who created the legislative exclusions in the first place. The failure or reluctance to keep an open mind regarding even the legitimate uses of force when conducting an Article 1F(b) analysis only perpetuates the culture of exclusion that Dauvergne and Kaushal have rightly criticized.

¹⁵⁷ *Ibid* at para 2.