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Framing Refugee Protection in the New World Disorder

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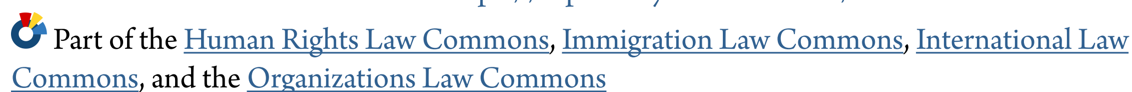
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Framing Refugee Protection in the New World Disorder

James C. Hathaway* and Colin J. Harvey**

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Introduction

Governments of developed states perceive their societies as vulnerable to the fallout from an increasingly brutal and chaotic world. They are aware that ready access to international travel carries the risk of importing political and other violence from even quite distant countries, and believe that they have a fundamental responsibility to do what they can to establish

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zones of safety and security for their own people.[1] To this end, governments have amended immigration laws to bar the entry of broad categories of potentially threatening outsiders.[2]

The stringency of these measures, however, is challenged by the simultaneous need to honor duties under international refugee law. Refugees are entitled to enter an asylum country without its authorization[3] and may not ordinarily be sent away without careful investigation of their need for protection.[4] State parties to the Convention relating to the Status of Refugees (Refugee Convention or Convention) are therefore bound to temper the scope of exclusionary efforts to ensure that the protection claims of refugees are not ignored. To the growing frustration of a number of governments, this obligation means that any screen on the entry of noncitizens must incorporate an exception for persons who claim to be at risk of persecution in their country of origin. Even persons believed to have engaged in serious acts of violence must not be summarily expelled if they advance an arguable claim to refugee status.[5]

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1. For example, the European Union has formally committed itself "to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime." TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, art. 2, Oct. 2, 1997, O.J. (C 340) 1, 12 (1997) [hereinafter TREATY OF AMSTERDAM].

2. One of the truly ironic results of the Oklahoma City bombing of 1995, a terrorist act with no foreign connections, was that it led to the enactment of unprecedented restrictions on the admission of noncitizens to the United States. As President Clinton conceded when signing the anti-terrorist legislation into law, "[t]his bill also makes a number of major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism." Statement on the Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 PUB. PAPERS 630, 632 (1996).

3.
> A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

OFFICE OF THE U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶ 28, at 9 (1992) [hereinafter UNHCR HANDBOOK].

4. Convention relating to the Status of Refugees, *done* July, 28, 1951, arts. 31-33, 189 U.N.T.S. 150, 174-76 [hereinafter Refugee Convention]. Refugee Convention duties are incorporated by reference in the Protocol relating to the Status of Refugees, *done* Jan. 31, 1967, art.1, 19 U.S.T. 6223, 6225, 606 U.N.T.S. 267, 268-70.

5. The British Home Secretary expressed his frustration when asylum claims were lodged by persons aboard the hijacked Afghan aircraft that landed in the United Kingdom in February 2000.

> I made it clear in my statement last Thursday and in subsequent comments that asylum applications are judged in accordance with the law—the 1951 [Refugee Convention] as it has been interpreted by statutes here and decisions of the courts—but I wish also to make it clear that the hijack presents us with a clash of obligations. We have obligations under the 1951 convention; we also have clear obligations under international law, which the British public plainly support, to ensure that we take the strongest possible measures to prevent and deter the international terrorist crime of hijacking.

344 PARL. DEB., H.C. (6th ser.) (2000) 595 (statement of Mr. Straw).

A number of jurisdictions have fastened onto a "solution" that appears to reconcile respect for refugee law with the determination of states to rid themselves quickly of potentially violent asylum seekers. Courts in these states have been persuaded that a person who has committed or facilitated acts of violence may lawfully be denied a refugee status hearing under a clause of the Refugee Convention that authorizes the automatic exclusion of persons whom the government reasonably believes are international or extraditable criminals. Refugee law so interpreted is reconcilable with even fairly blunt measures for the exclusion of violent asylum seekers.

In our view, this approach is doctrinally unsound and rife with critical risks for genuine refugees. The Refugee Convention as originally conceived fairly meets the legitimate needs of both refugees and the communities that receive them. Refugee law does not ignore the security interests of asylum countries, but refuses to allow those interests to run roughshod over the equally urgent need of persons at risk of persecution to secure entry to a place of safety.

Two parts of the Refugee Convention are relevant. The mechanism now increasingly invoked to justify bars on the entry of asylum seekers associated with acts of violence is Article 1(F).[6] This clause requires governments to deny refugee status to any person reasonably regarded as either an international criminal or a fugitive from domestic criminal justice, the person's fear of persecution notwithstanding. As elaborated below, this mechanism for "peremptory exclusion" is predicated on the satisfaction of an external and clearly defined standard of international or extraditable criminality. Only persons who meet this standard are deemed inherently unworthy of Convention refugee status and thus subject to exclusion without full consideration of the merits of their refugee claim. The rationale for Article 1(F) is *not* the protection of asylum-state safety and security interests (although it may sometimes be an ancillary result of peremptory exclusion).

Concerns about threats to the safety and security of an asylum state should be factored into the protection decision, instead, through an exception to the duty of states not to expose a refugee to the risk of return to persecution, the duty of *non-refoulement*.[7] Article 33(2) of the Convention authorizes a government to refuse to protect a refugee whose presence

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6. The provisions of this 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;
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Refugee Convention, *supra* note 4, art. 1(F), 189 U.N.T.S. at 156.

7. "No 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 opinion." *Id.* art. 33(1), 189 U.N.T.S. at 176.

threatens its most basic interests.[8] A receiving state may even return a dangerous refugee to face the risk of persecution in his or her state of origin, but only if the risk to national security or communal safety is established on the basis of a more demanding standard of proof.

Asylum states often resist this division of labor between Article 1(F) and Article 33(2). The attraction of Article 1(F) is that, in contrast to Article 33(2), it authorizes a state to forego its usual responsibility to assess refugee status. For states committed to barring the entry of potentially violent noncitizens to the greatest extent legally possible, it presents an administratively "least bad option." Reliance on Article 1(F) does not sanction automatic denials of entry, but it does allow the adjudication of safety concerns as a preliminary matter and according to a lower standard of proof.

Yet in relying on the peremptory Article 1(F) procedure to deny refugee status for safety and security reasons that are relevant only to an application to authorize *refoulement* under Article 33(2), governments contravene international refugee law. The Refugee Convention authorizes summary denial of refugee status only to persons adjudged inherently unworthy of protection as measured by reference to external standards of international or extraditable criminality. Governments are entitled to invoke an expansive range of concerns to justify a denial of protection on the grounds of safety or security, but only if they are prepared to meet the more demanding procedural requirements of Article 33(2). States that act under Article 1(F) to vindicate safety and security interests effectively demand the best of both worlds, denying the critical balance at the heart of the Refugee Convention between refugee rights and asylum-state interests.

State practice that confuses the roles of Articles 1(F) and 33(2) can ironically be justified by the official positions of the United Nations High Commissioner for Refugees (UNHCR). UNHCR defines Article 1(F) and Article 33(2) as complementary mechanisms, both directed to the protection of asylum-state interests.[9] Much contemporary state practice has taken its cue from UNHCR's recommendations, which appear to justify reliance on the peremptory procedures of Article 1(F) to vindicate safety and security concerns described in Article 33(2).

The UNHCR view has recently, however, come under fundamental challenge from the most senior courts of the United Kingdom, the United

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> 8. The benefit of the present provision 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.

Id. art. 33(2). For the minority of refugees that may lawfully be removed to a state other than their country of origin, only the requirements of Article 32 of the Refugee Convention need be met. Specifically, expulsion is authorized "on grounds of national security or public order" and must be "in pursuance of a decision reached in accordance with due process of law"—some aspects of which are specifically set out. *Id.* art. 32, 189 U.N.T.S. at 174.

9. *Infra* note 187 and accompanying text.

States, and Canada, all of which have explicitly or impliedly interpreted Article 1(F) as directed to the historically grounded purpose of excluding fundamentally unworthy persons from refugee status, not to the promotion of asylum-state welfare. This Article builds upon this embryonic jurisprudence challenging the traditional approach modeled on UNHCR's effective merger of Articles 1(F) and 33(2) and demonstrates how the combination of these two mechanisms deals fairly with both refugees and the states to which they turn for protection.

We begin by setting out detailed reasons in support of our view that Articles 1(F) and 33(2) serve complementary, but distinct purposes. Our analysis is firmly grounded in a reading of the Refugee Convention that interprets the text in the light of the historical record of the treaty's objects and purposes.[10] As the House of Lords observed, it makes good sense to give serious weight to the relevant *travaux préparatoires* of the Refugee Convention:

> Inevitably the final text will have been the product of a long period of negotiation and compromise. . . . It follows that one is more likely to arrive at the true construction of [the Refugee Convention] by seeking a meaning which makes sense in the light of the Convention as a whole, and the purposes which the framers of the Convention were seeking to achieve, rather than by concentrating exclusively on the language. A broad approach is what is needed, rather than a narrow linguistic approach.[11]

Indeed, such a holistic approach to treaty interpretation of the Refugee Convention is required by Article 31 of the Vienna Convention on the Law of Treaties:[12]

> In interpreting a treaty, it is erroneous to adopt a rigid priority in the application of interpretive rules. . . . Although the text of a treaty may itself reveal its object and purpose or at least assist in ascertaining its object and purpose, assistance may also be obtained from extrinsic sources. The form in which a treaty is drafted, the subject to which it relates, the mischief that it addresses, the history of its negotiations and comparison with earlier or amending instruments relating to the same subject may warrant consideration in arriving at the true interpretation of its text.[13]

While insisting on precision in the interpretation of international refugee law, our point is emphatically *not* that states should open their doors to persons whose engagement in or advocacy of violence threatens the

10. While we adopt a contextual approach to interpreting the Refugee Convention, other scholars express reservations about the value of the Refugee Convention's drafting history, preferring a more literal approach to treaty interpretation. *E.g.*, GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 368 (2d ed. 1996) ("For better or worse, refugee status decision-makers (and commentators. . .) make frequent use of the *travaux préparatoires* to the 1951 Convention. Many key terms are vague, undefined and open to interpretation, but the results of inquiry into the background. . . can be rather mixed.").

11. Adan v. Home Sec'y, [1999] 1 A.C. 293, 305 (1998) (Lloyd of Berwick, L.J.) (appeal taken from Eng. C.A.).

12. *Done* May 23, 1969, art. 31, 1155 U.N.T.S. 331, 340.

13. "Applicant A" v. Minister for Immigration & Ethnic Affairs (1997) 190 C.L.R. 225, 231 (Austl.) (Brennan, C.J.).

safety of the host-state community.[14] But neither should governments disregard the balanced approach to those concerns, which they have enacted into international law. The Refugee Convention is a supple instrument, capable of meeting the challenges of the new world disorder.[15] For both principled and pragmatic reasons, this Article emphasizes the importance of not confusing international criminals' and legal fugitives' exclusion from refugee status with measured efforts to defend the safety and security of communities that receive refugees. Both are important goals, but they are not the same goal.

I. Is Peremptory Exclusion Lawful?

A preliminary question is whether governments should ever be entitled to exclude an asylum seeker summarily from protection. After all, each government already enjoys the right to interpret the refugee definition without significant international scrutiny.[16] If governments are allowed to deny refugee status without fully considering the merits of the case, the potential for abuse of authority increases. Yet the Refugee Convention's drafters recognized the importance of reassuring states that accession to international refugee law would not require them to admit either international criminals or fugitives from justice. The Convention therefore authorizes state parties to order peremptory exclusion based on a low evidentiary threshold,[17] but

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14. Indeed, international human rights law now imposes a duty on states to take affirmative measures in pursuit of their populations' physical security. For example, the United Nations Human Rights Committee found Article 9(1) of the International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, art. 9(1), S. TREATY DOC. NO. 95-2 (1978), 999 U.N.T.S. 171, 175 [hereinafter Civil and Political Covenant], infringed where the Colombian government failed to respond meaningfully to death threats against a teacher who was ultimately forced to flee the country. U.N. GAOR, Hum. Rts. Comm., 45th Sess., Supp. No. 40, vol. II, Annex IX(D), ¶¶ 3.6, 5.5-.6, at 46-48, U.N. Doc. A/45/40 (1990) (discussing *W. Delgado Paéz v. Colombia*, Communication No. 195/1985). In general, the duty to take affirmative steps to protect human rights is clear. *See, e.g.*, Civil and Political Covenant, *supra*, art. 2(1), 999 U.N.T.S. at 173; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, art. 2(1), S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85Sp, 114 [hereinafter Torture Convention].

15. *See, e.g.*, S.C. Res. 1269, U.N. SCOR, 54 Sess., 4053d mtg. ¶ 4, U.N. Doc. S/RES/1269, at 2 (1999) (calling upon states to "take *appropriate* measures *in conformity with the relevant provisions of national and international law*, including standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not participated in terrorist acts" (emphasis added)).

16. In contrast to most major human rights treaties elaborated by the United Nations, state parties to the Refugee Convention agreed to no periodic reporting obligation, much less an interstate or individuated complaint procedure. *See* James C. Hathaway, *The International Refugee Rights Regime*, *in* 8-2 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 91 (1997).

17. In the view of UNHCR, the standard of proof required for exclusion is best stated as "substantially demonstrable grounds." *Note on the Exclusion Clauses*, U.N. Executive Comm. of the High Comm'r's Programme, 47th Sess., 8th mtg. ¶ 4, U.N. Doc. EC/47/SC/CRP.29 (1997), *available at* http://www.unhcr.ch/refworld/unhcr/excom/standcom/1997/29.htm [hereinafter *UNHCR Exclusion Note*]. This standard implies more than mere suspicion or conjecture, yet less than proof on a balance of probabilities. Exclusion can follow even if the asylum seeker has never been formally charged with or

only if the state reasonably believes a particular asylum seeker committed an indisputably wrong act—an international crime, an act contrary to the principles and purposes of the United Nations, or a serious nonpolitical crime committed outside the asylum state.

The general impetus for the elaboration of Article 1(F) of the Convention was a determination to give legal force to Article 14(2) of the Universal Declaration of Human Rights, which provides that the right to asylum "may not be invoked in the case of prosecutions genuinely arising from nonpolitical crimes or from acts contrary to the purposes and principles of the United Nations."[18] Article 1(F) primarily reflects a principled commitment to the promotion of an international morality through refugee law.[19] As observed by the French representative,

> it must be made quite clear that the object was not to specify in the Convention what treatment each country must mete out to individuals who had placed themselves beyond the pale, but only to state whether a country was entitled, in granting refugee status to such individuals, to do so on the responsibility of the High Commissioner and of the United Nations.[20]

This fundamental conviction that certain persons are beyond the pale—simply "not . . . deserving of international protection"[21]—led the drafters to craft Article 1(F) as a mandatory mechanism of exclusion. Thus, although a government may invoke its sovereignty to admit a person described in Article 1(F) to its territory, it is absolutely barred from granting Convention refugee status to that person.[22] The drafters considered, but ultimately rejected a proposal advanced by the United States that would have allowed "the question [to] remain within the discretion of each receiving country" by stipulating only that "[t]he High Contracting Parties

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convicted of a criminal offense. Indeed, no positive or concluded findings are required, so long as there are reasoned findings supporting the criminal allegation. *See generally* Joint Position Defined by the Council on the Harmonized Application of the Definition of the Term 'Refugee,' § 13, 1996 O.J. (L 63) 2, 7 [hereinafter EU Joint Position] (discussing the standards for the various clauses of Article 1(F)). Moreover, "the burden of establishing serious reasons for considering that [relevant crimes have] been committed [falls] on the party asserting the existence of such reasons. . . ." Ramirez v. Minister of Employment & Immigration, [1992] 2 F.C. 306, 314 (Can. Fed. Ct.).

18. G.A. Res. 217A, art. 14(2), U.N. Doc. A/810, at 74 (1948). An early formulation of Article 1(F) provided simply that "[n]o person to whom Article 14, paragraph 2 of the aforesaid Declaration is applicable shall be recognized as a refugee." *Correction to the Proposal for a Draft Convention Supported by France*, U.N. Ad Hoc Comm. on Statelessness & Related Problems, U.N. Doc. E/AC.32/L.3/Corr.1, at 1 (1950).

19. Arguably, this clause's initial purpose was simply the states' practical concern to avoid conflicts between their duty to protect refugees and their obligations under extradition treaties. States reached an agreement on Article 1(F)(b) for a combination of symbolic and practical reasons. *See infra* Part IV.A.

20. U.N. Econ. & Soc. Council Soc. Comm., 166th mtg., U.N. Doc. E/AC.7/SR.166, at 4 (1950) (statement of Mr. Rochefort of France).

21. UNHCR HANDBOOK, *supra* note 3, ¶ 140, at 33.

22. NEHEMIAH ROBINSON, CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS: ITS HISTORY AND INTERPRETATION 25 (1955) ("[Section F] is couched in categorical language . . . . It follows that, once a determination is made that there are sufficient reasons to consider a certain person as coming under this [section], the country making the determination is barred from according him the status of a [refugee].").

shall be under no obligation to apply the terms of this convention to any person."[23] France objected to the "disturbing . . . moral consequences"[24] of the U.S. approach. Israel similarly opposed the U.S. draft "on moral grounds," insisting that any state that decided to admit such a person would be "granting special benefits to a category of undesirable persons and thus placing itself in an unfavourable position *vis a vis* those States which adhered strictly to their obligations under the convention."[25] The United States ultimately acquiesced.[26]

Because no asylum seeker described in Article 1(F) can qualify for Convention refugee status, state parties to the Refugee Convention are under no duty to consider the merits of a protection claim made by such a person. Although it may sometimes be more convenient to consider an Article 1(F) exclusion in the course of an asylum hearing, at least where the facts that justify peremptory exclusion are intertwined with those relating to refugee status, there is no legal impediment to addressing Article 1(F) concerns as a preliminary matter.[27]

II. International Crimes: Article 1(F)(a)

Assuming that it is lawful for states to rely on Article 1(F) as a mechanism for peremptory exclusion, to what extent are its three substantive branches relevant for states anxious to exclude asylum seekers who have promoted or committed acts of violence? The first part of Article 1(F) excludes from

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23. U.N. Ad Hoc Comm. on Statelessness & Related Problems, 17th mtg., U.N. Doc. E/AC.32/SR.17, at 8 (1950) (statement of Mr. Henkin of the United States).

24. U.N. Ad Hoc Comm. on Statelessness & Related Problems, 18th mtg., U.N. Doc. E/AC.32/SR.18, at 3 (1950) (statement of Mr. Rain of France).

25. U.N. Ad Hoc Comm. on Statelessness & Related Problems, 17th mtg., U.N. Doc. E/AC.32/SR.17, at 9 (1950) (statement of Mr. Robinson of Israel).

26. U.N. Ad Hoc Comm. on Statelessness & Related Problems, 18th mtg., U.N. Doc. E/AC.32/SR.18, at 3 (1950) (statement of Mr. Henkin of the United States). As a result, the general clause of Article 1(F) was phrased in mandatory terms. The detailed discussions of the various sub-articles of Article 1(F) did not revisit this consensus.

27. *See, e.g.*, INS v. Aguirre-Aguirre, 526 U.S. 415 (1999).

> Though the BIA in the instant case declined to make findings respecting the risk of persecution facing respondent, this was because it determined respondent was barred from withholding under the serious nonpolitical crime exception. The BIA, in effect, found respondent ineligible for withholding even on the assumption he could establish a threat of persecution. This approach is consistent with the language and purposes of the statute.

Id. at 426 (citations omitted). UNHCR, in contrast, believes that exclusion should usually be considered as part of the status in determination.

> Normally it will be during the process of determining a person's refugee status that the facts leading to exclusion . . . will emerge. It may, however, also happen that the facts justifying exclusion will become known only after a person has been recognized as a refugee. In such cases, the exclusion clause will call for a cancellation of the decision previously taken.

UNHCR HANDBOOK, *supra* note 3, ¶ 140, at 33. Deborah Anker argues for a more emphatic position. DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES 417 (3d ed. 1999) ("The Convention envisions application of the exclusion clauses during the determination of refugee (or asylum) status and generally requires consideration of individualized circumstances. . .").

refugee status persons who are believed to have "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."[28] As this language implies, Article 1(F)(a) does not directly address exclusion on the grounds of risk to an asylum country. Nonetheless, some refugees who meet the categorical ineligibility criterion of Article 1(F)(a) are also persons a state may wish to exclude for its own security reasons.

For example, Spain appropriately denied refugee status to a Colombian asylum seeker because he had committed particularly cruel acts as a member of the insurgent *Fuerzas armadas revolucionarias de Colombia*.[29] Although Spain avoided its prima facie duty of protection, exclusion under Article 1(F)(a) was not lawful because of any security risk to Spain, but because Spain successfully linked the acts committed to conduct defined as fundamentally unacceptable under the Geneva Conventions regulating the protection of civilians during armed conflict.[30]

Article 1(F)(a) has less effect, however, as a means of peremptorily excluding persons who have engaged in acts of violence outside the context of war.[31] Some violent asylum seekers will be barred by virtue of the evolving notion of crimes against humanity, which now includes murder, severe deprivation of physical liberty, torture, rape, and other inhumane acts of similar character.[32] But the listed actions are only crimes against human-

28. Refugee Convention, *supra* note 4, art. 1(F)(a), 189 U.N.T.S. at 156.

29. Spanish Ministry of Interior, Decision No. 962802090007 (June 17, 1993).

30. *Id.* The Statute of the International Criminal Court defines war crimes within the court's jurisdiction to include grave breaches of the 1949 Geneva Conventions, other specified serious violations of the law and customs of war, and violations of common Article 3 of the 1949 Geneva Conventions. *Rome Statute of the International Criminal Court*, U.N. GAOR, 53d Sess., art. 8(2)(a)-(c), U.N. Doc. A/CONF.183/9, at 6-9 (1998) [hereinafter *ICC Statute*].

31. For example, the United Nations deferred inclusion of "terrorism" and drug-related crimes as matters within the jurisdiction of the International Criminal Court both because agreement on a definition proved illusive and because many governments felt that the complexity of these crimes meant that they were better dealt with at the national level. Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/10, Annex I, Res. E ("[A] Review Conference pursuant to article 123 of the Statute of the International Criminal Court [should be held to] consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court.").

32. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

ity if "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack,"[33] defined to mean "a course of conduct involving the multiple commission of acts . . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."[34] Because many asylum seekers will have been involved with acts of violence that do not meet this high standard, Article 1(F)(a) answers only a fairly small subset of asylum-state concerns.

III. Acts Contrary to the Principles and Purposes of the United Nations: Article 1(F)(c)

Some asylum seekers who have engaged in or advocated the use of violence will also find themselves peremptorily barred from refugee status on the basis of the Refugee Convention's Article 1(F)(c), which denies refugee status to persons believed "guilty of acts contrary to the purposes and principles of the United Nations."[35] Because only governments are parties to the U.N. Charter, the traditional view is that Article 1(F)(c) applies to persons formally entrusted with domestic implementation of U.N. principles and purposes, not ordinary citizens.[36] This clause has therefore been invoked to exclude from refugee status persons who used a position of power to violate human rights. In 1996, however, the United Kingdom sponsored an initiative in the General Assembly of the United Nations that would have required states to refuse refugee protection, on the basis of Article 1(F)(c), to anyone who is a terrorist or "who financed, planned and incited terrorist

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(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . ., or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

ICC Statute, *supra* note 30, art 7(1).

33. *Id.*

34. *Id.* art. 7(2)(a).

35. Refugee Convention, *supra* note 4, art. 1(F)(c), 189 U.N.T.S. at 156.

36. "It was difficult to see how an individual could commit acts contrary to the purposes and principles of the Charter of the United Nations, membership of which was confined to sovereign States." U.N. Econ. & Soc. Council Soc. Comm., 160th mtg., U.N. Doc. E/AC.7/SR.160, at 15 (1950) (statement of Mr. Bernstein of Chile); *see also* ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 286 (1966); JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 226-29 (1991). *Contra* U.N. Econ. & Soc. Council Soc. Comm., 166th mtg., U.N. Doc. E/AC.7/SR.166, at 5 (1950) (statement of Mr. Rochefort of France) ("So far as acts contrary to the principles and purposes of the United Nations were concerned, the first question which arose was whether such acts could be committed by individuals. An affirmative reply to that question was given by articles 14 and 30 of the Universal Declaration of Human Rights."). Some commentators take more flexible position in line with this view. ANKER, *supra* note 27, at 421-22; GOODWIN-GILL, *supra* note 10, at 110-14.

deeds."[37] This mandatory reinterpretation of Article 1(F)(c) was defeated, in large measure because states were appropriately skeptical that the General Assembly had the authority to amend the Refugee Convention indirectly.[38]

But even as it rejected the British proposal for a mandatory reinterpretation of Article 1(F)(c), the General Assembly's 1997 Resolution on Measures to Eliminate International Terrorism invited states to "take appropriate measures . . . before granting asylum, for the purpose of ensuring that the asylum seeker has not participated in terrorist acts."[39] The resolution identified terrorism as a violation of the purposes and principles of the United Nations, impliedly encouraging states to exclude terrorists under Article 1(F)(c).[40] However, even this more modest initiative is legally problematic. Putting to one side the question of whether the General Assembly has the authority by a nonbinding resolution to vary the principles and purposes of the United Nations,[41] the General Assembly should not characterize a matter as contrary to the principles and purposes

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37. U.N. GAOR 6th Comm., 51st Sess., 10th mtg. ¶ 19, U.N. Doc. A/C.6/51/SR.10, at 5 (1996) (statement of Ms. Wilmhurst of the United Kingdom).

38. Switzerland questioned whether certain paragraphs of the proposed [Declaration on Measures to Eliminate International Terrorism] did not run the risk of reinterpreting certain provisions of the [1951 Refugee] Convention which, historically, had been quite clear. Any reinterpretation which modified the provisions of the Convention would be tantamount to an amendment thereto, something that could only be undertaken by the bodies specified in the Convention itself. He welcomed the statement by the representative of the United Kingdom that that was not the aim of the proposed declaration. Switzerland was of the view, however, that the aims of the declaration could best be achieved on the basis of the established interpretation of the 1951 Convention. The international community must not allow the urgency of the task of combating terrorism to lead it to violate other key principles of international relations.

U.N. GAOR 6th Comm., 51st Sess., 4th mtg., U.N. Doc. A/C.6/51/SR.11, at 11 (1996) (statement of Mr. Pfirter, Observer for Switzerland). Mr. Pfirter made these comments during debate leading to passage of Measures to Eliminate International Terrorism (U.N. 1997 Terrorism Declaration). G.A. Res. 210, U.N. GAOR, 51st Sess., Agenda Item 151, U.N. Doc. A/RES/51/210 (1997) [hereinafter *1997 Terrorism Declaration*].

39. *1997 Terrorism Declaration*, *supra* note 38, Annex, ¶ 3.

40. "The States Members of the United Nations reaffirm that acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations; they declare that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations." *Id.* Annex, ¶ 2. The General Assembly did not intend to encourage states to deviate in any sense from their duties under international refugee law. *Id.* Annex, pmbl.

41. The General Assembly has no general lawmaking authority. U.N. CHARTER art. 10. While agreeing that General Assembly resolutions are not binding international law, Ian Brownlie nonetheless suggests that "[i]n some cases a resolution may have direct legal effect as an authoritative interpretation and application of the principles of the Charter." IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 14-15 (5d ed. 1998). Others have argued that General Assembly resolutions play a role in the creation of customary international law. Blaine Sloan, *General Assembly Resolutions Revisited (Forty Years Later)*, 58 BRIT. Y.B. INT'L. L. 39, 93 (1987). A stronger case for authority to vary the principles and purposes of the United Nations might be made for condemnations of terrorism by the Security Council. *E.g.*, S.C. Res. 1269, U.N. SCOR, 54th Sess., 4053d mtg., U.N. Doc. S/RES/1269 (1999). But not even the Security Council has general authority to make binding decisions on all subjects. *See* UN CHARTER ch. 7.

of the United Nations absent a clear normative consensus.[42] Yet the 1997 Resolution does not provide a general definition of "terrorism." Treaties on "terrorism" adopted at the universal level, such as earlier European initiatives,[43] have generally avoided the generic criminalization of "terrorism" in favor of specific commitments to more effectively enforce existing norms.[44] Only the International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention), opened for signature in January 2000, attempts a more general definition of terrorism.[45] The General

42. [T]he international community has been striving to avoid giving the benefit of political asylum to those who can truly be categorised as terrorists .... I say "striving to," because no Convention has yet been adopted which deals with this situation on a universal basis (or even in respect of states which are members of the United Nations) and a complete definition of "terrorist act" which takes such act outside the range of political crime may be very difficult to achieve and even more to obtain agreement to on the part of states.

T. v. Home Sec'y, [1996] A.C. 742, 774 (1995) (Slynn of Hadley, L.J.) (appeal taken from Eng. C.A.) (citations omitted).

43. For example, the pioneering European Convention on the Suppression of Terrorism codifies a fairly uncontroversial list of prohibited acts: aircraft hijacking; attacks on internationally protected persons; kidnapping; hostage-taking; serious unlawful detention; and offenses involving the use of a bomb, grenade, rocket, automatic firearm, or letter or parcel bomb to endanger persons. To ensure that any person who commits a relevant crime is brought to justice, contracting states agree to exclude all prohibited acts from the political offense exception, pursuant to which governments have insisted on the right to withhold extradition. Faced with a request for extradition based on a prohibited act, a state party must either extradite or prosecute the offender. European Convention on the Suppression of Terrorism, *done* Jan. 27, 1977, arts. 1, 7, Europ. T.S. No. 90 [hereinafter European Terrorism Convention].

44. These treaties address terrorism through specific concerns, such as interference with air and sea transportation, attacks on diplomats, and hostage-taking. *E.g.*, International Convention for the Suppression of Terrorist Bombings, *adopted* Dec. 15, 1997, S. TREATY DOC. 106-6 (1999), 37 I.L.M. 251 (1998) [hereinafter Terrorist Bombing Convention]; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, S. TREATY DOC. 101-1 (1989), 27 I.L.M. 672; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, S. TREATY DOC. 101-1 (1989), 27 I.L.M. 685; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, S. TREATY DOC. 100-19, 27 I.L.M. 627; International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11, 081, 1316 U.N.T.S. 205; Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, T.I.A.S. No. 11,080, 1456 U.N.T.S. 101; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 28, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.

45. In addition to prohibiting financial support for various specific acts already agreed to constitute forms of terrorism, *see supra* note 44, this Convention criminalizes the funding of

> [a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, where the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

International Convention for the Suppression of the Financing of Terrorism, *adopted* Dec. 9, art. 2(1)(b), 39 I.L.M. 270, 271 [hereinafter Terrorist Financing Convention]. If

Assembly's decision to promote the peremptory exclusion of asylum seekers without a clear and comprehensive international legal definition was therefore of questionable propriety.

If no international consensus on the substance of a U.N. principle exists, yet states are nonetheless invited to rely on that principle as grounds for summary exclusion of asylum seekers, it is inevitable that national and personal subjectivities will influence its interpretation. For example, one judge of the House of Lords supported exclusion by relying on a definition of terrorism from a 1937 League of Nations Convention, even though he candidly conceded that "[t]he Convention never came into force, but the definition is serviceable . . . ."[46] The Canadian Federal Court of Appeal recently held that it "accept[ed] that nations may be unable to reach a consensus as to an exact definition of terrorism. But this cannot be taken to mean that there is no common ground with respect to certain types of conduct."[47]

Of even greater concern, the United States codified a bar on asylum or withholding of deportation for persons who have engaged in terrorism or who the U.S. government reasonably believes have incited or are engaged in, or likely to engage in, terrorist activity.[48] The United States implements this policy using a domestic definition of terrorism.[49] Yet measured against even the most ambitious United Nations effort to promote such a definition,[50] U.S. law clearly disfranchises a broader category of refugees than an interpretation of Article 1(F)(c) rooted in international law would allow. For example, while the U.N. Terrorist Financing Convention requires a threat of death or serious bodily injury, the U.S. provision also includes detention as a terrorist act. The Terrorist Financing Convention requires that the threat be directed against a civilian or noncombatant,

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this conceptual standard attracts substantial support, it may provide the basis for the long-awaited generic criminalization of terrorism, a project to which the General Assembly has now committed itself in principle. *Id.* pmbl.

46. T. v. Home Sec'y, [1996] A.C. at 773 (Mustill, L.J.). This conclusion is particularly regrettable, as the earlier analysis in this opinion is more perceptive than any decision rendered by a senior court on the meaning of Article 1(F). Although these remarks were made in an analysis of Article 1(F)(b), they nonetheless demonstrate the absence of a sanctioned international standard of terrorist activity.

47. Suresh v. Minister of Citizenship & Immigration, 183 D.L.R. (4th) 629, 673 (Can. Fed. Ct. 2000). Ironically, the consensus identified by the court erroneously suggested that killing innocent civilians necessarily amounts to a crime against humanity. *Compare id.*, *with supra* notes 32-34 and accompanying text (discussing the meaning of "crime against humanity").

48. Under U.S. law, courts must refuse to withhold deportation on national security grounds if the government believes the applicant has engaged in "terrorist activity." 8 U.S.C. § 1227(a)(4)(B) (2000). An individual "engages" in terrorist activity if he or she, inter alia, provides any material support or funding to an individual who has already committed, or plans to commit, a terrorist act. 8 U.S.C. § 1182(a)(3)(B) (2000).

49. The Secretary of State has designated twenty-eight groups as terrorist organizations under 8 U.S.C. § 1189. Designation of Foreign Terrorist Organizations, 64 Fed. Reg. 55,112-13 (Oct. 8, 1999). The courts have thus far upheld the authority of the government to make these designations based on a secret and untested record. People's Mojahedin Org. of Iran v. United States Dep't of State, 182 F.3d 17, 19 (D.C. Cir. 1999).

50. *See supra* note 45.

while U.S. law is not similarly constrained. Perhaps most important, the international standard deems a relevant act terrorism only if the individual intended to coerce action by a government or international organization, while U.S. law considers an intent to compel action by any third party sufficient.[51]

Our point is not that the various understandings of terrorism embraced by national courts and governments are wrong or that the Terrorist Financing Convention's approach is clearly preferable. But exclusion based on a domestic definition of terrorism is at odds with the purpose of Article 1(F)(c) to exclude from refugee status only persons who have contravened "the principles and purposes *of the United Nations*."[52] Because the General Assembly's declaration that terrorism is contrary to the principles and purposes of the United Nations preceded, and still precedes, the adoption of a clear and workable international legal definition of terrorist activity, it has engendered ambiguity in the application of what should be a common international standard.[53]

The Canadian Supreme Court recently defined a more nuanced means to expand the scope of Article 1(F)(c). In *Pushpanathan v. Minister of Citizenship and Immigration*, the court determined that "where a widely accepted international agreement or United Nations resolution explicitly declares that the commission of certain acts is contrary to the purposes and principles of the United Nations, then there is a strong indication that those acts will fall within Article 1F(c)."[54] The court cited General Assembly resolutions condemning terrorism as examples of standards that "designate acts which are contrary to the principles and purposes of the United Nations. Where such declarations or resolutions represent a reasonable consensus of the international community, then that designation *should be considered determinative*."[55] While largely sympathetic to the court's basic

51. *Compare* Terrorist Financing Convention, *supra* note 45, art. 2(1)(b), 37 I.L.M. at 271, *with* 8 U.S.C. § 1182(a)(3)(B)(ii)(II).

52. Refugee Convention, *supra* note 4, art. 1(F)(c), 189 U.N.T.S. at 156 (emphasis added).

53. More generally, the definition of a refugee entitled to Convention rights, including the provisions for criminal and other exclusion, is not subject to reservation. Refugee Convention, *supra* note 4, arts. 1, 42(1), 189 U.N.T.S. at 152-56, 182. But the United States Supreme Court held that Convention refugees are not rights-holders, but simply persons entitled to ask the Attorney-General to grant asylum in her discretion. *See* James C. Hathaway & Anne K. Cusick, *Refugee Rights Are Not Negotiable*, 14 GEO. IMMIGR. L.J. 481, 484-98, 534-38 (2000) (citing INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); INS v. Stevic, 467 U.S. 407 (1984)). In the Supreme Court's view, only a subset of persons who meet the international refugee definition, namely those able to prove a probability of persecution, may claim Convention rights. *Id.* Even these "super-refugees" may only insist on the benefit of Article 33—the duty of *non-refoulement*—not the full range of rights set out in Articles 2 through 34 of the Convention. *Id.* This interpretation is completely aberrational, supported neither by the textual scope of relevant international law nor by the practice of any other state party. *Id.*

54. [1998] 1 S.C.R. 982, 1030 (Can.).

55. *Id.* (emphasis added). The force of the Canadian Supreme Court's position is strengthened by its clarification that only a subset of those standards is relevant to the Article 1(F)(c) inquiry, namely those that assist in defining "individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to

approach, we believe it raises two fundamental concerns.[56]

First, the court's reference to terrorism as an act that justifies exclusion under Article 1(F)(c) implies that this clause should not, as was historically the case, apply only to persons who abused positions of governmental authority. As Mr. Justice Bastarache stated:

> Although it may be more difficult for a non-state actor to perpetrate human rights violations on a scale amounting to persecution without the state thereby implicitly adopting those acts, the possibility should not be excluded *a priori*. . . . [T]he Court must . . . take into consideration that some crimes that have specifically been declared to contravene the purposes and principles of the United Nations are not restricted to state actors.[57]

Yet, as the judgment itself acknowledges, other states, UNHCR, and many commentators take the position that Article 1(F)(c) only addresses the exclusion of persons who held a position of governance.[58] Indeed, nonstate actors capable of displacing legitimate state authorities have only recently been held accountable for violations of international core norms.[59] Perhaps because of the continuing uncertainty on these issues, the Government of the Netherlands declared Articlel(F)(c) an inherently vague basis for any peremptory exclusion and therefore decided not to rely on this provision at all.[60]

Even if the Canadian Supreme Court appropriately stated the modern position on liability of nonstate actors to abide by fundamental principles

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persecution in a non-war setting." *Id.* at 1029. Measured against this standard, Article 1(F)(c) clearly assists in excluding refugees who were responsible for an ongoing violation of basic human rights.

56. As a practical matter, *Pushpanathan*'s interpretive structure requires fairly sophisticated legal analysis, making it a less-than-ideal tool for many frontline refugee decision-makers. *See* Gerry Van Kessel, *Canada's Approach Towards Exclusion Ground 1F*, *in* REFUGEE LAW IN CONTEXT: THE EXCLUSION CLAUSE 287, 292 (Peter J. van Krieken ed., 1999) [hereinafter REFUGEE LAW IN CONTEXT].

57. *Pushpanathan*, [1998] 1 S.C.R. at 1031-32.

58. Nicole Michel, *Purposes and Principles of the United Nations: The Way in Which France Applies Article 1F(c)*," *in* REFUGEE LAW IN CONTEXT, *supra* note 56, at 294-96.

59. The recent decision of the United Nations Committee Against Torture held that

> for a number of years Somalia has been without a central government, that the international community negotiates with the warring factions and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall . . . within the phrase "public officials or other persons acting in an official capacity . . . ."

U.N. GAOR, Comm. Against Torture, 54th Sess., Supp. No. 44, Annex VII(A)(11) ¶ 6.5, at 119, U.N. Doc. A/54/44 (1999) (discussing *Elmi v. Australia*, Communication No. 120/1998).

60. "I shall not use the term 'acts in contravention of the [principles] and purposes of the United Nations contained in [Article 1] F(c) as independent grounds. The exclusion provisions of [Articles] 1(F)(a) and 1(F)(b) provide enough starting points at present for exclusion in cases where it is indicated." Letter from the Netherlands Secretary of State for Justice to Parliament, Nov. 28, 1997, Kamerstukken 1997-1998, nr. 19637, nr. 195 (unofficial translation, on file with the authors) [hereinafter *Netherlands Policy Statement*].

of the United Nations, a second concern arises from its willingness to view even legally nonbinding General Assembly declarations as capable of redefining the scope of Article 1(F)(c) on a "determinative" basis.[61] Acknowledging the importance of looking beyond the U.N. Charter to understand the contemporary scope of the principles and purposes of the United Nations,[62] objection might still be taken to the notion that legally nonbinding General Assembly declarations can effect such a redefinition.[63]

At the very least, however, we believe there would be general agreement that it makes sense to look to widely ratified United Nations treaties in defining the evolving nature of U.N. principles and purposes.[64] Thus, for example, an asylum seeker believed to have engaged in hijacking or an attack on an internationally protected person might appropriately be excluded under Article 1(F)(c).[65] Article 1(F)(c) therefore has the potential to exclude some asylum seekers who have committed or facilitated acts of violence, in addition to the class of persons already captured by Article 1(F)(a). If consensus can be achieved on the thorny issue of the duty of persons not in positions of official authority to govern their conduct by the principles and purposes of the United Nations, widely subscribed United Nations treaties on human rights and criminal law could define a broader class of individuals considered inherently unworthy of Convention refugee status.

IV. Serious Nonpolitical Crimes: Article 1(F)(b)

As the analysis in Sections II and III makes clear, neither Article 1(F)(a) nor Article 1(F)(c) of the Refugee Convention presently affords a neat means of peremptorily excluding all asylum seekers believed to have committed or facilitated acts of violence. Most official attention has therefore focused on the remaining peremptory exclusion clause, Article 1(F)(b). The "common

61. *Supra* text accompanying note 55.

62. The Austrian Administrative Court took a different view. Georg K v. Ministry of the Interior, VwSlgNF-A 185/72, 71 I.L.R. 284 (Aus. VwGH 1972). Although the court in this case agreed that individuals who have not held positions of governmental authority may nonetheless violate the principles and purposes of the United Nations, the court considered the U.N. Charter the relevant point of reference.

> The decisive factor in determining whether the conduct of a natural person falls within Article 1(F)(c) can only be whether or not it is aimed at and objectively capable of impairing or disturbing the peaceful order among the subjects of international law which is set out in the Charter of the United Nations.

Id., 71 I.L.R. at 290.

63. *Supra* note 41. The Canadian Supreme Court is not alone in endorsing the legal significance of General Assembly resolutions for purposes of interpreting Article 1(F)(c). *See, e.g.*, EU Joint Position, *supra* note 17, § 13.3, para. 3 ("In order to determine whether an action may be deemed contrary to the purposes and principles of the United Nations, Member States should take account of the conventions and resolutions adopted in this connection under the auspices of the United Nations.").

64. Pushpanathan v. Minister of Citizenship & Immigration, [1998] 1 S.C.R. 982, 1030 (Can.).

65. *See supra* note 44 (listing treaties prohibiting hijacking and attacks on internationally protected persons).

law criminality clause"[66] authorizes a state party to the Refugee Convention to exclude from refugee status all persons it reasonably believes have committed "a serious non-political crime outside the country of refuge prior to his admission to that country . . . ."[67] Perhaps even more frequently than in the case of Articles 1(F)(a) and 1(F)(c), some asylum seekers appropriately excluded under Article 1(F)(b) will be persons who have engaged in or promoted acts of violence. But it is important to remember that Article 1(F)(b) is an integral part of Article 1(F), the general purpose of which is not the protection of asylum-state safety and security, but the exclusion of persons deemed inherently unworthy of Convention refugee status.[68] Article 1(F)(b) therefore does not license receiving countries to exclude peremptorily asylum seekers in the exercise of security-based discretion. Any contribution to the security of the asylum state that follows from application of Article 1(F)(b) must, in other words, be purely incidental to its valid invocation.

Rather than promoting asylum-state safety, Article 1(F)(b) implements the core of Article 14(2) of the Universal Declaration of Human Rights, by which the right to asylum "may not be invoked in the case of prosecutions genuinely arising from non-political crimes . . . ."[69] Simply put, the drafters believed that fugitives from justice—including both those whose serious, unpunished criminal conduct would bring refugee law into disrepute and the narrower category of persons who would use refugee status to avoid lawful extradition—were inherently unworthy of refugee status. As elaborated below, the definition of criminality for purposes of Article 1(F)(b), like the exclusion tests under Article 1(F)(a) and Article 1(F)(c), is premised on the satisfaction of an external standard.[70] Specifically, only asylum seekers who meet the asylum state's definition of extraditable criminality are appropriately excluded from refugee status under Article 1(F)(b).

Both the British House of Lords and United States Supreme Court have issued ground-breaking judgments that affirm the need to base Article 1(F)(b) analysis in norms of extradition law. The 1996 British decision in *T. v. Home Secretary* provided the most detailed analysis. The House of Lords upheld the denial of refugee status to an Algerian member of the *Front islamique du salut* (FIS) involved in planting a bomb at the Algiers airport and attacking an army barracks to protest the annulment of an

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66. It is evident from the literature . . . that the rather puzzling expression "un crime de droit commun," often rendered as "common crime," has nothing to do with the common law, but is equivalent to "ordinary crime," or conduct recognised as criminal by the common consent of nations. Murder is a common crime; treason is not.

T. v. Home Sec'y, [1996] A.C. 742, 759 (1995) (Mustill, L.J.) (appeal taken from Eng. C.A.).

67. Refugee Convention, *supra* note 4, art. 1(F)(b), 189 U.N.T.S. at 156.

68. *Supra* notes 18-22 and accompanying text.

69. *Universal Declaration of Human Rights*, G.A. Res. 217A, art. 14(2), U.N. Doc. A/810, at 74 (1948).

70. *See infra* notes 113-30 and accompanying text.

election in which the FIS had secured a majority of votes.[71] The foundational premise in *T. v. Home Secretary* was that the interpretation of Article 1(F)(b) should be firmly anchored in the same norms relevant to an adjudication for extradition. Speaking for three of the five law lords who rendered the decision, Lord Lloyd of Berwick observed that

> it was common ground that the words ["non-political crime"] must bear the same meaning as they do in extradition law. Indeed, it appears from the travaux préparatoires that the framers of the convention had extradition law in mind when drafting the convention, and intended to make use of the same concept, although the application of the concept would, of course, be for a different purpose.[72]

In one of the two concurring judgments, Lord Mustill acknowledged that

> the reference to the "serious non-political crime" in the [Refugee Convention] 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.[73]

In its 1999 decision of *INS v. Aguirre-Aguirre*, the U.S. Supreme Court upheld the refusal of asylum to a Guatemalan who participated in student protests against the government's failure to investigate murders and disappearances.[74] Aguirre-Aguirre had forced passengers on public buses to disembark, pelting them with sticks and stones when necessary, then set the buses on fire.[75] In support of its decision to apply Article 1(F)(b), the U.S. Supreme Court endorsed Lord Mustill's approach to the definition of a nonpolitical crime.[76] While the *Aguirre-Aguirre* decision was not explicitly framed by reference to standards of extradition law, the holding insisted on an approach to Article 1(F)(b) that mirrors the analysis for an extradition request.

First, *Aguirre-Aguirre* rejected the Ninth Circuit Court of Appeals's view that "additional factors" beyond the usual extradition-based concern—including consideration of whether the offense involved either "atrocity" or "gross disproportionality" of means to an end and an evaluation of the "necessity" and "success" of the applicant's actions—are required to exclude under Article 1(F)(b). To the contrary, the U.S. Supreme Court held that, as in extradition law, these concerns are simply factors to consider in determining whether "the political aspect of an offense outweighs its common-law character."[77] Second, the Supreme Court rejected the so-called "balancing test" advocated by UNHCR and lower courts.[78] In line

71. T. v. Home Sec'y, [1996] A.C. at 753.
72. *Id.* at 778 (Lloyd of Berwick, L.J.).
73. *Id.* at 764 (Mustill, L.J.).
74. INS v. Aguirre-Aguirre, 526 U.S. 415, 421 (1999).
75. *Id.* at 421-22.
76. "'The crime either is or is not political when committed, and its character cannot depend on the consequences which the offender may afterwards suffer if he is returned.'" *Id.* at 428 (quoting T. v. Home Sec'y, [1996] A.C. at 769 (Mustill, L.J.)).
77. *Id.* at 429.
78. *Id.* at 428; *see also infra* Part VI.C.

with extradition law, *Aguirre-Aguirre* held that "it is not obvious that an already-completed crime is somehow rendered less serious by considering the further circumstances that the alien may be subject to persecution if returned to his home country."[79]

These two judgments, in addition to *obiter dicta* in two Canadian Supreme Court decisions,[80] adopted an understanding of Article 1(F)(b) that is at odds with the traditional position advocated by UNHCR and frequently endorsed by lower courts around the world.[81] None of these decisions by leading common-law courts conceived of Article 1(F)(b) as a means to deny refugee status based on general concerns for asylum-state safety or security. Explicitly or implicitly, each court embraced an understanding of Article 1(F)(b) rooted in norms of extradition law. As the following analysis illustrates, this approach is consistent with the Refugee Convention's drafting history and avoids the conceptual and practical pitfalls of the alternative UNHCR approach.

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79. *Aguirre-Aguirre*, 526 U.S. at 426. An earlier federal district court decision explicitly recognized the importance of defining the political offense exception in refugee law as a function of its interpretation in extradition law. *Dwomoh v. Sava*, 696 F. Supp. 970 (S.D.N.Y. 1988) (involving a refugee claimant who had been a soldier in the army of Ghana). In 1986, the claimant, disturbed by worsening political conditions and political executions, participated in a coup against the government. The U.S. Board of Immigration Appeals excluded him from refugee status on the grounds that he was fundamentally a criminal at risk of prosecution for treason. Rejecting this result, the district court drew on the predecessor International Refugee Organization (IRO) definition, citing the desire of the Refugee Convention's drafters to extend "'at least as much protection to refugees as had been provided by previous agreements.'" *Id.* at 976 (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 438 n.20 (1987) (quoting U.N. ESCOR, Ad Hoc Comm. on Statelessness & Related Problems, 10th Sess., U.N. Doc. E/AC.32/5, at 37 (1950))). Under the IRO, "the definition of a refugee . . . [included] individuals who have engaged in resistance activities against totalitarian government." *Id.* Indeed, the court noted that the IRO Manual explicitly endorsed "the long-standing international practice *under extradition law* of refusing to return individuals accused of purely political crimes aimed directly against a government, concluding that *the same principle should be applied in refugee law.*" *Id.* (emphasis added).

80. In *Attorney-General of Canada v. Ward*, the court observed that

> Hathaway would appear to confine paragraph (b) to accused persons who are fugitives from prosecution. The interpretation of this [clause] was not argued before us. I note, however, that Professor Hathaway's interpretation seems to be consistent with the views expressed in the *Travaux préparatoires*, regarding the need for congruence between the Convention and extradition law.

[1993] 2 S.C.R. 689, 743 (Can. 1992) (citations omitted). More recently, the Canadian Supreme Court's *Pushpanathan* decision held that "[i]t is quite clear that Article 1F(b) is generally meant to prevent ordinary criminals extraditable by treaty from seeking refugee status . . . . The parties sought to ensure that common criminals should not be able to avoid extradition and prosecution by claiming refugee status." Pushpanathan v. Minister of Citizenship & Immigration, [1998] 1 S.C.R. 982, 1033-34 (Can.). This reasoning was rejected, however, in Australia. Ovcharuk v. Minister for Immigration & Multicultural Affairs (1998) 158 A.L.R. 289 (Austl. Fed. Ct.) (Branson, J.).

81. For a detailed discussion of the views of UNHCR and the state practice premised on its interpretation of Article 1(F)(b), see *infra* notes 192-203 and accompanying text.

A. The Historical Record

Our reading of the *travaux préparatoires* suggests that while the drafters of Article 1(F)(b) achieved a clear consensus on the scope of this exclusion clause, their agreement was prompted by distinct, but complementary objectives.[82] As previously noted, the inspiration for Article 1(F)(b) was Article 14(2) of the Universal Declaration of Human Rights.[83] That provision's dry and pragmatic language[84] suggests a fairly modest and rather technical reason to enact Article 1(F)(b): avoiding conflict between the duty to protect refugees and the duty to honor extradition treaties.[85] In line with this goal, some states viewed Article 1(F)(b) as simply making clear that in conflicts between refugee law and specific extradition treaty provisions, extradition law would govern.[86] The British representative, for example, argued that "the action of States was governed by treaties relating specifically to extradition, and it would therefore be for States to take appropriate action in any given case in the light of their obligations under such treaties."[87] He opined that there was value in excluding "the person who was sought . . . on legitimate *prima facie* grounds, for a trial for a non-political crime."[88] The Netherlands representative similarly argued for "a

82. *Contra* GOODWIN-GILL, *supra* note 10, at 103-04.

83. *Supra* text accompanying note 69.

84. *Supra* text accompanying note 69.

85. Article 14 of the Universal Declaration of Human Rights was concerned with the right of asylum, and its second paragraph constituted a proviso to the general provision of the first paragraph. That second paragraph seemed . . . to be intended to apply to persons who were fugitives from prosecution in another country for non-political crimes, and the effect would seem to be that the provisions of article 14 would not override specific extradition obligations. . . . [T]he Convention mentioned neither the right of asylum nor the principle of extradition. In that connexion, the action of States was governed by treaties relating specifically to extradition, and it would therefore be for States to take appropriate action in any given case in the light of their obligations under such treaties.

Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 29th mtg., U.N. Doc. A/CONF.2/SR.29, at 14-15 (1951) (statement of Mr. Hoare of the United Kingdom); *see also* Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 24th mtg., U.N. Doc. A/CONF.2/SR.24, at 9 (1951) (statement of Mr. Herment of Belgium) ("[I]t was possible that, under international law, a refugee convicted of, or charged with, a common-law crime would have necessarily to be handed over to the authorities of his country of origin. Inclusion of the provision in question was therefore imperative.").

86. "[T]he exception of common law criminals subject to extradition would naturally continue to be applicable." U.N. Ad Hoc Comm. on Statelessness & Related Problems, 5th mtg., U.N. Doc. E/AC.32/SR.5, at 5 (1950) (statement of Mr. Henkin of the United States); *see also* U.N. Econ. & Soc. Council Soc. Comm., 166th mtg., U.N. Doc. E/AC.7/SR.166, at 4 (1950) (statement of Mr. Rochefort of France). Indeed, the text adopted by the General Assembly in establishing UNHCR explicitly excluded a person "[i]n respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition . . . ." *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428, U.N. GAOR, 5th Sess., Supp. No. 20, Annex ¶ 7(d), at 47, U.N. Doc. A/1775 (1950).

87. Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 29th mtg., U.N. Doc. A/CONF.2/SR.29, at 15 (1951) (statement of Mr. Hoare of the United Kingdom).

88. *Id.*; *see also id.* at 16-17 (statement of Mr. Petren of Sweden).

reservation on the subject of extradition."[89]

Yet even those states that supported adoption of Article 1(F)(b) for fairly practical, extradition-based reasons were not prepared to endorse the primacy of extradition law in all circumstances. The British representative, notwithstanding his desire to avoid conflicts between refugee law and extradition law, objected to the article as initially drafted. He argued that the version of Article 1(F)(b) presented to the Conference of Plenipotentiaries—excluding persons "fall[ing] under the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights"[90]—was too vague for incorporation in a legally binding treaty. He therefore proposed its deletion,[91] an action that suggests that he believed it would be better to compromise extradition obligations than authorize a standard that "would have made it too easy for States to withdraw the status of refugee from many persons who had been granted asylum from persecution."[92]

In the ensuing debate, France and several other frontline receiving states argued against the British proposal to delete Article 1(F)(b), but not because they sought to uphold the primacy of extradition treaties. For these countries, which relied on the refugee definition to decide who should be admitted to residence in their territories, there was a principled belief that unpunished common criminals were "not worthy" of protection.[93] France insisted that the Convention must allow asylum countries to "screen the refugees entering their territories"[94] in order to exclude fugitives from justice "who did not yet enjoy refugee status."[95] Because "in the present state of affairs, there was no international court of justice competent to try war criminals or violations of common law already dealt with by national legislation,"[96] the absence of such a screening tool would make it politically and socially untenable to continue granting asylum to all refugees. The relative precision of the French delegation's concern made it possible for the British representative to withdraw his proposal to delete Article 1(F)(b). Because the French government's objectives could be met by text that would not open the door to abusive exclusion decisions, which the British representative feared the bald reference to the Universal Declaration might have done,[97] he could agree to a more carefully defined

89. *Id.* at 14 (statement of Baron van Boetzelaer of the Netherlands).

90. U.N. Doc. A/CONF.2/1, Mar. 12, 1951, art. 1(E).

91. U.N. Doc. A/CONF.2/74, July 13, 1951.

92. Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 29th mtg., U.N. Doc. A/CONF.2/SR.29, at 21 (1951) (statement of Mr. Hoare of the United Kingdom).

93. *Id.* at 14 (statement of Mr. Herment of Belgium).

94. *Id.* at 17 (statement of Mr. Rochefort of France).

95. *Id.* at 21 (statement of Mr. Rochefort of France); *see also id.* at 26 (statement of Mr. Bozovic of Yugoslavia) ("He explained that his amendment embraced two concepts: that of crimes committed outside the receiving country; and that of crimes committed by persons who had not at the time acquired the status of refugee.").

96. *Id.* at 13 (statement of Mr. Rochefort of France).

97. *Id.* at 21 (statement of Mr. Hoare of the United Kingdom) ("[W]hile he did not regard the revised [text of Article 1(F)(b)] as entirely free from objection, [he] felt that it at least removed his main objection to the text . . . as originally drafted . . . .").

approach to the exclusion of fugitives from justice.

Thus, the *travaux* suggest two distinct, but closely related rationales for Article 1(F)(b). For some countries, the primary concern was to avoid the admission as refugees of persons who could not be tried for their offenses in the asylum state. For others, the goal was to honor extradition obligations despite intervening claims to refugee status. Proponents of both perspectives agreed that because of the gravity of peremptory exclusion, only crimes generally recognized as truly serious should be grounds for exclusion. The net result is a consensus on the substantive ambit of Article 1(F)(b) defined by three criteria: only crimes committed outside the adjudicating state are relevant, those crimes must be justiciable, and the crimes must meet a fairly exacting definition of gravity. In other words, the drafters' differing perspectives on the primary purpose of Article 1(F)(b) did not prevent them from arriving at a clearly defined standard for the peremptory exclusion of certain common criminals.

B. An Historically Grounded Approach to Application of Article 1(F)(b)

Interpreting the text in the light of the drafting record, the first requirement for invocation of Article 1(F)(b) is therefore that the criminal allegation be based on acts committed outside a country of refuge,[98] whether in the country of origin[99] or in transit to the asylum state.[100] As noted by the Canadian representative prior to the vote on this clause, "the issue turned on the temporal element, namely, whether a person had committed a crime outside the territory of the receiving country *before* he had applied for the status of refugee."[101] Criminal activity in a state of refuge, on the other hand, is appropriately adjudicated through due process of law,[102] with

98. Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 24th mtg., U.N. Doc. A/CONF.2/SR.24, at 13 (1951) (statement of Mr. Hoare of the United Kingdom) ("His particular preoccupation was that persons who committed crimes in their country of refuge should not be excluded from the application of the Convention."); *see also* Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 29th mtg., U.N. Doc. A/CONF.2/SR.29, at 16 (statement of Mr. Petren of Sweden), 18 (statement of Mr. Rochefort of France), 24 (statement of Mr. Herment of Belgium) (1951). The representative of Yugoslavia introduced the specific incorporation of this principle. Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 29th mtg., U.N. Doc. A/CONF.2/SR.29, at 20.

99. Exclusion does not follow if the criminal law is subverted to attain a persecutory end. As observed by Mr. Herment of Belgium:

> [T]he Belgian delegation did not consider that the status of refugee could be denied to a person simply because he had been convicted of a common law offence in his country of origin. In any case, the countries of origin concerned, and their methods of dispensing justice, were well enough known.

Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 29th mtg., U.N. Doc. A/CONF.2/SR.29, at 14.

100. In response to a question from the conference president on this issue, the Netherlands representative suggested that all crimes committed prior to admission to an asylum country were relevant. *Id.* at 21-22.

101. *Id.* at 26 (statement of Mr. Chance of Canada); *see also id.* (statement of Mr. Bozovic of Yugoslavia).

102. *Id.* at 24 (statement of Mr. Hoare of the United Kingdom) ("[P]aragraph E would cover any crime committed by a refugee abroad, and its provisions would cease to apply

recourse to expulsion or return if the refugee is consequently found to pose a risk to public safety.[103]

Second, both rationales for the exclusion clause require that the criminal offense be justiciable in the country where it was committed.[104] Insofar as the claimant has served his or her sentence, been acquitted of the charges, benefited from an amnesty, or otherwise met all obligations under the criminal law of the country where the offense occurred, he or she would not have avoided due process or be subject to extradition and should therefore not be excluded from refugee status. As Paul Weis commented:

> It is . . . difficult to see why a person who before becoming a refugee, has been convicted of a serious crime and has served his sentence, should for ever be debarred from refugee status. Such a rule would seem to run counter to the generally accepted principle of penal law that a person who has been punished for an offence should suffer no further prejudice on account of the offence committed.[105]

Indeed, delegates to the Conference on Territorial Asylum agreed that the criminality exclusion should bar only the claims of persons believed "still liable to prosecution or punishment."[106]

Third, as the British representative's comments make clear,[107] the drafters recognized the grave consequences of refusing to protect a person at risk of persecution. They therefore agreed to constrain the scope of relevant criminality in three ways.

Most fundamentally, they agreed that exclusion under Article 1(F)(b) is warranted only if the asylum seeker committed an offense sufficiently serious to justify his or her extradition from the asylum state to the country where the offense took place.[108] Whether or not extradition is actually being sought, extradition law was considered the best standard to assess the gravity of wrongdoing that renders an asylum seeker unworthy of refugee status.[109] Because there was (and is) no international measure for serious forms of common criminality, the incorporation by reference of domestic standards for extraditable criminality was thought the most credible means to define an offense of sufficient gravity.[110]

The starting point for analysis is therefore extradition law's foundational principle of double criminality.[111] The reasons for this limitation

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once the refugee had been assimilated into the country of asylum."); *see also* UNHCR HANDBOOK, *supra* note 3, ¶ 153, at 36.

103. Refugee Convention, *supra* note 4, arts. 32, 33(2), 189 U.N.T.S. at 174-76; *see also infra* text accompanying notes 146-59.

104. GRAHL-MADSEN, *supra* note 36, at 291-92.

105. Paul Weis, *The Concept of the Refugee in International Law*, 87 J. DU DROIT INT'L 928, 984-86 (1960).

106. *Report of the United Nations Conference on Territorial Asylum*, Conference on Territorial Asylum, art. 2(2), U.N. Doc. A/CONF.78/12 (1977).

107. *Supra* text accompanying notes 90-92.

108. *Supra* text accompanying notes 90-97.

109. *Infra* text accompanying notes 113-14.

110. *Infra* text accompanying notes 116-18.

111. In *S. v. Refugee Status Appeals Authority*, the High Court of New Zealand canvassed its own criminal law and the Penal Code of Sri Lanka before determining that

are self-evident, viewed in relation to the narrower goal of Article 1(F)(b)—avoiding conflicts with extradition treaties. Because an offense is the basis for extradition only if the alleged act is criminal in both the state of refuge and the state where it was committed,[112] there is obviously no discordance between refugee law and extradition law unless the conduct is within the realm of extraditable offenses. But reliance on standards of extraditable criminality also ensures that the integrity of refugee protection is not compromised by a perception that it shelters fugitives from justice. This is so because an individual whose actions were not criminal where and when committed is not a fugitive from justice. Also, if the criminality of the actions is not echoed in the asylum country's criminal law, no grounds for public outrage in the receiving state would exist.

But the drafters went further. Anxious to guard against exclusion from refugee status based on an aberrational approach to extraditable criminality, the drafters limited the scope of relevant criminality to crimes[113] within the usual realm of extraditable offenses.[114] In other words, recognizing that not all countries define extraditable criminality in the same way,[115] the drafters erred on the side of conservative interpretation. Absolute deference to any state's individuated understanding of extraditable criminality was unacceptable, as the British delegate's comments to the Conference of Plenipotentiaries make clear:

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aggravated robbery was a "serious crime" for purposes of Article 1(F)(b) exclusion. "[T]he authority was well justified in reaching the conclusion that both in New Zealand and Sri Lanka and the international community generally the conduct of the plaintiff . . . would inevitably be regarded as serious." [1998] 2 N.Z.L.R. 301, 311 (H.C.), *aff'd*, [1998] 2 N.Z.L.R. 291 (C.A.).

112. *See, e.g.*, BROWNLIE, *supra* note 41, at 319. There is general agreement that the principle of double criminality is a requirement for extradition. GEOFF GILBERT, TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW: EXTRADITION AND OTHER MECHANISMS 104-12 (1998). *Contra* Riley v. Australia (1985) 159 C.L.R. 1, 16 (Austl.) (Deane, J.).

113. The French delegate, Mr. Rochefort, "pointed out that a crime was not the same thing as a misdemeanour, and that the term 'crime', in the sense in which it was used in the Universal Declaration of Human Rights, meant serious crimes." Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 29th mtg., U.N. Doc. A/CONF.2/SR.29, at 18 (1951). This characterization is particularly important since the clause's final language was based on the French formulation and translated to English. *Draft Convention Relating to the Status of Refugees: Text of Article 1 adopted by the Conference on 20 July 1951*, Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, Agenda Item 6, U.N. Doc. A/CONF.2/L.1/ADD.10, at 3 (1951).

114. In addition to the several references to avoiding conflict with extradition treaties, *supra* notes 85-89 and accompanying text, the consensus in favor of the extradition standard is also clear from the response to UNHCR's observation at the Conference of Plenipotentiaries that its own statute was explicitly framed to "exclude[ ] from protection a person 'in respect of whom there are serious reasons for considering that he has committe[d] a crime covered by the provisions of treaties of extradition . . . .'" Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 29th mtg., U.N. Doc. A/CONF.2/SR.29, at 24 (1951) (statement of Mr. van Heuven Goedhart of UNHCR) (omission in original). The ensuing discussion took this standard as a point of reference, but sought to constrain the breadth of extraditable crimes that would be relevant for purposes of Article 1(F)(b).

115. CHRISTOPHER L. BLAKESLEY, TERRORISM, DRUGS, INTERNATIONAL LAW, AND THE PROTECTION OF HUMAN LIBERTY 212 (1992).

> But what was meant by considering that a person fell within a category of prosecutions? . . . As it stood . . . clause (b) would include refugees who had committed a crime, no matter how trivial . . . provided it was not a political crime, and would thus automatically exclude them from the benefits of the Convention. It must be obvious to all that such a proposition was untenable.[116]

In response, the Belgian representative noted that he "preferred the words 'serious crimes' . . . to mention of crimes 'covered by the provisions of treaties of extradition' . . . . Some crimes in respect of which the offender could be extradited were punishable by only three months' imprisonment, and were obviously not serious."[117] These remarks led the Swiss and French delegations to propose a successful amendment, which allowed exclusion on the grounds of extraditable criminality only where the offense is generally recognized as "serious."[118]

Thus, even a crime that satisfies the double criminality standard will not be a basis for exclusion under Article 1(F)(b) if it reflects an aberrational understanding of extraditable offenses.[119] The crime must be commonly treated by states as the basis for extradition.[120] This limitation will occasionally compromise the extradition-based goal of Article 1(F)(b), but only to the extent necessary to honor the objective of excluding from refugee status only those persons whose criminal conduct is generally agreed to be grave.

Finally, if the crime committed outside the asylum country is serious enough to fall within the usual range of extraditable offenses, whatever exceptions the asylum state normally applies to extradition requests also form an integral part of this standard for exclusion under Article 1(F)(b). As previously observed, the absence of a universal consensus on the definition of crimes that render a person unworthy of refugee status left the Convention's drafters no option but to defer to the particularized understandings of state parties.[121] That understanding is defined in part by reference to each country's catalogue of extraditable crimes.[122] Yet the catalogue of relevant offenses does note exhaust each country's definition of serious criminality; the political offense exception and guarantees against removal to face discriminatory prosecution or punishment override

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116. Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 29th mtg., U.N. Doc. A/CONF.2/SR.29, at 11 (1951) (statement of Mr. Hoare of the United Kingdom).

117. *Id.* at 24 (statement of Mr. Herment of Belgium).

118. This amendment was suggested by the Swiss delegate, *id.* at 17 (statement of Mr. Schürch of Switzerland), and formally proposed by Mr. Rochefort of France, *id.* at 20.

119. Grahl-Madsen suggested that only the commission of an extraditable crime punishable by imprisonment for several years justifies the application of Article 1(F)(b). GRAHL-MADSEN, *supra* note 36, at 297.

120. UNHCR observes that "[r]ape, homicide, armed robbery, and arson are examples of offences which are likely to be considered serious in most States." *UNHCR Exclusion Note*, *supra* note 17, ¶ 16.

121. *Supra* text accompanying notes 107-10.

122. *Supra* text accompanying notes 116-20.

any categorical presumptions.[123]

Because a government's internationally recognized definition of extraditable criminality has two parts—a list of presumptively serious crimes, qualified by exceptions that identify inappropriate circumstances for extradition—refugee law should not defer to a partial understanding of extraditable criminality. Although refugee law permits each state to resort to its own understandings of extraditable criminality, insisting that each government apply a *complete* definition ensures a holistic standard of serious criminality. Just as an individual who committed a crime on the list of extraditable offenses is not considered a fugitive from justice if the political offense exception applies, an individual cannot logically be labeled unworthy of refugee status for having committed a prima facie extraditable offense in circumstances that the asylum state's own values deem insufficient for removal.[124]

Most obviously, the express language of Article 1(F)(b) specifies that peremptory exclusion is unwarranted if the crime is "political."[125] Because the objective is consistent of treatment by each state party of persons under its authority, not uniformity of approach among states, the range of relevant considerations varies from state to state. Depending on the scope of the political offense exception in the asylum country, Article 1(F)(b) may operate to deny exclusion for pure political offenses, *délits politiques absolus*, or for relative political offenses, *délits politiques relatifs*, or both.[126] Relative political offenses may include both complex political offenses, *délits politiques complexes*, and acts deemed sufficiently connected to an act against the political order, *délits politiques connexes*. In essence, the extradi-

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123. Through implementation of the political offense exception to extradition, a state effectively asserts that certain humanitarian or political values are sufficiently important to trump another country's interest in criminal prosecution or punishment. The state invoking the political offense exception refuses to cooperate with the requesting state on the grounds that it will not be a party to an exercise of authority that it views as illegitimate. In this sense, the political offense exception implicitly states an understanding of the fundamental limits to criminal law authority. Not even international comity in the administration of criminal justice can be invoked to defeat the independent right of each state to determine and assert these principled limits. *See* M. Cherif Bassiouni, *The Political Offense Exception in Extradition Law and Practice*, *in* INTERNATIONAL TERRORISM AND POLITICAL CRIMES 398, 444 (M. Cherif Bassiouni ed., 1975).

124. "State practice vests the decision about the 'political' nature of the defendant's crime with the *requested* State who has custody of the offender. . . . The typical 'political offence' treaty exception is left purposefully vague. It therefore allows the requested party to determine unilaterally what constitutes a 'political offence.'" WILLIAM SLOMANSON, FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW 213-14 (2d ed. 1995).

125. Refugee Convention, *supra* note 4, art. 1(F)(b), 189 U.N.T.S. at 156.

126. Pure political offenses are those crimes squarely directed against the political order—treason, sedition, and perhaps espionage. Relative political offenses involve acts with a mix of political and private interests, thus raising the need to decide the "true nature" of the offense. Whether a crime is a relative political offense may focus, for example, on considerations of remoteness and proportionality of means to end. *See* GILBERT, *supra* note 112, at 217-46.

tion laws of most states require that the crime be an ordinary offense,[127] prosecuted and punished in a nondiscriminatory way.

Importantly, this duty to grant refugees the benefit of domestic understandings of the political offense exception does not mean that governments are duty-bound to admit all refugees who have engaged in or facilitated acts of violence. To the contrary, states have shown themselves increasingly committed to accepting a restricted approach to the political offense exception for the express purpose of promoting transnational efforts to deter violence. While the political offense exception has been applied in the past with little consistency,[128] a discernible tendency exists today to redefine the political offense exception to exclude various violent acts. State parties to the 1977 European Convention on the Suppression of Terrorism (European Terrorism Convention), for example, agreed to exclude certain acts from the political offense exception, inter alia, "an offence involving kidnapping, the taking of a hostage or serious unlawful detention," and "an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons."[129] The 1996 European Union Convention Relating to Extradition Between the Member States goes further, abolishing the political offense exception altogether for extraditions between EU governments.[130] As the EU further evolves toward a federal entity, this process is likely to intensify.[131]

Outside the European context, however, many states remain reluctant to abandon the political offense exception.[132] At best, they define certain particularly violent offenses as beyond the scope of political justification. For example, governments that have adhered to the United Nations International Convention for the Suppression of Terrorist Bombings (Terrorist

127. *See, e.g.*, Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 29th mtg., U.N. Doc. A/CONF.2/SR.29, at 17 (1951) (statements of Mr. Bozovic of Yugoslavia and Mr. Rochefort of France).

128. "In the past, political offence decisions have been based upon whether the fugitive was from the former Soviet bloc, whether the requesting State was an ally, support for the fugitive or his group in the requested State, even economic interests." GILBERT, *supra* note 112, at 205.

129. European Terrorism Convention, *supra* note 43, art. 1(d)-(e); *see also* Additional Protocol to the European Convention on Extradition, *done* Oct. 15, 1975, Europ. T.S. No. 86.

130. Art. 5, 1996 O.J. (C 313) 2; *see* G. Vermeulen & T. Vander Beken, *New Conventions on Extradition in the European Union: Analysis and Evaluation*, 15 DICK. J. INT'L L. 265, 276 (1996); Renuka E. Rao, Note, *Protecting Fugitives' Rights While Ensuring the Prosecution and Punishment of Criminals: An Examination of the New EU Extradition Treaty*, 21 B.C. INT'L & COMP. L. REV. 229 *passim* (1998).

131. TREATY OF AMSTERDAM art. 29; *see also* Action Plan of the Council and Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Justice and Security, 1999 O.J. (C 19) 1. Protocol 29 to the Treaty Establishing the European Community clarifies that the intention is to regard all Member States as "safe" for refugee- and asylum-law purposes. Protocol on Asylum for Nationals of Member States of the European Union, 1997 O.J. (C 340) 173.

132. "The main obstacle will always be obtaining international agreement to amend and restrict the exemption: its liberality is deeply-rooted in historic-legal 'folklaw.'" GILBERT, *supra* note 112, at 329.

Bombing Convention) agree not to apply the political offense exception to deny the extradition of persons who "unlawfully and intentionally deliver[ ], place[ ], discharge[ ] or detonate[ ] an explosive or other lethal device" against listed targets.[133] Any state party to the Terrorist Bombing Convention that incorporates into its domestic law and practice the relevant exclusions to the political offense exception may therefore invoke Article 1(F)(b) of the Refugee Convention to deny protection to asylum seekers believed to have committed acts outside the narrowed scope of the political offense exception.[134] The Terrorist Bombing Convention's adoption exemplifies how new understandings of criminal exclusion under international refugee law evolve automatically to account for comparable commitments to grant extradition.[135]

Even as states narrow the breadth of the classic political offense exception, however, they have simultaneously embraced a duty not to extradite persons that face seriously discriminatory applications of criminal law authority. This limitation on the duty to extradite is incorporated in both the European Terrorism Convention[136] and the United Nations Terrorist Financing Convention:

> Nothing in this Convention shall be interpreted as imposing an obligation to extradite . . ., if the requested State Party has substantial grounds for believing that the request for extradition . . . has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.[137]

Thus, an individual does not face true criminal prosecution where relevant forms of discrimination result in selective prosecution, denial of procedural or adjudicative fairness, or differential punishment.[138] The symmetri-

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133. Terrorist Bombing Convention, *supra* note 44, arts. 2, 9(1), 37 I.L.M. at 253, 256.

134. Nonetheless, resort to the political offense exception is not entirely prohibited. *Id.* art. 12, 37 I.L.M. at 257.

135. In *Benbrahim Boudriah*, for example, the Belgian refugee agency excluded an Algerian supporter of the *Front islamique du salut* who knowingly encouraged and facilitated terrorist attacks. It found the applicant ineligible to claim the political offense exception because Belgium had opted to exclude hostage-taking, aircraft hijacking, and terrorism from the scope of the exception. There is no double standard under this symmetrical approach; Belgium was entitled to impose exclusion *because* the acts of the asylum seeker were within the scope of legitimate criminality as measured against the very standards asserted by Belgium in the exercise of its authority to deny extradition. Belgian Commission permanente de recours des réfugiés, Decision No. 94/993/R2632 (Mar. 28, 1995). Similarly, as a state party to the European Terrorism Convention, the Government of the Netherlands could refuse to recognize any crime listed in that treaty as "political" for the purposes of interpreting Article 1(F)(b) of the Refugee Convention. *Netherlands Policy Statement*, *supra* note 60. The same communication, however, also purported to declare acts contrary to the U.N. 1997 Terrorism Declaration outside the scope of Article 1(F)(b). *Id.* Unless the Netherlands made a parallel commitment with regard to its extradition jurisdiction, this additional qualification would not conform to the purposes of Article 1(F)(b).

136. *Supra* note 43, arts. 1, 7.

137. Terrorist Financing Convention, *supra* note 45, art. 14, 39 I.L.M. at 276.

138. HATHAWAY, *supra* note 36, at 176-79.

cal logic of Article 1(F)(b) provides the basis for arguing that emergent exceptions to extradition should be automatically incorporated in Article 1(F)(b) analysis, on the same basis as the more traditional political offense exception.[139]

In practical terms, it will be easiest to apply these principles for Article 1(F)(b) exclusion where an extradition treaty actually exists between the country where the crime was committed and the asylum state. Whatever special protections or limitations thought appropriate in a particular bilateral or multilateral setting should logically apply in assessing exclusion under Article 1(F)(b) within that same context. The only caveat, in line with the drafters' intentions to avoid exclusion on the grounds of an aberrational understanding of extraditable criminality,[140] is that refugees should not be excluded under Article 1(F)(b) where a particular extradition relationship provides seriously deficient protections as measured against generally prevailing norms.

Where no extradition arrangement exists between the asylum state and the country where the crime was committed, only the more general goal of Article 1(F)(b) to avoid a loss of public confidence by the admission of unpunished criminals is relevant. The asylum country should therefore apply its general standards of both extraditable criminality and the political offense exception and other limitations on extradition. Those standards are the best measure of the circumstances in which the citizenry of the receiving state would see insufficient grounds to justify the asylum seeker's removal.

This extradition-based approach to the definition of criminal conduct for purposes of peremptory exclusion under Article 1(F)(b) not only is historically justified but also represents a fair compromise between the general duty to protect persons at risk of persecution and the importance of excluding from refugee status fugitives from justice. Each government has the power to commit itself to new standards of international or extraditable criminality, thereby automatically expanding the range of relevant crimes for peremptory exclusion purposes.[141] The standard is flexible, yet explicit and verifiable. But insistence on formal standards of extraditable criminality provides a check on arbitrary action by establishing a clearly defined and externally conceived standard for the power to exclude.[142]

139. The decision of the Netherlands Council of State in *Folkerts v. State-Secretary of Justice* explicitly recognizes the conceptual linkage between these limitations on extradition authority and the duty of *non-refoulement* under the Refugee Convention. Afdeling Rechtspraak van de Raad van State [Afd. Rechtspr.], 26 oktober 1978, ARB 78, 74 I.L.R. 472, 474-76 (Neth. Council of State 1978).

140. *Supra* text accompanying notes 116-18.

141. Where a court reviewing a refugee status decision also has extradition authority, its findings for Article 1(F)(b) of the Refugee Convention may have similar effect. *E.g.*, T. v. Home Sec'y, [1996] A.C. 742 (1995) (appeal taken from Eng. C.A.).

142. "The *a priori* denial of the fundamental protections of a treaty whose purpose is the protection of human rights is a drastic exception to the purposes of the [Refugee] Convention . . . and can only be justified where the protection of those rights is furthered by the exclusion." Pushpanathan v. Minister of Citizenship & Immigration, [1998] 1 S.C.R. 982, 1035 (Can.).

Thus, the linkage between Article 1(F)(b) and extradition law avoids the possibility of a double standard by prohibiting governments from excluding a person from refugee status under Article 1(F)(b) based on facts they would judge insufficient to justify extradition. Article 1(F) essentially imposes a requirement of ethical symmetry, where a state may not hold a person inherently undeserving of refugee status if it would insist on the right to withhold the extradition of a comparably situated person.

V. Asylum-State Safety and Security: Article 33(2)

Our analysis thus far has sought to clarify why peremptory exclusion under Article 1(F) is defined by categorical norms rather than concerns about asylum-state safety and security. In some circumstances, Article 1(F) will serve as a means for states in practice to advance their security interests by excluding a subset of asylum seekers believed to have committed or facilitated acts of violence. In addition to the categories of persons excluded under subsections (a) and (c)—for example, refugee claimants who have committed war crimes, crimes against humanity, hijacking, or attacks on diplomats—Article 1(F)(b) ensures that there is no need even to consider the refugee claims of most persons who have not been prosecuted and punished for serious common crimes committed abroad.

But because the purpose of Article 1(F) is to identify inherently unworthy asylum seekers, not protecting the asylum country, it is true that our understanding of Article 1(F)(b) denies governments the right of peremptory exclusion for other asylum seekers who have committed or facilitated acts of violence. Specifically, those claimants whose criminal conduct took place in the asylum state, whose crimes abroad are no longer justiciable, or who would not meet the general test for extraditable criminality cannot be excluded under Article 1(F)(b). While those persons may have a violent past of concern to asylum countries, asylum states may not deny refugee status on that basis. As Lord Mustill observed in the House of Lords decision in *T. v. Home Secretary*,

> I am quite unable to see how the fact, if it is a fact, that the foreign crime shows the asylum seeker to be a wicked man of whom the country of refuge would be well rid can have any bearing on this question [of the interpretation of Article 1(F)(b)]. Indeed the shape of the legislation shows that this is not so, for article 1F(b) of the [Refugee] Convention assumes that a person who has committed a serious crime, which might make him just as unwelcome in the country of refuge, is immune from refoulement so long as his offence can be characterised as political.
>
> Moreover, the argument overlooks article 33(2) of the Convention . . . . The state of refuge has sufficient means to protect itself against harbouring dangerous criminals without forcing on an offence, which either is or is not a political crime when and where committed, a different character according to the opinions of those in the receiving state about whether the refugee is an undesirable alien: opinions which may be shaped by considerations which have nothing to do with the political nature of the offence committed

elsewhere.[143]

This judgment succinctly states the complementary roles of Article 1(F) and Article 33(2). Article 1(F) was inserted at the insistence of countries that perceived themselves as vulnerable to large inflows of refugees.[144] It is designed to afford the possibility of preadmission exclusion based on a relatively low standard of proof—"serious reasons for considering"[145]—and without recourse to formal procedures to assess the criminal charge. The comparatively narrow scope of this recourse balances its expediency; it applies only to persons believed to have committed international crimes or pre-entry common crimes that are justiciable and sufficiently serious to justify extradition. Concerns about asylum-state safety and security are instead vindicated by reliance on Article 33(2) of the Refugee Convention,[146] the original and more broadly applicable criminality provision.[147] If the asylum country is not concerned about the inherent unworthiness of an asylum seeker but rather the promotion of particularized safety or security concerns, refugee status assessment should proceed as usual. But *refoulement* is nonetheless authorized if the refugee presents a risk to national security, or alternatively if his or her final conviction for a particularly serious crime justifies a finding of risk to the asylum-state community. If either test is met, Article 33(2) allows state parties to expel or return dangerous refugees, including those whose crimes were committed in the asylum state, who have served their sentence or otherwise acquitted themselves of criminal liability, or who would be entitled to invoke a recognized extradition exception.

Justice Bastarache of the Supreme Court of Canada also recognized the distinctiveness of Article 1(F)(b) and Article 33(2):

> [P]ersons falling within Article 1F of the Convention are automatically excluded from the protections of the [Convention]. Not only may they be

143. [1996] A.C. at 711 (Mustill, L.J.) (citation omitted).

144. Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 24th mtg., U.N. Doc. A/CONF.2/SR.24, at 13 (1951) (statement of Mr. Rochefort of France) ("France's reason for taking such a firm stand on the subject lay in the fact that she had to administer the right of asylum under much more difficult conditions than did countries which were in a position to screen immigrants carefully at their frontiers."); *see also id.* at 18 (statement of Mr. Makiedo of Yugoslavia). These states also did not want to undermine the possibilities for resettlement of admitted refugees. Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 19th mtg., U.N. Doc. A/CONF.2/SR.19, at 7 (1951) (statement of Mr. Rochefort of France) ("If refugee status was to be granted to criminals, immigration countries could not fail to question its value.").

145. GRAHL-MADSEN, *supra* note 36, at 289.

146. Refugee Convention, *supra* note 4, art. 33(2), 189 U.N.T.S. at 176.

147. Indeed, the United Kingdom argued that there was no need for a criminality exclusion clause in Article 1(F) in view of Article 33(2). Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 24th mtg., U.N. Doc. A/CONF.2/SR.24, at 4 (1951) (statement of Mr. Hoare of the United Kingdom); see also Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 29th mtg., U.N. Doc. A/CONF.2/SR.29, at 12 (1951) (statement of Baron von Boetzelaer of the Netherlands) ("Common criminals should not enjoy the right of asylum; but that consideration had already been taken care of in article [33] of the draft Convention . . . .").

> returned to the country from which they have sought refuge without any determination . . . that they pose a threat to public safety or national security, but their substantive claim to refugee status will not be considered. The practical implications of such an automatic exclusion, relative to the safeguards of the [Article 33(2)] procedure, are profound.[148]

In particular, the evidentiary standard for denying protection under Article 33(2), "reasonable grounds," is higher than that for exclusion under Article 1(F)(b), "serious reasons for considering." The English Court of Appeal ruled that the more demanding standard of proof under Article 33(2) means that the assertion of risk must be "sufficiently particularised" to substantiate the reasonableness of exclusion.[149] A court applying Article 33(2) must satisfy itself that the grounds for holding a refugee to be a risk are reasonable before protection against *refoulement* may be validly denied.[150]

Equally important, Article 33(2) does not annul refugee status, but simply authorizes a host government to divest itself of its particularized protective responsibilities. The individual in question remains a refugee and is therefore entitled to UNHCR assistance and the protection of any other state party where the refugee's presence does not infringe the state's safety and security.

So construed, Article 1(F)(b) and Article 33(2) form a coherent and logical system. A state may deny a person refugee status under Article 1(F)(b) if admission as a refugee would result in the protection of an individual who has not expiated serious criminal acts. While this result may appear harsh, it is the only means available to ensure that refugee law does not benefit fugitives from justice.[151] Because ordinary crimes cannot normally be prosecuted in any country other than the country where they were committed, any response short of excluding common-law criminals from the refugee protection system would undermine both the symbolic and practical goals of Article 1(F)(b).[152] If, on the other hand, the concern is not the avoidance of criminal responsibility, but instead protection of the host state and its citizenry, there is no need to deny refugee status. To quote once more from the Supreme Court of Canada's *Pushpanathan* decision:

> The purpose of Article 1 is to define who is a refugee. Article 1F then 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. . . . Thus, the general purpose of Article 1F is not the protection of

148. Pushpanathan v. Minister of Citizenship & Immigration, [1998] 1 S.C.R. 982, 999-1000 (Can.).

149. "NSH" v. Home Sec'y, [1988] Imm. A.R. 389, 393, 395-96 (Eng. C.A.).

150. *Id.*

151. Removal may nonetheless be prohibited by countervailing norms of human rights law. *Infra* notes 281-89 and accompanying text.

152. *See supra* text accompanying notes 98-103.

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.[153]

A. Danger to National Security

The first category of persons legitimately subject to *refoulement* under Article 33(2) comprises those "whom there are reasonable grounds for regarding as a danger to the security of the [receiving] country . . . ."[154] While the *travaux préparatoires* do not precisely define national security, there are indications that delegates to the Conference of Plenipotentiaries were particularly concerned about the possibility of Communist infiltration.[155] More generally, however, there is little controversy that national security is at risk where the asylum seeker's actions precipitate a fundamental threat against the asylum state.[156]

The major area of controversy for the national security leg of Article 33(2) involves refugees who promote violence against a foreign government not capable of or likely to retaliate against the asylum state. Article 33(2) authorizes *refoulement* only for a refugee "whom there are reasonable grounds for regarding as a danger to the security *of the country in which he is* . . . ."[157] This fairly precise phrasing suggests the illegality of *refoulement* unless the refugee's actions endanger asylum-state security, not that

153. *Pushpanathan*, [1998] 1 S.C.R. at 1024.

154. Refugee Convention, *supra* note 4, art. 33(2), 189 U.N.T.S. at 176.

155. It must be borne in mind that . . . each government had become more keenly aware of the current dangers to its national security. Among the great mass of refugees it was inevitable that some persons should be tempted to engage in activities on behalf of a foreign Power against the country of their asylum, and it would be unreasonable to expect the latter not to safeguard itself against such a contingency.

Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 16th mtg., U.N. Doc. A/CONF.2/SR.16, at 8 (1951) (statement of Mr. Hoare of the United Kingdom).

> In drafting [Article 33], members of [the Ad Hoc] Committee had kept their eyes on the stars but their feet on the ground. Since that time, however, the international situation had deteriorated, and it must be recognised, albeit with reluctance, that at present many governments would find difficulty in accepting unconditionally the principle [of *non-refoulement*].

Id. at 8-9 (statement of Mr. Chance of Canada).

156. In the circumstances, and for the purposes of this case, we adopt the position that a person may be said to offend against national security if he engages in, promotes, or encourages violent activity which is targeted at the UK, its system of government or its people. This includes activities directed against the overthrow or destabilisation of a foreign government if that foreign government is likely to take reprisals against the UK which affect the security of the UK or of its nationals. National security extends also to situations where UK citizens are targeted, wherever they may be.

Rehman v. Home Sec'y, [1999] INLR 517, 528 (Special Immig. App. Comm'n) (Potts, J.). In the Court of Appeal, this view was characterized as "a narrow interpretation." Home Sec'y v. Rehman, [2000] 3 W.L.R. 1240, 1251 (Eng. C.A.).

157. Refugee Convention, *supra* note 4, art. 33(2), 189 U.N.T.S. at 176 (emphasis added).

of some other country.[158] Yet the Canadian Federal Court recently defended a nearly unlimited government right to define the scope of their national security relevant to the removal of Convention refugees.[159]

In *Suresh v. Minister of Citizenship and Immigration*, the court ordered the removal from Canada of a Sri Lankan Tamil, whose refugee status had been formally recognized, upholding a security-based certificate of inadmissibility issued because the refugee had engaged in fundraising and procurement of material to support the allegedly terrorist activities of the Liberation Tigers of Tamil Eelam.[160] Rejecting the need for evidence of any risk to Canada or Canadians, the court found that "the 'security of Canada' cannot be limited to instances where the personal safety of Canadians is concerned. It should logically extend to instances where the integrity of Canada's international relations and obligations are affected."[161] Because "[t]he efficacy of those collective efforts is undermined each time a nation provides terrorist organizations with a window of opportunity to operate offshore," removal from Canada on national security grounds was found justified.[162]

While it seems right that a state's national security may be implicated by actions of a refugee that, while focused abroad in a direct and immediate sense, nonetheless rebound to the serious detriment of host-state security, the Canadian court's approach goes too far. In line with the general evidentiary standard of Article 33(2),[163] the connection between an impact on "the integrity of Canada's international relations" and Canada's essential welfare should have been proved, not simply assumed.

The English Court of Appeal adopted a more balanced approach in *Home Secretary v. Rehman*.[164] The court was reviewing a decision to deport an individual otherwise entitled to indefinite leave to remain in the United Kingdom, but found to have raised funds for the Mujahedin operating in Pakistan and organized training in England for Mujahedin fighters allegedly engaged in terrorist acts in the Indian sub-continent.[165] The

158. The German Federal Constitutional Court has determined that nonviolent support for a foreign organization that engages in terrorist activities is insufficient for exclusion from refugee status. Federal Constitutional Court, Decision No. 2 BvR 126/94 (Oct. 13, 1994); *see also* Federal Constitutional Court, Decision No. 9C 276/94 (Jan. 10, 1995). In contrast, where a Turkish Kurd committed to the secession of Kurdistan from Turkey engaged in physical violence against his political opponents residing in Germany, the duty of protection could legitimately be raised. BVerfGE 81, 142 (F.R.G.).

159. The court held that the phrase "danger to the security of Canada" should be informed by the provisions of the *Immigration Act* and the *Canadian Security Intelligence Service Act*. Generally stated, the purpose of this legislation is to exclude from Canada persons who are or were members of a terrorist organization and who may engage in nefarious activities either in Canada or abroad using Canada as a base. Suresh v. Minister of Citizenship & Immigration, 183 D.L.R. (4th) 629, 671 (Can. Fed. Ct. 2000) (citation omitted).

160. *Id.* at 629, 631-35.

161. *Id.* at 671.

162. *Id.* at 672.

163. *See supra* text accompanying text notes 149-50.

164. [2000] 3 W.L.R. 1240 (Eng. C.A.).

165. *Id.*

judgment shares many of the Canadian court's concerns about international cooperation in the eradication of violence,[166] but nonetheless insists on evidence of a threat to the host state before its national security can be found threatened.

Specifically, the court recognized the possibility that the promotion of violence abroad endangered national security, but only where there is a "real possibility" of "adverse repercussions on the security of *this country*."[167]

> "In alleged terrorist cases, a person may be said to be a danger to the United Kingdom's national security if he or she engages in, promotes or encourages violent activity which has, or is likely to have, adverse repercussions on the security of the United Kingdom, its system of government or its people."[168]

This approach helpfully transposes the notion of national security to a social context different from that contemplated by the drafters of the Refugee Convention without losing sight of the essential purpose of individualized *refoulement*—the protection of the host state's most essential interests—and without compromising the relatively demanding evidentiary standard of Article 33(2).

B. Danger to the Asylum State's Community

Beyond the relatively small number of cases where a refugee's presence poses a risk to national security, Article 33(2) also authorizes *refoulement* for refugees who have been "convicted by a final judgment of a particularly serious crime" and who are found to constitute "a danger to the community" of the asylum state.[169] The threshold standard of relevant criminality is more flexibly defined than under Article 1(F)(b), but is pitched at a

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166. The court quoted with approval from the Home Office note filed before the Special Immigration Appeals Commission.

> Whatever may have been the position in the past, increasingly the security of one country is dependent upon the security of other countries. That is why this country has entered into numerous alliances. They acknowledge the extent to which this country's security is dependent upon the security of other countries. . . .
>
> "An important part of the Government's strategy to protect the U.K. and U.K. citizens and interests abroad from the terrorist threat is to foster cooperation between states in combating terrorist groups, whatever their objectives. The U.K. can only expect other states to take measures to combat terrorists who target the U.K. or U.K. citizens if the U.K., for its part, reciprocates by combating terrorists who target states other than the U.K. It cannot be predicted when such ties of reciprocity may prove to be critical to protecting national security from, e.g., a terrorist bombing campaign. It is therefore essential in the interests of national security that the U.K. fosters such ties with as many states as possible now, against the day when any of them may be able to act directly to safeguard the U.K.'s security interests (whether by taking measures against terrorists in their own territory, or by providing the U.K. with intelligence about proposed terrorist activity)."

Id. at 1251-52; *see also* Terrorism Act, 2000, ch. 11 (Eng.).

167. *Id.* at 1253 (emphasis added).

168. *Id.* (quoting a definition of national security from counsel for amicus curiae).

169. Refugee Convention, *supra* note 4, art. 33(2), 189 U.N.T.S. at 176.

higher level of gravity. While Article 1(F)(b) requires a "serious" crime, Article 33(2) authorizes *refoulement* only if the crime is "particularly serious." The drafters did not view this test as met where, for example, a refugee repeatedly engages in relatively minor forms of criminality.[170] Logically, *refoulement* under Article 33(2) should be considered only where the crimes usually defined as "serious"—for example, rape, homicide, armed robbery, and arson[171]—are committed with aggravating factors, or at least without significant mitigating circumstances.

Second, *refoulement* based on the security interests of the host community is permissible only where there has been conviction by a final judgment. Appeal rights should have expired or been exhausted,[172] thereby limiting the risk of *refoulement* strictly to those whose criminality has been definitively established in accordance with prevailing legal norms. Because the language of Article 33(2) restricts particularized *refoulement* to those refugees whose criminal liability has been clearly established, states should take particular care to ensure that convictions registered outside the asylum country resulted from a procedure that satisfied basic standards of fairness.

Third and finally, the nature of the conviction and other circumstances must justify the conclusion that the refugee constitutes a danger to the community from which he or she seeks protection.[173] Because the danger flows from the refugee's criminal character, it does not matter whether the crime was committed in the state of origin, an intermediate state, or the asylum state.[174] Also, it is not relevant whether the refugee has served a penal sentence or otherwise been punished. But in contrast to

170. The United Nations rejected a proposal to authorize *refoulement* for habitual offenders convicted of a series of less serious crimes. Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 16th mtg., U.N. Doc. A/CONF.2/SR.16, at 16-17 (1951) (statements of Mr. Theodoli and Mr. Hoare); *see also* Supreme Administrative Court of Finland, Decision No. 673 (Feb. 19, 1988), *available at* http://www.unhcr.ch/refworld/legal/refcas/hcr0134.htm.

171. *UNHCR Exclusion Note*, *supra* note 17, ¶ 16.

172. Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 16th mtg., U.N. Doc. A/CONF.2/SR.16, at 14 (1951) (statement of Mr. Hoare of the United Kingdom).

173. On its proper construction, Art 33(2) does not contemplate that a crime will be characterised as particularly serious or not particularly serious merely by reference to the nature of the crime that has been committed although this may suffice in some cases. The reason is that there are very many crimes where it is just not possible to determine whether they are particularly serious without regard to the circumstances surrounding their commission.

Betkoshabeh v. Minister for Immigration & Multicultural Affairs (1998) 157 A.L.R. 95, 100 (Austl. Fed. Ct.). In a subsequent judicial review after reconsideration of the original decision to exclude, Betkoshabeh was ordered removed from Australia because the grounds for his fear of persecution had ceased to exist. Minister for Immigration & Multicultural Affairs v. Betkhoshabeh (1999) 55 A.L.D. 609 (Austl. Fed. Ct.).

174. Moreover, the possibility of a refugee committing a crime in a country other than his country of origin or his country of asylum could not be ignored. No matter where a crime was committed, it reflected upon the personality of the guilty individual, and the perpetrator was always a criminal. . . .

The President pointed out that paragraph 2 [of Article 33] afforded a safeguard for States, by means of which they could rid themselves of common

exclusion from refugee status under Article 1(F)(b) of the Convention, particularized *refoulement* cannot be based on the refugee's criminality per se.[175] *Refoulement* is instead authorized only where genuinely necessary to protect the asylum-state community from an unacceptably high risk of harm.[176]

Thus, the practice of some states to give dangerous refugees the option of indefinite incarceration in the asylum state as an alternative to *refoulement* is one mechanism that should be considered.[177] Article 33 should moreover be read in consonance with Articles 31 and 32 to allow dangerous refugees the opportunity to seek entry into a nonpersecutory state, rather than face return to their home country.[178] The Convention drafters hoped that even dangerous refugees would not be sent to a country where persecution awaited them.[179] The position finally adopted nonetheless recognizes that in extreme cases, general considerations of humanity

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> criminals or persons who had been convicted of particularly serious crimes in other countries.

Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 35th mtg., U.N. Doc. A/CONF.2/SR.35, at 24 (1951) (statements of Mr. Rochefort of France and Mr. Larsen of Denmark).

175. *See, e.g.*, Netherlands/F.V., HR, 13 mei 1988, NJ 910, 20 NETH. Y.B. INT'L L. 329. This case involved a Sri Lankan Tamil asylum seeker who served a prison sentence for possession of 3.72 grams of heroin, at the end of which the state applied for deportation based on his narcotics conviction. In considering the scope of Article 33(2), the court held that

> the provision that anyone who has committed a particularly serious crime cannot claim the benefit of the prohibition in paragraph 1 is based on the notion that he constitutes a danger to the community of the country of residence. It follows that the question whether there has been a particularly serious crime in the abovementioned sense should be answered not in the abstract but by reference to the specific details of the case itself, including in particular the view of the court on the gravity of the crime committed, as evidenced by the sentence imposed.

Id. ¶ 3.2.1, 20 NETH. Y.B. INT'L L. at 331. In contrast, a French tribunal purported to withdraw protection from a Sri Lankan refugee convicted of a serious narcotics offense in France on the grounds that the penalty set in the criminal case, which included expulsion from France, must be viewed as a particularly serious criminal offense that gives rise to a French national security risk. *Nagasamy Sivanadiyan*, French Commission des recours des réfugiés, Decision No. 261376 (Apr. 24, 1995).

176.
> [T]he Swiss Government wished to reserve the right in quite exceptional circumstances to expel an undesirable alien, even if he was unable to proceed to a country other than the one from which he had fled, since the Federal Government might easily find itself so placed that there was no other means of getting rid of an alien who had seriously compromised himself.

U.N. Ad Hoc Comm. on Statelessness & Related Problems, 40th mtg., U.N. Doc. E/AC.32/SR.40, at 32 (1950) (statement of Mr. Schürch of Switzerland).

177. The Convention drafters, however, assumed this option was no better than *refoulement*. "To condemn such persons to lifelong imprisonment, even if that were a practicable course, would be no better solution." Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 16th mtg., U.N. Doc. A/CONF.2/SR.16, at 8 (statement of Mr. Hoare of the United Kingdom).

178. THE REFUGEE CONVENTION, 1951, at 343 (Paul Weis, 1995).

179.
> The Chairman realized that the presence of particularly intractable refugees might cause certain difficulties in certain reception countries. Nevertheless, it was for the governments of those countries to find the means of making reservations to meet special cases, while accepting the principle, which applied to all

should yield to the reasonable expectations of asylum-state safety.[180] Thus, if the demanding criteria of Article 33(2) are satisfied, an asylum state may, as a last resort, remove a dangerous refugee even to his or her country of origin.

C. No Need to "Balance" Risk to the Refugee

By authorizing states to engage in *refoulement* only where there are reasonable grounds to believe that a refugee poses a security risk or where a refugee convicted of a particularly serious crime is shown to be a danger to the host community, the drafters effectively balanced refugee and communal rights in Article 33(2). If compelling evidence exists that the refugee is a danger to asylum-state security or safety of the community of that country, there is no additional proportionality requirement to satisfy. By definition, no purely individuated risk of persecution can offset a threat to the vital security interests of the receiving state. Because the objective of Article 33(2) is protecting the host state and its community, a risk to important collective interests defeats the refugee's right to invoke protection against *refoulement*. Refugee law does not require the application of a proportionality test once the enumerated standards are met.

Most scholars disagree,[181] basing the need for a balancing test largely on the comment of the British cosponsor of Article 33(2) that "[i]t must be left to States to decide whether the danger entailed to refugees by expulsion outweighed the menace to public security that would arise if they were permitted to stay."[182] Yet the British emphasis on letting states weigh relative risks was actually a response to a proposal to restrict states' margin of appreciation,[183] not an argument for a superadded proportionality test. Indeed, the British representative associated himself with his French cosponsor's explanation of the rationale for the particularized *refoulement* clause:

> civilized nations, of not expelling refugees to territories where they would meet certain death.

U.N. Ad Hoc Comm. on Statelessness & Related Problems, 20th mtg., U.N. Doc. E/AC.32/SR.20, at 15 (1950) (statement of Mr. Chance of Canada).

180. "A State would always be in a position to protect itself against refugees who constituted a danger to national security or public order." Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 16th mtg., U.N. Doc. A/CONF.2/SR.16, at 5 (1951) (statement of Msgr. of Mr. Comte of the Holy See).

181. *E.g.*, GOODWIN-GILL, *supra* note 10, at 139-40; ROBINSON, *supra* note 22, at 124; THE REFUGEE CONVENTION, 1951, *supra* note 178, at 342.

182. Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 16th mtg., U.N. Doc. A/CONF.2/SR.16, at 8 (1951) (statement of Mr. Hoare of the United Kingdom).

183. "What was meant for example by the words 'reasonable grounds'? He considered that the wording: 'may not, however, be claimed by a refugee *who constitutes* a danger to the security of the country' would be preferable." Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 16th mtg., U.N. Doc. A/CONF.2/SR.16, at 7-8 (1951) (statement of Msgr. Comte of the Holy See).

> The French and United Kingdom delegations had submitted their amendment in order to make it possible for states to punish activities . . . directed against national security or constituting a danger to the community. . . .
>
> The right of asylum rested on moral and humanitarian considerations which were freely recognised by receiving countries, but it had certain essential limitations. A country could not contract an unconditional obligation towards persons over whom it was difficult to exercise any control, and into the ranks of whom undesirable elements might well infiltrate. The problem was a moral and psychological one, and in order to solve it, it would be necessary to take into account the possible reactions of public opinion.[184]

This conviction that the establishment and maintenance of a relatively open refugee protection system required a strong safeguard for the basic security interests of receiving states led the Conference of Plenipotentiaries to reject the Ad Hoc Committee's unconditional insistence on strict observance of *non-refoulement.*[185]

Moreover, while advocacy of a proportionality test before applying Article 33(2) is superficially humane, it may work in practice against a liberal view of the duty to protect refugees. Because of the implicit premise that some individuated forms of harm could be more compelling than national security or danger to the host community, a proportionality test risks trivializing the significance of the latter two concepts. For example, in holding that Article 33(2) mandated a "balancing test," the English Court of Appeal authorized the government to construe relatively minor concerns as matters of national security or communal danger:

> [T]he Secretary of State argues that on the plain wording of the article a refugee may be expelled or returned even to a country where his life or freedom would be threatened, and that no balancing exercise is necessary: expulsion or return is permitted even where the threat to life or freedom is much more serious than the danger to the security of the country.
>
> . . . .
>
> . . . Despite the literal meaning of article 33, it would seem to me quite wrong that *some trivial danger to national security* should allow expulsion or return in a case where there was a present threat to the life of the refugee if that took place.[186]

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184. Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 16th mtg., U.N. Doc. A/CONF.2/SR.16, at 7 (1951) (statement of Mr. Rochefort of France).

185. The PRESIDENT thought that the *Ad hoc* Committee, in drafting article [33], had, perhaps, established a standard which could not be accepted. That Committee, as could be seen from its report on its second session, had felt that the principle inherent in article [33] was fundamental, and that it could not consider any exceptions to the article.

Id. at 13 (statement of Mr. Larsen of Denmark).

186. Regina v. Home Sec'y *ex parte* Chahal, [1995] 1 W.L.R. 526, 533 (Eng. C.A. 1993) (Staughton, L.J.) (emphasis added). In an earlier case, the same court had reasoned:

> It may be that in many cases, particularly where a case is near the borderline, the Secretary of State will weigh in the balance all the compassionate circumstances, including the fact that the person is a refugee, before reaching a final conclusion. But where national security is concerned I do not see that there is any legal requirement to take this course. Indeed article 33.2 of the Convention

The notion that there could be such a thing as a "trivial danger to national security" to balance against purely individuated interests is disturbing. This decision illustrates how asserting the importance of a "balancing test" inadvertently legitimates an unwarranted extension of the grounds for *refoulement*. If, in contrast, national security and danger to the community are appropriately and narrowly defined, they would always trump purely individuated risks, and no additional balancing test is required.

VI. The Risks of the UNHCR's Alternative Interpretation

To this point, we have drawn upon the Refugee Convention's drafting history to demonstrate that Article 1(F) and Article 33(2) of the Refugee Convention are intended to further two distinct goals, each of which has some bearing on states' right to refuse protection to asylum seekers who have advocated or engaged in violence. Specifically, the duty of peremptory exclusion under Article 1(F)(b) applies only to persons who are fugitives from domestic justice—their crimes must have been committed outside the asylum state, remain justiciable, and justify a grant of extradition. The right of particularized *refoulement* under Article 33(2), on the other hand, entitles state parties to defend their most basic interests in safety and security. Even if not a fugitive from justice, the refugee may be removed from the country upon a showing that his or her presence endangers national security or that established criminality justifies a finding of danger to the host community.

UNHCR, in contrast, argues that Article 1(F)(b) and Article 33(2) are both mechanisms for protecting asylum-state interests.[187] Specifically, UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status (Handbook)* states that Article 1(F)(b) is primarily a means of protecting the interests of the asylum-country population:

> The aim of this exclusion clause is to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime. It also seeks to render due justice to a refugee who has committed a common crime (or crimes) of a less serious nature or has committed a political offence.[188]

While UNHCR is not alone in advocating an understanding of Article 1(F)(b) that focuses on protecting asylum-state interest,[189] its *Handbook* is

> provides that a refugee cannot claim the benefit of article 33.1 where there are reasonable grounds for regarding him "as a danger to the security of the country in which he is."

"NSH" v. Home Sec'y, [1988] Imm. A.R. 389, 399 (Eng. C.A.). But the Chahal court unfortunately rejected that view. *Chahal*, [1995] 1 W.L.R. at 533.

187. It is important to recall that the intention of [Article 1(F)(b)] is to reconcile the aims of rendering due justice to a refugee . . . and to protect the community in the country of asylum from the danger posed by criminal elements fleeing justice. This Article should be seen in parallel with Article 33 . . . .

UNHCR Exclusion Note, *supra* note 17, ¶ 16.

188. UNHCR HANDBOOK, *supra* note 3, ¶ 151, at 36.

189. Guy Goodwin-Gill equivocates on this issue. He accurately notes that the UNHCR position on Article 1(F)(b) "leaves much to be desired. . . [I]t suggests that

likely the source of this interpretation[190] and has had immense influence on state practice.[191] UNHCR, after all, is charged by the international community with the responsibility of supervising the Refugee Convention,[192] and state parties formally "undertake to co-operate with [UNHCR] . . . in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of [the Refugee] Convention."[193] This unique trust and authority placed in UNHCR has rightly been understood to call for decision-makers to give a measure of deference to its interpretations.[194]

Encouraged by UNHCR to see Articles 1(F)(b) and 33(2) as largely interchangeable means to protect the well being of their communities,[195] courts have often approved governmental efforts to invoke Article 1(F) in avoiding Article 33(2)'s higher standard of proof and more demanding substantive threshold. For example, the United States has traditionally imported considerations into analysis of Article 1(F)(b) that are not relevant in extradition proceedings.[196] In *McMullen v. INS*, the Ninth Circuit

continuing exclusion may be justified by continuing criminal character, in a manner reminiscent of article 33(2)." GOODWIN-GILL, *supra* note 10, at 102-04. Yet rather than taking a clear position on the purpose of Article 1(F)(b), he presents several options to define a "more principled approach." *Id.* One of his four possible rationales for Article 1(F)(b) is concern for asylum-state safety, since the commission of a serious crime may be "indicative of some future danger to the community of the State of refuge . . . ." *Id.* Goodwin-Gill's reluctance to see Article 1(F)(b) as the means for excluding from refugee status fugitives from justice likely follows from his view that it is unclear "whether the drafters intended the exclusion clause to have more than an incidental role in the extradition process." *Id.* His references to the *travaux*, however, only show that the drafters had different views of precisely *how* refugee law and extradition law would be correlated through Article 1(F)(b), not whether the alignment should exist.

190. Grahl-Madsen's analysis, which preceded the UNHCR *Handbook*, notes that Article 1(F)(b) derives from the exclusion of "ordinary criminals extraditable by treaty" under the IRO mandate and the commitment of Article 14(2) of the Universal Declaration of Human Rights to deny asylum to persons in flight from "prosecutions genuinely arising from non-political crimes." GRAHL-MADSEN, *supra* note 36, at 290. He concludes succinctly that "the drafters of the cited instruments have desired that the instruments they drew up should not be abused by fugitives from justice nor interfere with the law of extradition." *Id.* (citation omitted). "In Article 33(2) emphasis is laid on the danger which the person concerned represents to the community and not on the formal classification of his offence." *Id.* at 292. Frédéric Tiberghien endorses a comparable position. FRÉDÉRIC TIBERGHIEN, LA PROTECTION DES RÉFUGIÉS EN FRANCE 103 (2d ed. 1988).

191. *Infra* text accompanying notes 210-30.

192. *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428, U.N. GAOR, 5th Sess., Supp. No. 20, Annex ¶ 8(a), at 47, U.N. Doc. A/1775 (1950).

193. Refugee Convention, *supra* note 4, art. 35(1), 189 U.N.T.S. at 176.

194. Indeed, even while taking a position at odds with that articulated in the *Handbook*, the United States Supreme Court acknowledged it as "a useful interpretative aid." INS v. Aguirre-Aguirre, 526 U.S. 415, 427 (1999). Notably, that decision made no reference to the work of leading international scholars in refugee law and only briefly alluded to the jurisprudence of another state party to the Refugee Convention.

195. UNHCR appears to endorse a unified understanding of these provisions. *See supra* note 187.

196. The U.S. Supreme Court *Aguirre-Aguirre* decision implicitly rejected this approach in 1999. *Aguirre-Aguirre*, 526 U.S. 415; *see supra* text accompanying notes 74-79.

Court of Appeals ruled that extradition law was no more than a source of guidance, insisting for example that exclusion under Article 1(F)(b) is warranted only if the acts committed amount to an "atrocity."[197] Courts in Australia and New Zealand, while recognizing the relevance of extradition law, have similarly opined that the two concepts "are not necessarily analogous."[198] The Canadian Federal Court in *Gil v. Minister of Employment and Immigration* articulated the most extreme position, explicitly rejecting the relevance of the scope of extraditable criminality to exclude under Article 1(F)(b) a militant Iranian student opposed to the Khomeini regime because "[i]t is not in the public interest that this country should become a safe haven for mass bombers."[199]

As already explained, the historical record does not justify UNHCR's view that Article 1(F)(b) is, like Article 33(2), a means by which a government may effectively protect its own security interests.[200] But beyond this doctrinal concern, the UNHCR position is both illogical and dangerous in practice.

UNHCR explains the existence of two distinct provisions, both allegedly intended to promote the same goal of asylum-state safety and security, by distinguishing the circumstances where each applies. Specifically, UNHCR takes the position that Article 33(2) is the means by which an asylum state can divest itself of responsibility toward a refugee who has engaged in criminal activities *within* the asylum country, while Article 1(F)(b) allows exclusion based only on criminal acts committed "outside the country of refuge."[201] This allocation of roles, however, is difficult to reconcile with the substance of the two articles.

Specifically, Article 1(F)(b) authorizes exclusion where the asylum seeker has committed a "serious" crime. In contrast, Article 33(2) allows states to deny protection only where the refugee has committed a "particularly serious" crime *and* has been found to be "a danger to the community" of the asylum country.[202] Under UNHCR's interpretation, a state has a

197. 788 F.2d 591, 595-96 (9th Cir. 1986). In contrast to the majority's freestanding approach to interpreting "non-political crime," Judge Goodwin's concurring opinion soundly condemned the logic of a conceptual divorce between the political offense exception codified in refugee law and extradition law. As he candidly observed, "[t]he majority's attempt to distinguish deportation from extradition for the purpose of defining political offenses amounts to no more than a distinction without a difference." *Id.* at 600 (Goodwin, J., concurring).

198. Singh v. Minister for Immigration & Multicultural Affairs, No. BC9907644 (Austl. Fed. Ct. Nov. 19, 1999) (LEXIS, Australia Library, UNRPT File); *see also* S. v. Refugee Status Appeals Authority [1998] 2 N.Z.L.R. 301, 311 (H.C.), *aff'd*, [1998] 2 N.Z.L.R. 291 (C.A.).

199. [1995] 1 F.C. 508, 535 (Can. Fed. Ct. 1994).

200. *See supra* Part IV.A.

201. UNHCR argues that "[r]efugees who commit serious crimes within the country of refuge are not subject to the exclusion clause. They are subject to that country's criminal law process and to Articles 32 and 33(2) of the 1951 Convention, in the case of particularly serious crimes." *UNHCR Exclusion Note*, *supra* note 17, ¶ 19.

202. The treatment afforded narcotics offenders exemplifies the enhanced risk to refugees from resorting to Article 1(F)(b). States have routinely characterized narcotics offenses as "serious." *E.g.*, Dhayakpa v. Minister for Immigration & Ethnic Affairs

justifiable concern for its safety when faced with an asylum seeker who has committed no more than a "serious" crime in another country. But armed with evidence that a refugee committed the same crime in its own territory, a state may have no right to withhold protection, according to UNCHR. This inconsistency derives from UNHCR's insistence that a state may protect itself against risks to its own safety posed by an on-site criminal asylum seeker only in accordance with Article 33(2)—only where the crime committed is "particularly serious," not just serious, and the state finds that the asylum seeker can fairly be characterized as a danger to the host community. Thus, UNHCR's view of the respective roles for Articles 1(F)(b) and 33(2) requires accepting the astounding proposition that some crimes committed outside the asylum country are probative of risk to the asylum-state community, but the same crimes committed inside the asylum country are no basis for concern about communal safety. This makes no sense.

The historically grounded explanation for the roles of Article 1(F)(b) and Article 33(2), on the other hand, does not present this logical difficulty. Because the objective of Article 1(F)(b) is to guard against infiltration of the asylum system by fugitives from justice and to ensure that refugee law presents no impediment to obligations under extradition treaties, it is logical to base exclusion decisions on the simple fact that an asylum seeker committed an extraditable crime. In contrast, given Article 33(2)'s purpose of reconciling asylum-state security interests with the refugees' protection interests, the Article calls for an inquiry predicated on demonstrating risk to the host state or its community. The "balancing" of interests that UNHCR erroneously attempts to import into Article 1(F)(b)[203] is textually present in Article 33(2)—only "particularly serious" crimes can outweigh a presumptive need for shelter from persecution, and the asylum state must demonstrate a real danger to its community from the refugee's presence. In sum, by recognizing that the purpose of Article 1(F)(b) is to exclude fugitives from justice and promote international comity in enforcing criminal law, with only Article 33(2) directed to vindicating domestic safety and security, a division of roles that corresponds with both history and logic is identified.

Beyond its illogicality, UNHCR's failure to embrace the historically grounded view of Article 1(F)(b) as excluding only fugitives from justice from refugee status has lent credibility to the peremptory denial of refugee status to an unjustifiably broad class of persons. The UNHCR view that Article 1(F)(b) safeguards asylum-state safety and security has encouraged

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(1995) 62 F.C.R. 556, 560 (Austl. Fed. Ct.); Rajkumar, French Commission des recours des réfugiés, Decision No. 230875 (Mar. 12, 1993). But the circumstances of the offense may exclude them from the ambit of "particularly serious" crimes. *See, e.g.*, Bahadori v. INS, 947 F.2d 949 (9th Cir. 1991) (unpublished table decision); Beltran-Zavala v. INS, 912 F.2d 1027 (9th Cir. 1990). Article 33(2)'s insistence on the need to prove both a final conviction and risk to the asylum community before withdrawing protection further narrows the risk of a denial of protection. Netherlands/F.V., HR, 13 mei 1988, NJ 910, ¶ 3.2.1, 20 NETH. Y.B. INT'L L. 329, 331.

203. *See infra* text accompanying notes 253-70.

some governments to exclude summarily persons whose actions do not fall within even the prima facie range of extraditable criminality. States have thus relied on Article 1(F)(b) to exclude asylum seekers whose crimes have been committed in the asylum country and whose criminality is no longer justiciable. Also, UNHCR's severing of the intended linkage between Article 1(F)(b) and extradition law has prompted states to articulate refugee-specific and sometimes punitive redefinitions of a "nonpolitical crime." Governments have too often felt free to adopt a double standard under which refugee status is summarily denied in circumstances that would have immunized an individual from extradition. Had states appreciated the historical rationale for Article 1(F)(b), those refugees would have benefited from the more abundant protections codified in Article 33(2).

A. Unwarranted Expansion of the Class of Persons Subject to Peremptory Exclusion

The UNHCR view of Article 1(F)(b) as a mechanism for protecting asylum-state interests has sometimes been invoked to exclude persons whose criminal conduct has not, in fact, taken place outside the country of refuge. For example, the Australian Federal Court in *Dhayakpa v. Minister for Immigration and Ethnic Affairs* considered the case of an applicant determined to be a Chinese citizen by virtue of his birth in Tibet.[204] The court accepted his genuine risk of persecution based on the political opinion imputed to him as a consequence of his service in the Indian Special Frontier Force.[205] Prior to his application for refugee status, however, he was charged and convicted of conspiracy to import heroin into Australia.[206] The Refugee Review Tribunal excluded him from refugee status under Article 1(F)(b) on the grounds that he had committed a serious nonpolitical crime "outside the country of refuge."[207] The Federal Court affirmed this finding:

> A person who would otherwise qualify for admission as a refugee may be disqualified by the operation of Art 1F(b) if it were shown that such a person had a record of serious non-political criminal offences whether in the country of origin or elsewhere. In my opinion also it makes no difference that the offence, in this case a continuing offence, was committed both outside and within Australia.[208]

This finding is untenable if Article 1(F)(b) is understood as a means of avoiding the admission of persons who would otherwise evade criminal responsibility for their actions, or more specifically who would compromise the implementation of extradition treaties. Yet the court circumvented the express language of Article 1(F)(b), referring only to crimes committed "outside" the country of refuge, *because of* its view that the fundamental purpose of Article 1(F)(b) is to protect the host country's secur-

204. *Dhayakpa*, 62 F.C.R. at 559-60.
205. *Id.* at 561.
206. *Id.* at 560-61.
207. *Id.* at 564-65.
208. *Id.* at 565.

ity interests.[209] Basing its finding on the UNHCR *Handbook*, the court concluded: "The exemption in Art 1F(b) . . . is protective of the order and safety of the receiving State. It is not . . . to be construed so narrowly as to undercut its evident policy."[210]

In contrast, German courts have not challenged the historical understanding of Article 1(F)(b) as directed to the exclusion of fugitives from justice. Thus, the Bavarian Higher Administrative Court—also confronted with a criminality exclusion request for an asylum seeker guilty of a continuing offense—did not take the Australian approach.[211] The German court held that because a continuing offense is committed partly in the asylum country and can be prosecuted in that state, Article 1(F)(b) is inapplicable.[212]

An even more shocking distortion of Article 1(F)(b) is endorsed by French tribunals. In *Azam Ghulam*,[213] the tribunal suggested that a Pakistani refugee claimant convicted in France of voluntary homicide could properly be excluded from refugee status under Article 1(F)(b).[214] The *Commission des recours* opined that although Article 1(F)(b) speaks to crimes committed outside the asylum country, it is also sometimes a basis for exclusion based on crimes committed inside the asylum country.[215] The subsequent *Rajkumar* decision elucidated the logic behind this counterintuitive holding.[216] That case involved a refugee claimant convicted in France of a narcotics offense, and who was sentenced to six years of imprisonment followed by expulsion from France.[217] Incredibly, the *Commission des recours* held that it was entitled to apply Article 1(F)(b) to a crime committed *on French territory* because "persons on French soil who have yet to be granted refugee status"[218] remain "outside" of France![219]

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209. *See id.*

210. *Id.*

211. Bavarian Higher Administrative Court, Decision No. 72 XII 77 (June 7, 1979) (Oberverwaltungsgericht). The case involved a Czech citizen who hijacked a Czech civilian aircraft to make his escape to asylum. The court observed that the crime was not committed wholly outside the country of refuge, but rather continued and ended in Germany. *Id.* Because a German court therefore had jurisdiction over the offence, an extradition-based understanding of Article 1(F)(b) prohibits exclusion. Instead, the individual should be tried and punished as appropriate under domestic law, with removal pursuant to Article 33(2) where appropriate. Developments in international law since this case may also require the exclusion of aircraft hijackers from refugee status, pursuant to Article 1(F)(c). *See supra* text accompanying note 65.

212. Bavarian Higher Administrative Court, Decision No. 72 XII 77 (June 7, 1979) (Oberverwaltungsgericht).

213. French Commission des recours des réfugiés, Decision No. 62749 (Sept. 15, 1988).

214. *Id.*

215. *Id.*

216. French Commission des recours des réfugiés Decision No. 230875 (Mar. 12, 1993).

217. *Id.*

218. Where refugee status has been recognized, however, the Conseil d'Etat recognizes that the state may be withdraw status only under Article 33(2) of the Refugee Convention, not Article 1(F)(b). Moses Allueke, French Conseil d'Etat, Decision No. 188981 (Nov. 3, 1999).

Our point is *not* that UNHCR approved of either the Australian or French misinterpretations of Article 1(F)(b). To the contrary, UNHCR has insisted that "Article 1F(b) requires that the crime in question was committed 'outside the country of refuge . . . prior to his admission' to the country of asylum. This could be the country of origin, or another country. It can never be the country where the applicant seeks recognition as a refugee."[220] But it should come as no surprise that governments invited to view Article 1(F)(b) as a means to protect their security interests, rather than to exclude fugitives from justice, are tempted to engage in semantic machinations that expand the scope of the Article 1(F)(b) exclusion in ways that are fundamentally at odds with both the Convention's text and the drafters' intentions.

Beyond expanding the class of persons subject to peremptory exclusion to include claimants whose criminality has not taken place wholly outside the asylum state, UNHCR's interpretation of the purpose of Article 1(F)(b)[221] has also supported the exclusion under Article 1(F)(b) of persons whose past criminality is no longer justiciable. UNHCR's position on justiciability as a requirement for Article 1(F)(b) exclusion has traditionally been vague.[222] Its more recent assertions, however, actually give comfort to those who would invoke this exclusion clause against persons who are in no sense fugitives from justice.[223]

While states such as Canada[224] and Switzerland[225] have traditionally declared that criminals who satisfy the penalty imposed upon them should not be excluded under Article 1(F)(b), this principled position is increasingly fragile.[226] Indeed, in the Australian *Dhayakpa* decision, the court

219. It is unlikely that this reasoning can be reconciled with the judgment of the European Court of Human Rights that held that asylum seekers in an "international zone" at Paris's Orly Airport were entitled to real and effective rights. Amuur v. France, 1996-III Eur. Ct. H.R. 826, 850.

220. *UNHCR Exclusion Note*, *supra* note 17, ¶ 19 (alteration in original).

221. *Supra* note 187 and accompanying text.

222. The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant. In the latter case, there is a presumption that the exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates.

UNHCR HANDBOOK, *supra* note 3, ¶ 157, at 37.

223. "While Article 1F(b) offers no guidance on the role of expiation, practice has been to interpret it as applying chiefly to fugitives from justice, and not to those who have already served their sentences, unless they are regarded as continuing to constitute a menace to a new community." *UNHCR Exclusion Note*, *supra* note 17, ¶ 19.

224. Attorney-General of Canada v. Ward, [1993] 2 S.C.R. 689, 743 (Can. 1992) ("Ward would still not be excluded [under Article 1(F)(b)], having already been convicted of his crimes and having already served his sentence.").

225. Office fédéral des réfugiés, *Manuel de procédures d'asile* 144 (1996) ("On ne doit pas exclure *a priori* de la protection contre les persécutions garantie par le droit d'asile toute personne ayant encouru dans le passé une sanction pénale.").

226. One commentator noted the tacit—and in our view legally problematic—attempt of the Canadian Federal Court Trial Division in *Shamlou v. Minister of Citizenship and Immigration*, (1995) 103 FTR 241, to dissent from the Canadian Supreme Court's position enunciated in *Ward*. Joseph Rikhof, *Exclusion Clauses: The First Hundred Cases in the Federal Court*, 34 IMMIGR. L. REP. (2d) 137 (1996).

had no difficulty ordering exclusion under Article 1(F)(b) even though Dhayakpa had completed his prison sentence in Australia by the time he applied for refugee status.[227] The court flatly rejected Professor Grahl-Madsen's insistence on justiciability as an essential element of criminality for Article 1(F)(b):

> Grahl-Madsen suggests that the Art 1F(b) exemption does not extend to crimes for which punishment has been suffered or crimes which are either too unimportant to warrant extradition or are no longer justiciable. The difficulty with that construction, so far as it refers as to prior punishment or justiciability, is that it imports into Art 1F(b) limitations not able to be found in the language of the Article.[228]

The court failed to address the fact that Article 1(F)(b) is limited to crimes committed "outside the country of refuge" and textually constrained by the political offense exception—indicators of an extradition-based rationale for the article. Also, the Australian Federal Court did not consult the *travaux prêparatoires* to distill the contextualized purpose of Article 1(F)(b) or compare the article's history with that of Article 33(2).[229] It simply insisted that

> The operation of the [Article 1(F)(b)] exemption is not punitive. There can be no question of twice punishing a person for the same offence. Rather it is protective of the interests of the receiving State. The *protective function* is not limited according to whether or not the punishment has been inflicted . . . .[230]

Indeed, it is difficult to contest the court's approach if UNHCR's erroneous interpretation of Article 1(F)(b) is embraced. Yet if understood as a mechanism to exclude fugitives from justice, the Australian reasoning is patently wrong.

In sum, the view that Article 1(F)(b) promotes asylum-state security interests means in practice that persons who are in no sense fugitives from justice abroad are subject to exclusion. Both expansions of the exclusion class identified here—persons whose criminal conduct did not occur outside the asylum state and those whose criminality is no longer justiciable—may not be excluded under the historically grounded understanding of Article 1(F)(b). Nonetheless, to the extent that Article 1(F)(b) has erroneously come to be understood simply as a means to protect the interests

227. Dhayakpa v. Minister for Immigration & Ethnic Affairs (1995) 62 F.C.R. 556, 565 (Austl. Fed. Ct.).

228. *Id.* at 564.

229. In the Australian Federal Court's more recent decision of *Ovcharuk v. Minister for Immigration & Multicultural Affairs*, (1998) 158 A.L.R. 289 (Austl. Fed. Ct.), Judge Sackville canvassed the drafting history of the Refugee Convention, *id.* at 302-04, but found no clear evidence that the drafters intended Article 1(F)(b) to exclude persons on grounds of extraditable criminality. *Id.* at 301-06. While the justiciability issue was not expressly addressed, the court upheld the *Dhayakpa* rule to exclude a Russian national convicted in Australia and serving time in an Australian prison at the time of his application for a protection visa. *Id.* at 289.

230. *Dhayakpa*, 62 F.C.R. at 565 (emphasis added).

of receiving states, the expansion of the excluded class is entirely explicable.

B. Redefining the Political Offense Exception

Beyond giving comfort to states that seek to widen the scope of relevant prima facie criminality, UNHCR's failure to link Article 1(F)(b) to extradition law also facilitated the evolution of a distinctly punitive understanding of the political offense exception in refugee law. As elaborated above, Article 1(F)(b) requires states to interpret extraditable criminality not only by the gravity of the offense but also their own understandings of the limits to justifiable extradition. Article 1(F)(b) incorporates the political offense exception found in most extradition treaties, a proviso that authorizes a state to withhold extradition where it considers the individual concerned likely to face "political," rather than truly criminal, prosecution.[231]

A different position, however, is taken by UNHCR. Rather than advocating a symmetrical approach to the political offense exception in refugee law and extradition law, UNHCR appears to encourage a more categorical interpretation, albeit one that borrows selectively from various national understandings of the political offense exception in extradition law:

> The serious crime must also be non-political, which implies that other motives, such as personal reasons or gain, predominate. Increasingly, extradition treaties specify that certain crimes, notably acts of terrorism, are to be regarded as non-political for the purpose of those treaties, although they typically also contain protective clauses in respect of refugees. For a crime to be regarded as political, its political objective must also, for the purposes of this analysis, be consistent with the exercise of human rights and fundamental freedoms. Crimes which deliberately inflict extreme human suffering, or which violate *jus cogens* rules of international law, cannot possibly be justified by any political objective.[232]

A crime's characterization as political will therefore normally follow from the motive for its commission, unless the act in question infringes human rights or a *jus cogens* norm of international law or results in the infliction of "extreme human suffering."

There is no consensus, however, that the political offense exception in extradition law should be interpreted in line with UNHCR's understanding of a political crime for purposes of Article 1(F)(b).[233] The unfortunate implication of UNHCR's decision to posit this single objective test for interpreting the political offense provision of Article 1(F)(b) is that governments should feel free—and, perhaps, even obliged—to interpret the political offense proviso in refugee law differently than in their extradition

231. *See supra* text accompanying notes 123-39.

232. *UNHCR Exclusion Note*, *supra* note 17, ¶ 17 (endnote omitted).

233. "The political offense exception to extradition is one of the more controversial topics in extradition law today; paradoxically, it is one of the most universally accepted, yet strongly contested rules of international law. Virtually all domestic extradition laws and international treaties contain the exception." BLAKESLEY, *supra* note 115, at 264-69.

law.[234] The ethical symmetry imposed by the historical understanding of Article 1(F)(b) is lost,[235] and states are invited to exclude refugees for reasons beyond the reasonable limits on their usual authority to withhold extradition.

The determination of some asylum states not to be bound in refugee law by their definitions of the political offense exception is most forcefully argued in the Canadian decision, *Gil v. Minister of Employment and Immigration*.[236] In defining its approach to interpreting the political offense exception in Article 1(F)(b), the Federal Court observed that

> the characterization of crimes as "political" is found in both extradition and refugee law. This has led some commentators to suggest that they are but two sides of the same coin and serve to complement one another: the fugitive who cannot be extradited may seek asylum; the refugee claimant who is excluded may be extradited.[237]

In response, the court advanced nine arguments[238] to demonstrate "a need for even greater caution in characterizing a crime as political for the purposes of applying Article 1F(b) than for the purpose of denying extradition."[239]

The Canadian court's approach, however, is fundamentally flawed.[240]

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234. This lack of symmetry follows logically from UNHCR's understanding of Article 1(F)(b) as embodying a commitment to protect asylum-state interests. It makes little sense to reconcile refugee law with extradition law by adopting divergent tests for justifiable prima facie criminality. It would be even less defensible to defer to a state's standards of unacceptable criminality while simultaneously refusing to acknowledge that country's appreciation of the principled limits of criminal law authority.

235. *See supra* text accompanying notes 141-42.

236. [1995] 1 F.C. 508, 535 (Can. Fed. Ct. 1994). The approach in *Gil* has been endorsed by decision-makers in other countries. *E.g.* T. v. Home Sec'y, [1996] A.C. 742, 785 (1995) (Lloyd of Berwick, L.J.) (appeal taken from Eng. C.A.) (noting that it "derived the greatest help" from the decision in *Gil*); S. v. Refugee Status Appeals Authority [1998] 2 N.Z.L.R. 301, 315-17 (H.C.), *aff'd*, [1998] 2 N.Z.L.R. 291 (C.A.).

237. *Gil*, [1995] 1 F.C. at 516 (footnote omitted).

238. *Id.* at 516-18.

239. *Id.* at 518.

240. The first argument posited in *Gil* is that deference in refugee law to the extradition-law interpretation of the political offense exception is unwarranted because extradition is a treaty obligation, whereas refugee status is a domestic legal obligation established to comply with a treaty. *Id.* at 516. That states often implement the Refugee Convention in domestic law does not, however, detract from the treaty-based duty not to exclude from protection a refugee who has committed a "political crime." If the Federal Court uses a narrower understanding of political offense as a strategy to avoid the prospect of refugees insisting on the benefits of international obligations an asylum country has freely chosen to adopt and codify in domestic law, then the court illegitimately undercut rights granted by executive and legislative action.

A second unfounded argument advanced against a symmetrical approach to defining the political offense exception is that extradition proceedings generally involve a contestation of "guilt," whereas refugees often admit "crimes" claimed to be political. *Id.* at 516-17. This distinction is artificial and semantic. In both extradition and refugee contexts, the individual concerned asserts that he or she is not "guilty" in any meaningful sense because the relevant acts either have not been committed or have been committed in a context that should not impose criminal liability. In either case, the individual makes essentially the same assertion—that exposure to the other state's legal apparatus carries the risk of wrongful criminal conviction.

A third tack taken by the Canadian court suggested an ulterior motive to assertions of political offense in refugee claims, since a political offense finding makes refugee status "almost a foregone conclusion." *Id.* at 517. In the extradition context, on the other hand, "it is generally assumed that the requesting state will afford to the fugitive all the usual legal protections and no ulterior motive is presumed. . ." *Id.* It is not, however, the requesting state's potential ulterior motive that is the relevant point of comparison—the requesting state would not characterize a matter as a political offense. The relevant comparison for ulterior motives is the individual who resists extradition—where like a refugee, his or her assertion of the political offense exception may be motivated by no more than a desire to avoid removal. In both cases, though, the "risk" is simply that an individual improperly raises the defense, not that he or she prevents removal for improper reasons. The relevant decision-maker makes that decision in each case.

A fourth argument adopted by the court is that political offense in Canadian extradition law broadly includes both political crimes and politically motivated prosecutions. *Id.* In contrast, the court suggests that the Refugee Convention recognizes only "political crimes" as a basis for withholding removal. *Id.* The fact that Canada lists "political crimes" and "politically motivated prosecutions" separately in *its* extradition laws cannot, however, be taken as dispositive of the substantive scope of the international legal definition of a "political crime." In fact, modern multilateral extradition treaties tend to allow states to withhold extradition on the grounds of politically selective prosecution. *See supra* text accompanying notes 136-38.

A fifth basis for divorcing the political offense exception in refugee law from its extradition-law counterpart is the inappropriateness of requiring a state to grant "asylum" to an individual "only" exposed to the risk of prosecution for a relative political offense. *Id.* at 517-18. The asserted duty "to welcome [a political assassin] with open arms," *id.*, is both inflammatory and inaccurate. Each state remains free to determine whether the predominantly political character of an act renders something political that would otherwise be a common crime. But if the state so determines, it is difficult to see why states would object to protecting an individual at risk of prosecution for a defensible action. It is also hard to understand why a state would feel less comfortable admitting a person "only" exposed to criminal prosecution for an act that is not in essence criminal, contrasted with the duty to protect persons charged with offenses that are not appropriately within the ambit of the criminal law. In both cases, the goal is preventing the removal of persons to face an abuse of power through the criminal law of the destination state. In any event, the Canadian Federal Court's position does not account for Refugee Convention Articles 1(F)(a) and (c) or 33(2), all of which safeguard a state from being required to admit dangerous persons.

The sixth argument raised in *Gil* is that the political offense exception in refugee law should not be construed on the basis of extradition-derived interpretations because Article 1(F)(b) is limited to serious crimes, whereas the extradition concept has no such qualifications. *Id.* at 518. But states do *not* grant extradition in every matter a requesting state might conceivably deem criminal; they grant extradition only where the alleged crime is within a list of serious offenses. The shorthand "serious crimes" codified in the Refugee Convention simply acknowledges that states do not agree on a single list of offenses that warrant extradition. *See supra* text accompanying notes 116-20. There is no dispute, however, regarding the shared goal of reserving extradition for "serious crimes."

The *Gil* court also attempted to justify a freestanding interpretation of the political offense exception in refugee law on the grounds that extradition law concerned the prosecution of matters generally agreed to be criminal, while refugee law "is concerned with the admission to Canada of permanent residents who may ultimately become citizens." *Id.* This argument is not true under international law. Refugee law does *not* impose a duty to grant permanent admission, much less citizenship. Some countries, including Canada, have chosen to make this equation for reasons of domestic policy and politics. That decision cannot, however, logically be asserted as a basis for denying refugees the legally mandated right to receive protection for the duration of the risk in their country of origin. This issue parallels the central question in an extradition hearing where the individual invokes the political offense exception, namely whether the nature or circum-

The asserted linkage between the political offense exception in refugee law and extradition law is not based simply on common terminology, but on the historical record of the drafting process. The drafters established Article 1(F)(b) precisely to align refugee law with extradition law; consequently, it is not surprising they incorporated the same political offense concept.[241] More fundamentally, while an excluded refugee claimant may be extradited, it does not follow that any nonextraditable person may seek "asylum," at least if that term implies an automatic right to claim the benefits of refugee status. Either the court used the term "asylum" carelessly—to imply some general sociopolitical discretionary right to remain—or it failed to recognize the consequence for a refugee claimant if a court holds that an alleged offense in the country of origin is a political offense. In particular, Article 1(F)(a) and (c), as well as Article 33(2), may still be invoked to deny protection, even to a person at genuine risk for a relevant reason. These provisions therefore answer the court's *in terrorem* argument that "[i]t is not in the public interest that this country should become a safe haven for mass bombers."[242]

Recently overruled U.S. precedent, *McMullen v. INS*,[243] illustrates the risk to refugees where Article 1(F)(b) analysis is not grounded in the usual

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stances of the alleged offense are such that returning the individual would pose an unacceptable risk.

Finally, two arguments advanced in *Gil* make clear the importance of a developed appreciation for the historically grounded purposes of Article 1(F)(b). First, the court argued that in a refugee case, unlike an extradition case, the state of origin rarely expresses any interest in the claimant's return. *Id.* at 516. Second and related, the court rightly observed that whereas a decision to extradite necessarily involves the individual's return to face trial, the exclusion of a refugee may not lead to his or her return to the country where the crime was committed. *Id.* at 518. The common concern expressed in these arguments is that reconciling the understanding of political offense in refugee law with the meaning assigned in extradition law may not make sense because the same consequences do not follow in each case. In other words, Article 1(F)(b) exclusion may follow *even where* there is no indication that prosecution in the state of origin will ensue. If so, why should the extradition-derived test necessarily govern?

If the drafters intended Article 1(F)(b) only to reconcile refugee law with extradition law in the fairly narrow sense of enabling asylum countries to avoid conflicting obligations, the Federal Court's objections would be warranted. But because Article 1(F)(b) has a second and more general goal—namely, to exclude from refugee status all fugitives from justice as unworthy of international protection, regardless of whether they are actively pursued for extradition purposes—the two objections cannot stand. Understood as identifying those asylum seekers who are not, in substance, fugitives from *justice*, the logic of defining the political offense proviso in Article 1(F)(b) according to the asylum state's political offense exception for extradition is clear.

241. *See supra* Part IV.A. Interestingly, the correlation between refugee law and extradition law seems to work in both directions. John Dugard and Christine Van den Wyngaert recently wrote that Article 11 of the 1957 European Convention on Extradition, Dec. 13, 1957, art. 11, 359 U.N.T.S. 273, 282, which excludes extradition where the requested state believes a persecutory intent underlies the request, was "modelled on the *non-refoulement* provision in the 1951 Convention [r]elating to the Status of Refugees." John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187, 192-93 (1998).

242. *Gil*, [1995] 1 F.C. at 535.

243. 788 F.2d 591 (9th Cir. 1986).

rules of extradition law. Under the traditional U.S. definition of the political offense exception, if the case involves an insurgent seeking to change his or her government through a process that enjoys a broad base of popular support, U.S. courts will remain ideologically neutral and refrain from assessing the appropriateness of particular means to achieve political self-determination.[244] Yet confronted in *McMullen* with an asylum claim from a member of the Provisional Irish Republication Army (PIRA) who had participated in the bombing of military barracks before formally resigning in protest of the PIRA's increasingly extremist tactics, the U.S. Court of Appeals for the Ninth Circuit *refused* to reverse a decision ordering his exclusion from refugee status on the grounds of criminality.[245] The court candidly asserted the importance of not placing "too much weight on the definition of political offences in extradition cases," insisting instead on a "balancing approach including consideration of the offense's 'proportionality' to its objective and its degree of atrocity . . .,"[246] a notion traditionally rejected by U.S. courts in the extradition context.

Because of its mistaken view that the criminal exclusion clause in refugee law promotes asylum-state security,[247] the court felt no qualms about the asymmetry of refusing to protect as a refugee the kind of person normally protected in an extradition context. The *McMullen* court ignored its own case law on the political offense exception in extradition law and adopted for refugee law purposes the Seventh Circuit's more restrictive approach,[248] as stated in *Eain v. Wilkes*:

> [N]othing would prevent an influx of terrorists seeking a safe haven in America. Those terrorists who flee to this country would avoid having to answer to anyone anywhere for their crimes. . . . We do not need them in our society. . . . [T]he political offense exception . . . should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere.[249]

This reasoning is patently false. By simply acknowledging that it no longer claims the right to deny the extradition of persons charged with terrorist acts, the United States could easily exclude from refugee status under Arti-

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244. *See* GILBERT, *supra* note 112, at 229.

> Until 1986, no member of the Provisional Irish Republican Army (IRA) had ever been returned following a request from the United Kingdom government. The courts held that there was a political disturbance in Northern Ireland and any crime committed for the objectives of the IRA was a political offence and, thus, non-extraditable.

Id.

245. *McMullen*, 788 F.2d at 592-95.

246. *Id.* at 596.

247. The *McMullen* court asserted that the purpose of criminal exclusion in refugee proceedings is to identify persons guilty of "an act which Congress has determined makes the individual an 'undesirable' in the eyes of the law." *Id.*

248. *Id.* at 597-98.

249. 641 F.2d 504, 520 (7th Cir. 1981).

cle 1(F)(b) persons who commit those crimes.[250] Even if it wished to retain the political discretion to withhold the extradition of terrorists in some circumstances, the United States could still protect its security interests by meeting the standards in Article 33(2) of the Refugee Convention.

These cases demonstrate that the UNHCR position rationalizes a free-standing approach to interpreting Article 1(F)(b) that can lead to exclusion based on often visceral and highly subjective characterizations of conduct as "terrorism" or an "atrocity."[251] As Lord Mustill remarked,

> Whilst I respect this impulse, it is hard to accept as a reliable basis on which to apply the exception, for it posits that the community of nations has found it so clear that conduct which is political in the ordinary sense of the word may be deprived of that character by its atrocious nature . . . . [In reality] there is a tacit qualification, the boundaries of which depend entirely on the personal reaction of the official or judge in the receiving state as to whether the act is "atrocious" enough to merit special treatment.[252]

C. The Fallacy of the "Balancing Test"

State reliance on UNHCR's approach to Article 1(F)(b) has generated two kinds of risk for refugees. First, the view of Article 1(F)(b) as safeguarding state security interests has permitted governments to expand the class of persons subject to peremptory criminal exclusion to include, for example, persons whose criminal acts took place partly or wholly inside the asylum state and those whose criminal conduct is no longer justiciable. Second, by severing the intended linkage between Article 1(F)(b) and extradition law, the UNHCR approach prompted a redefinition of the political offense exception that resulted in the inequitable withholding of refugee status from persons who would be exempt from removal under the asylum state's understanding of the limits on legitimate criminal law authority.

This critique, however, neglects the integral quid pro quo in UNHCR's understanding of Article 1(F)(b). UNHCR tempers its view that the criminal exclusion clause may be invoked to protect state safety and security interests by insisting that states may not invoke Article 1(F)(b) if it would "result in greater harm to the offender than is warranted by the alleged crime."[253] According to the *Handbook*:

> If a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him. If the persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been

250. A revised extradition treaty between the United States and the United Kingdom was ratified on December 23, 1986, which facilitated the extradition of IRA members to the United Kingdom. GILBERT, *supra* note 112, at 230.

251. *McMullen* endorsed exclusion on the basis of "atrocity." *McMullen*, 788 F.2d at 596-97; *see also* EU Joint Position, *supra* note 17, § 13.2 ("Particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes. This applies both to the participants in the crime and to its instigators.").

252. T. v. Home Sec'y, [1996] A.C. 742, 772 (1995) (Mustill, L.J.) (appeal taken from Eng. C.A.).

253. *UNHCR Exclusion Note*, *supra* note 17, ¶ 18.

> committed in order to establish whether the applicant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a *bona fide* refugee.[254]

There is no reason to doubt that the "balancing test" was inspired by a sincere humanitarian impulse. Yet it is not a legally tenable position. By implicitly suggesting that some forms of "less serious" criminality can be relevant for Article 1(F)(b) purposes,[255] UNHCR effectively invites states to impose exclusion for crimes that fail to meet the drafters' basic litmus test of extraditable criminality. Also, state practice does not support the notion of gradations in persecution suggested by the reference to "less serious" persecution. Since any form of persecution is usually understood to involve a "basic attack on human rights,"[256] UNHCR's suggestion that only "severe persecution" implicates "life or liberty" is highly doubtful.

Moreover, no historical support exists for a general duty under refugee law to balance the harm feared by the asylum seeker against the gravity of the crime committed.[257] To the contrary, the drafters of the Refugee Convention were aware that asylum seekers who were fugitives from justice might experience a risk to their life or liberty from criminal sanction in their country of origin. The drafters believed the duty to apply extradition-derived exemptions from return when considering Article 1(F)(b) exclusion was a sufficient guarantee against the prospect of removing a refugee

254. UNHCR HANDBOOK, *supra* note 3, ¶ 156, at 37.

255. The implication of this proposed rule is that "less serious" crimes may justify exclusion only if the risk is "less serious" persecution. Apart from the unwarranted expansion of relevant crimes, this approach also suggests that some persecutory risks are more worthy of concern than others—a proposition that only creates uncertainty and confusion for the recognition of refugee status.

256. EU Joint Position, *supra* note 17, § 4; *see also* JAMES C. SIMEON, HUMAN RIGHTS NEXUS WORKING PARTY, INT'L ASS'N OF REFEREE LAW JUDGES, RAPPORTEUR'S REPORT 2 (1998) (on file with the authors) [hereinafter IARLJ NEXUS REPORT].

> The Report proposes that the same model or framework of analysis for the term persecution be adopted in every jurisdiction. The model proposed is one that would integrate the use of human rights standards in the delineation of the term persecution. . . . In short, the activities that a refugee claimant alleges to be persecutory are to be measured against the rights enunciated in international human rights instruments in order to assess whether the activities complained of are persecutory.

Id.

257. The superadded balancing test proposed by UNHCR must be distinguished from the balancing inherent in the notion of a "serious non-political crime." As the Supreme Court of Canada observed, "Article 1F(b) contains a balancing mechanism in so far as the specific adjectives 'serious' and 'non-political' must be satisfied . . . ." Pushpanathan v. Minister of Citizenship & Immigration, [1998] 1 S.C.R. 982, 1034 (Can.). The objective of this form of balancing, however, is to assess whether the act in question has a predominantly political character. For example, balancing is called for where the claimant faces politically inspired prosecution or differential sentencing or punishment that would render a prima facie routine prosecution a "relative political offense." *See* GRAHL-MADSEN, *supra* note 36, at 298 (stating that the balancing required under Article 1(F)(b) is an inquiry into whether the means or duration of punishment for a crime "seem far out of proportion to what would be a just punishment for the crime committed, or, in other words, whether the political reasons for the person's absence from his home country outweigh the criminal reasons").

to face a process that was not, in pith and substance, a fair application of ordinary criminal law. Also, the drafters did not expressly or impliedly commit to compare the relative weight of an asylum seeker's criminal and refugee character. To the contrary, Article 1(F)(b) categorically excludes fugitives from justice, so long as the crimes committed meet the agreed minimum standard of gravity.

Whatever the "right" view of balancing, courts today are increasingly unwilling to endorse UNHCR's balancing test. The Canadian Federal Court in *Gil* fired the initial salvo. The court rejected any duty to balance the harm faced by an excluded refugee claimant against the gravity of the criminal conduct: "[T]he claimant to whom the exclusion clause applies is *ex hypothesi* in danger of persecution; the crime which he has committed is by definition "serious" . . . . It is not in the public interest that this country should become a safe haven for mass bombers."[258]

This approach shows the inherent difficulty of UNHCR's insistence that the purpose of Article 1(F)(b) is to protect the security interests of asylum countries, yet exclusion must not occur where important individuated interests are concerned. The *Gil* decision makes clear that the severe nature of the risk faced by the refugee in the country of origin does not undercut the security concerns of the asylum country. With Article 1(F)(b) misconstrued as promoting asylum-state interests, it is understandable that states have begun to question the logic of UNHCR's superadded balancing test.

A year later, the Canadian Federal Court addressed the balancing test issue again—this time with a more measured analysis. *Malouf v. Canada* considered the claim of a Lebanese national convicted on narcotics and theft charges before entering Canada to seek refugee status.[259] He fled to Canada prior to sentencing on those convictions.[260] The Immigration and Refugee Board did not inquire into the merits of his refugee status claim, but simply excluded him on the basis of Article 1(F)(b).[261] The Federal Court Trial Division certified a question to the Court of Appeal: "[I]s [the decision-maker] required to consider the well-foundedness of the Convention refugee claimant's claim and then, if it is determined to be well-founded, to balance the seriousness of the non-political crime considered to have been committed by the claimant against the persecution feared by the claimant?"[262] The appellate court answered the question in a clear and legally correct manner:

> Paragraph (b) of Article 1F of the Convention should receive no different treatment than paragraphs (a) and (c) thereof; none of them requires the [decision-maker] to balance the seriousness of the Applicant's conduct against the alleged fear of persecution. . . . [A] proportionality test [is] only

258. Gil v. Minister of Employment & Immigration, [1995] 1 F.C. 508, 534-35 (Can. Fed. Ct. 1994).
259. [1995] 190 N.R. 230 (Can. Fed. Ct.).
260. Malouf v. Canada, [1995] 1 F.C. 537, 541-42 (Can. Fed. Ct.).
261. *Id.* at 544-45.
262. Malouf v. Canada, [1995] 190 N.R. 230, 231 (Can. Fed. Ct.).

appropriate for the purposes of determining whether or not a serious crime should be viewed as political.[263]

Resort to balancing has also been rejected by the Australian Federal Court,[264] the British House of Lords,[265] the High Court of New Zealand,[266] and most recently the U.S. Supreme Court. In *Aguirre-Aguirre*, the U.S. Supreme Court considered the Ninth Circuit's insistence that exclusion under Article 1(F)(b) is predicated on finding that the gravity of the asylum seeker's criminal acts outweighed the gravity of persecution feared from return.[267] In other words, the Court of Appeals applied a UNHCR-style additional "balancing test." The Supreme Court firmly rejected this interpretation:

> The Court of Appeals' error is clearest with respect to its holding that the [Board of Immigration Appeals] was required to balance respondent's criminal acts against the risk of persecution he would face if returned to Guatemala. . . . As a matter of plain language, it is not obvious that an already-completed crime is somehow rendered less serious by considering the further circumstance that the alien may be subject to persecution if returned to his home country. . . .
>
> . . . By its terms, the statute . . . requires independent consideration of the risk of persecution facing the alien before granting withholding. It is reasonable to decide, as the BIA has done, that this factor can be considered on its own and not also as a factor in determining whether the crime itself is a serious, nonpolitical crime.[268]

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263. *Id.*

264. Dhayakpa v. Minister for Immigration & Ethnic Affairs (1995) 62 F.C.R. 556, 563 (Austl. Fed. Ct.).

> The adjective "serious" in Art 1F(b) involves an evaluative judgment about the nature of the allegedly disqualifying crime. A broad concept of discretion may encompass such evaluative judgment. But once the non-political crime committed outside the country of refuge is properly characterized as "serious," the provisions of the Convention do not apply. There is no obligation under the Convention on the receiving State to weigh up the degree of seriousness of a serious crime against the possible harm to the applicant if returned to the state of origin.

Id.

265. T. v. Home Sec'y, [1996] A.C. 742, 769 (1995) (Mustill, L.J.) (appeal taken from Eng. C.A.) ("The gravity of the offence is relevant to the question whether it is 'serious' for the purposes of article 1F(*b*). But the crime either is or is not political when committed, and its character cannot depend on the consequences which the offender may afterwards suffer if he is returned.").

266. *S. v. Refugee Status Appeals Authority* found that Article 1(F)(b) does not exclude only criminals who face "minimal persecution," but simply serious criminals. [1998] 2 N.Z.L.R. 301 (H.C.), *aff'd*, [1998] 2 N.Z.L.R. 291 (C.A.). Once the crime in question satisfies Article 1(F)(b), there is no basis for an implied duty to balance the gravity of the harm feared against the seriousness of the crime committed. *Id.* This decision approves of the Canadian decisions in *Gil* and *Malouf* arriving at the same conclusion that "a firm line has been taken that the balancing exercise argued for by the plaintiff is not required." *Id.* at 317. The court based this conclusion in part on the notion that the similarities between extradition law and refugee law "cannot be pushed too far." *Id.* The court also suggested that reliance on the "plain words" will allow for a more uniform interpretation of Article 1(F)(b) across states. *Id.* at 318.

267. INS v. Aguirre-Aguirre, 526 U.S. 415 (1999).

268. *Id.* at 425-26.

In view of this clear, and logically compelling, judicial trend, it seems unlikely that UNHCR's insistence on a superadded balancing requirement will survive in state practice. The net result of UNHCR's reformulation of Article 1(F)(b) is therefore decidedly negative for refugees. Not only has the agency's ahistorical interpretation legitimated official efforts to expand the class of persons subject to peremptory criminal exclusion,[269] but also the one more generous approach to protection in the *Handbook*—the balancing requirement—is now largely discredited.[270]

VII. Does Clarity About the Scope of Criminal Exclusion Really Matter?

Our focus on defining a coherent understanding of the respective roles for Articles 1(F) and 33(2) in claims advanced by asylum seekers who have engaged in or supported violence abroad may be perceived by some as unwise or unnecessary. At the level of principle, some may object to a discussion of whether persons genuinely at risk of persecution should nonetheless be returned to their home state because they do not "deserve" refugee status. The concern is that the suggestion runs directly counter to the contemporary position that at least some human rights are owed to everyone, whatever their past actions.

Linked to this ethical concern is a practical objection, asserting the peripheral relevance of refugee law. Since relevant norms of human rights law are increasingly interpreted to prevent governments from expelling at-risk persons,[271] even on the grounds of criminality or avoiding a communal security threat, some may believe that accuracy in interpreting refugee law is a matter of only modest concern because a remedy will always be available under general norms of human rights law.[272]

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269. *See supra* Parts VI.A-B.

270. In any event, the need for this quid pro quo has substantially diminished in recent years as a result of the evolving interpretations of, for example, the European Convention on Human Rights, the Convention Against Torture, the International Covenant on Civil and Political Rights, and the Geneva Conventions. As described in more detail below, the class of persons that UNHCR's balancing requirement would embrace—those for whom "the persecution feared is so severe as to endanger the offender's life or liberty"—can now avail themselves of additional legal protections that do not depend on Convention refugee status (though these are not sources of enfranchisement in the host state). *See infra* text accompanying notes 281-88.

271. *E.g.*, *General Comment 15: The Position of Aliens Under the Covenant*, U.N. Hum. Rts. Comm., 27th Sess. ¶ 2, U.N. Doc. HRI/GEN/1/Rev.1, at 19 (1986) [hereinafter *General Comment 15*] ("[T]he general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.").

272. While the ebb and flow of the refugee definition will continue to be of critical importance and merit analysis accordingly, the asylum seeker and refugee must also be positioned within a human rights framework which extends beyond the [Refugee] Convention. In many circumstances this framework has more to offer in terms of human rights protection.

Richard Plender & Nuala Mole, *Beyond the Geneva Convention: Constructing a* De Facto *Right of Asylum from International Human Rights Instruments*, *in* REFUGEE RIGHTS AND REALITIES: EVOLVING INTERNATIONAL CONCEPTS AND REGIMES 81, 105 (Frances Nicholson & Patrick Twomey eds., 1999).

There is no doubt that the broader duties of nonreturn developing under international human rights law are of extraordinary benefit to those who may not qualify for Convention refugee status.[273] As our analysis makes clear, the Refugee Convention's peremptory exclusion rules and its limitations on the duty of *non-refoulement* embrace the notion of "deserving" and "undeserving" persons. Those found undeserving, even though at risk of serious harm, are not granted refugee status.[274] In contrast, relevant human rights guarantees assume that personhood triggers protection, whatever the individual's behavior. Human rights law focuses decision-makers exclusively on the risk of sufficiently serious ill-treatment upon return. Accusations of engaging in or promoting violent activity are immaterial to this substantive assessment of risk.

The strongest case for the effective irrelevance of refugee law can be made for state parties to the 1950 European Convention for the Protection on Human Rights and Fundamental Freedoms (European Convention), generally regarded as the most effective international human rights system currently in operation.[275] Unlike international refugee law, the European Convention establishes a supervisory mechanism for individuals to seek "international" enforcement of their rights. The European Court of Human Rights has moreover taken a dynamic approach to interpreting Article 3 of the European Convention, finding many rejected asylum seekers nonetheless entitled to remain in Europe by virtue of the duty of states not to subject anyone to "torture or to inhuman or degrading treatment or punishment."[276] Indeed, the court specifically determined in *Chahal v. United Kingdom* that official concerns about asylum-state safety and security cannot override the protection duty under the European Convention:

> Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in

273. *See generally* Oldrich Andrysek, *Gaps in International Protection and the Potential for Redress Through Individual Complaints Procedures*, 9 INT'L J. REFUGEE L. 392 (1997); Alberta Fabbricotti, *The Concept of Inhuman or Degrading Treatment in International Law and its Application in Asylum Cases*, 10 INT'L J. REFUGEE L. 637 (1998); Brian Gorlick, *Refugee Protection and the Committee Against Torture*, 7 INT'L J. REFUGEE L. 504 (1995).

274. "[R]efugee law is limited to asylum-seekers and refugees seeking protection with 'clean hands'." Hélène Lambert, *Protection Against* Refoulement *in Europe: Human Rights Law Comes to the Rescue*, 48 INT'L & COMP. L.Q. 515, 543 (1999).

275. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

276. *E.g.*, Hilal v. United Kingdom, No. 45276/99 (Eur. Ct. H.R. Mar. 3, 2001), *available at* http://www.echr.coe.int; Jabari v. Turkey, No. 40035/98 (Eur. Ct. H.R. July 11, 2000), *available at* http://www.echr.coe.int; Bahaddar v. Netherlands, 1998-I Eur. Ct. H.R. 250; D. v. United Kingdom, 1997-III Eur. Ct. H.R. 777; H.L.R. v. France, 1997-III Eur. Ct. H.R. 745; Chahal v. United Kingdom, 1996-V Eur. Ct. H.R. 1831; Ahmed v. Austria, 1996-VI Eur. Ct. H.R. 2195; Amuur v. France, 1996-III Eur. Ct. H.R. 826; Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A) (1991); Vilvarajah v. United Kingdom, 215 Eur. Ct. H.R. (ser. A) (1991). *See generally* Ralf Alleweldt, *Protection Against Expulsion Under Article 3 of the European Convention on Human Rights*, 4 EUR. J. INT'L L. 360 (1993); Terje Einarsen, *The European Convention on Human Rights and the Notion of an Implied Right to* De Facto *Asylum*, 2 INT'L J. REFUGEE L. 361 (1990); Christian Tomuschat, *A Right to Asylum in Europe*, 13 HUM. RTS. L.J. 257 (1992).

modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct . . . .

The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. . . . In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.[277]

The absolute nature of the protection duty under the European Convention thus contrasts markedly with international refugee law, lending weight to the criticism that accuracy in interpreting refugee law is of marginal practical importance.

On closer analysis, however, it would be a mistake to assume that all persons entitled to Convention refugee status would also be protected by the more powerful Article 3 of the European Convention. Although the substantive scope of Article 3 is broader in some ways than the refugee definition,[278] it is also narrower.[279] The European Convention may only be invoked by persons who face the risk of "torture or inhuman or degrading treatment or punishment."[280] Fear of "persecution" under the Refugee Convention, on the other hand, embraces persons who reasonably anticipate a broader range of human rights violations.[281] For example, an indi-

277. *Chahal*, 1996-V Eur. Ct. H.R. at 1855 (citation omitted). The British Home Office rejected Chahal's asylum claim on the grounds that the breakdown of law and order in the Punjab could not be regarded as persecution within the terms of the Refugee Convention. *Id.* ¶ 35. Relying on Articles 32 and 33 of the Refugee Convention, the government further determined that even if Chahal's claim was within the refugee definition, he would nonetheless be barred from refugee protection for reasons of national security. *Id.* The European Court of Human Rights, however, found substantial grounds to believe that Chahal faced a real risk of "torture or . . . inhuman or degrading treatment or punishment" contrary to Article 3 of the European Convention. *Id.* ¶¶ 72, 98-104. The court was persuaded by objective evidence of past and continuing human rights violations by the Punjabi police and the inadequacy of efforts to reform or reorganize the police. *Id.* ¶¶ 72, 98-104.

278. First, as the *Chahal* case makes clear, the European Convention does not deny protection on grounds of criminality. Second, it does not condition entitlement to protection on a showing of nexus between the risk faced and one of the five grounds of civil or political status.

279. Lambert, *supra* note 274, at 517 ("[T]he standard of evidential requirements is set incredibly high and, as a result, can rarely be met in cases involving asylum-seekers.").

280. European Convention on Human Rights, *supra* note 275.

281. *See, e.g.*, Sandralingham v. Home Sec'y, [1996] Imm. A.R. 97, 109 (Eng. C.A.) (Simon Brown, L.J.); Gashi v. Home Sec'y, [1997] INLR 96, 111-12; *see also* IARLJ NEXUS REPORT, *supra* note 256, at 4.

> Professor Hathaway presents a framework of analysis based on the hierarchical ordering of human rights as found in the UDHR, ICCPR and the ICESCR, i.e., the International Bill of Rights. . . .
>
> The [Human Rights Nexus Working Party] acknowledges that Professor Hathaway's hierarchical approach is a widely accepted and easily applied standard for assessing what constitutes persecution through an application of the IBR.

vidual who fears arbitrary detention or severe economic sanctions for a Convention reason would be unlikely to benefit from the duty of nonreturn under Article 3 of the European Convention, but nonetheless qualifies for Convention refugee status.

The value of the Refugee Convention becomes even more apparent outside the European context. Remedies under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention)[282] and the International Covenant on Civil and Political Rights (Civil and Political Covenant)[283] are being actively engaged by rejected asylum seekers in states that have adhered to the relevant complaint mechanisms. For example, where an individual meets the evidentiary standard in Article 3 of the Torture Convention, return is absolutely prohibited.[284] Thus, the Committee Against Torture required Sweden to protect a Shining Path guerrilla excluded from refugee status.[285] It held that "the test of article 3 of the Convention [against Torture] is absolute. . . . The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention."[286] Similarly, the Human Rights Committee held that an individual may not be returned to face the risk of arbitrary deprivation of life contrary to Article 6 of the Civil and Political Covenant, whatever his or her personal circumstances.[287]

IARLJ NEXUS REPORT, *supra* note 240, at 4.

282. *Supra* note 14.

283. *Supra* note 14.

284. U.N. GAOR, Comm. Against Torture, 52d Sess., Supp. No. 44, vol. II, Annex V(A)(1), at 56, U.N. Doc. A/52/44 (1997) (discussing *Tala v. Sweden*, Communication No. 43/1996); U.N. GAOR, Comm. Against Torture, 51st Sess., Supp. No. 44, vol. II, Annex V, at 62 (discussing *X v. Netherlands*, Communication No. 31/1995), 68 (discussing *Alan v. Switzerland*, Communication No. 21/1995), 81 (discussing *Kisoki v Sweden*, Communication No. 41/1996).

> Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable.

U.N. GAOR, Comm. Against Torture, 53d Sess., Supp. No. 44, vol. II, Annex IX ¶ 6, at 52, U.N. Doc. A/53/44 (1998).

285. U.N. GAOR, Comm. Against Torture, 52d Sess., Supp. No. 44, vol. II, Annex V(B)(4) ¶ 14.5, at 94, U.N. Doc. A/52/44 (1997) (discussing *Tapia Paez v. Sweden*, Communication No. 39/1996).

286. *Id.*

287. U.N. GAOR, Hum. Rts. Comm., 48th Sess., Supp. No. 40, vol. II, Annex XII(U), at 138, U.N. Doc. A/48/40 (1993) (discussing *Kindler v. Canada*, Communication No. 470/1991); U.N. GAOR, Hum. Rts. Comm., 49th Sess., Supp. No. 40, vol. II, Annex IX(CC), at 189, U.N. Doc. A/49/40 (1994) (discussing *Chitat Ng v. Canada*, Communication No. 469/1991); U.N. GAOR, Hum. Rts. Comm., 50th Sess., Supp. No. 40, vol. II, Annex X(M) ¶ 16.1, at 116, U.N. Doc. A/50/40 (1995) (discussing *Cox v. Canada*, Communication No. 539/1993) ("[I]f a State party to the Covenant takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.").

The substantive breadth of these U.N. human rights procedures, like Article 3 of the European Convention, is therefore in some ways broader than the refugee definition by virtue both of the absence of a criminality exclusion provision or the need to link risk to civil or political status.

Yet even more than Article 3 of the European Convention, the U.N. human rights remedies akin to the duty of *non-refoulement* are available only to a small subset of persons with a "fear of being persecuted"—those who risk either torture or loss of life.[288] Also, many countries have not ratified these treaties, and even fewer have authorized the U.N. treaty bodies to entertain individuated complaints from persons in their jurisdiction. Finally, no U.N. human rights body can issue enforceable judgments. For all of its importance as a de facto basis for appeal from negative refugee status assessments, international human rights law does not yet establish a duty of nonreturn for all persons entitled to Convention refugee status.[289]

Fundamentally, caution is warranted before advocating a position that unwittingly contributes to a process of "de-formalization."[290] As valuable as the duties of nonreturn elaborated under the European Convention and the United Nations human rights treaties are, persons who benefit solely from the human rights law prohibitions belong to a general class of "nonreturnable" persons whose status and entitlements may vary in practice considerably. Although nonreturnable persons may claim generic civil and political rights,[291] their access to important economic and social rights is less clear. Those rights are not formally guaranteed at the regional level, are subject to a duty of progressive implementation internationally, and may legally be withheld altogether from noncitizens present in less

288. "[N]ot all human rights qualify as potential obstacles to extradition. Moreover, there is no certainty about the content and scope of the rights that are most likely to block extradition." Dugard & Van den Wyngaert, *supra* note 241, at 205.

289. There are various human rights violations that may be absolute obstacles to extradition (such as torture), or that may in appropriate circumstances thwart extradition (such as the denial of a fair trial). However, the inevitable conclusion to be drawn from extradition practice is that, despite the link between human rights and extradition, no general human rights exception exists.

Id. at 205-06.

290. Our concern is that states have artificially circumscribed the ambit of obligations under the Refugee Convention, thereby eroding its normative value. The term "de-formalization" here describes a process that steadily undermines the concept of legality. The intention is to classify the attack on international refugee law as part of a general assault on international legality. If legality retains a critical edge, then it must, at least in theory, act as a constraint on powerful actors in the international community. This argument has similarities with the recent resurgence of interest in the democratic tradition in modern law. *See, e.g.*, DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR (1997); WILLIAM E. SCHEUERMAN, BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW (1994). This concept challenges the idea, prevalent in some modern schools of legal scholarship, that legality is either a "game" or a concept without determinate content.

291. *See General Comment 15*, *supra* note 271; *see also* European Convention on Human Rights, *supra* note 275, art. 1, 213 U.N.T.S. at 224 ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."); Bouchelkia v. France, 1997-I Eur. Ct. H.R. 686 (dealing with Article 8 of the European Convention); Amuur v. France, 1996-III Eur. Ct. H.R. 533 (dealing with Article 5 of the European Convention).

developed countries.[292] Refugees, in contrast, are automatically entitled to claim social and economic rights, including rights to work, education, social assistance, and public housing.[293] Nor may the presence of refugees simply be tolerated by the asylum state. Refugees have the right to recognition of their personal status and must be provided with identity papers and travel documents.[294] In short, refugee status means much more than protection against *refoulement*; it is also social and political enfranchisement.

Because international refugee law is a status-granting mechanism, it is important to resist its steady erosion.[295] Persons genuinely at risk of persecution require not only protection against return but also the means to reestablish and support themselves in the asylum country. A generic human rights treaty may afford protection from return to a person illegitimately excluded from refugee status, but nonetheless leave that person in legal and social limbo. Recognition as a refugee therefore makes a substantive difference.

Conclusion

If international refugee law is to command the respect of those tasked with its implementation, a defensible framework for offering and denying protection must be advanced. From its inception, international refugee law has therefore accepted the need to reconcile each state's duty to protect involuntary migrants with its responsibility to avoid the infiltration by international criminals and fugitives from justice through refugee law.

Persons believed to have committed international crimes are deemed inherently unworthy of international protection. This automatic exclusion is partly purposive. The summary denial of refugee status to persons believed to have committed international crimes clearly facilitates the extradition of those persons to states prepared to prosecute crimes of universal jurisdiction, as well as to international criminal tribunals. But the peremptory exclusion of international criminals is more fundamentally symbolic. The stigma of having acted contrary to fundamental international norms is so significant that the drafters of the Refugee Convention determined that international criminals should never be allowed to benefit

292. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, art. 2(1), (3), 993 U.N.T.S. 3, 5.

293. Refugee Convention, *supra* note 4, arts. 17-19, 21-23, 189 U.N.T.S. at 164-68.

294. *Id.* arts. 12, 27-28, 189 U.N.T.S. at 162, 172.

295. *Note on International Protection*, U.N. Executive Comm. of the High Comm'r's Programme, 50th Sess. ¶ 10, at 3, U.N. Doc. A/AC.96/914 (1999).

> Overall, UNHCR detected a distinct trend in an increasing number of States to move gradually away from a law or rights-based approach to refugee protection, towards more discretionary and ad hoc arrangements that give greater primacy to domestic concerns rather than to their international responsibilities. These restrictive tendencies found their most recent manifestation in one country where legislative proposals aimed at doing away with the distinction between aliens and refugees, including dropping any requirement for specific determination of refugee status under the 1951 Convention.

Id.

from refugee status. To hold otherwise would be to risk a loss of public confidence in the logic of a duty to protect refugees arriving at their borders.

The right of states to exclude peremptorily persons who have committed serious, nonpolitical crimes outside the country of refuge derives from a comparable mix of practical and symbolic concerns. Exclusion under Article 1(F)(b) ensures that governments can honor their extradition treaties without fear that fugitives from justice might demand shelter under refugee law. But more generally, Article 1(F)(b) avoids the risk of degradation of refugee law that would likely follow from a duty to protect fugitives from justice who have committed serious crimes.[296] Because the asylum country normally does not have jurisdiction to try or punish serious common crimes committed outside its territory, granting refugee status to a fugitive from justice would have the socially invidious consequence of insulating the asylum seeker from the consequences of his or her criminal actions. Public confidence in the ethical value of refugee law would clearly be challenged.

Peremptory exclusion of fugitives from justice is not an ideal solution. To the contrary, it would be preferable to have a broader universal consensus on which acts are appropriately defined as criminal, uniformly enforced through an international mechanism—perhaps modeled on the International Criminal Court.[297] Asylum seekers believed to have committed a relevant offense could then be prosecuted and punished for their crimes without any risk of direct or indirect *refoulement* to a place where persecution is feared. But as the difficulties defining the substantive jurisdiction and independent enforcement authority of the International Criminal Court make clear, the current situation is still a long way from such a comprehensive commitment to the internationalization of a broad range of crime. Refugee law accepts and works within the present reality. It errs on the side of excluding suspected serious criminals in the interest of keeping the protection system itself alive.

Conceding the right of states to engage in peremptory exclusion under Article 1(F) of the Refugee Convention is not, however, tantamount to acknowledging that any and all persons tainted by allegations of involvement with violence may be denied refugee status. To the contrary, our purpose here has been to show that an historically grounded and internally consistent interpretation of the Refugee Convention leads to precisely the opposite conclusion. Apart from those persons whose actions satisfy the relatively strict definitions of international criminality, the Refugee Con-

296. Comparable symbolic concerns are less likely to follow from recognizing the refugee status of minor criminals or those who had already expiated their criminal actions—or who could be required to face criminal justice in the asylum state.

297. It is interesting to recall that the drafters authorized peremptory exclusion in response to asylum seekers who were also fugitives from justice because of the absence of an international tribunal able to prosecute their crimes. *Supra* text accompanying note 96.

vention restricts the right of states to engage in peremptory exclusion to common criminals that the asylum country would agree to extradite.

Under this analytical framework, governments have two principled options if concerned about protecting their communities from the risks associated with asylum seekers who have engaged in or promoted violence abroad. First and most obvious, a government can commit to an understanding of extraditable criminality—including a narrowed political offense exception—under which it agrees to extradite persons accused of particular acts never deemed justifiable. To the extent a state limits its discretion over extradition in a manner consistent with generally accepted state practice, it is fully entitled to import that understanding of extraditable criminality into the peremptory exclusion rules of Article 1(F)(b) of the Refugee Convention.

Alternatively, states that insist on maintaining the discretion to refuse the extradition of some persons who have been involved with violent activities will have to justify refusals of protection on the basis of the more demanding standard set by Article 33(2) of the Refugee Convention. Where the state is not concerned about avoiding the admission of a fugitive from justice, but instead worries that a particular individual's involvement with or facilitation of violence poses a risk to asylum-state security or safety, refugee status must be assessed and recognized where appropriate. Particularized expulsion or *refoulement* is authorized under Article 33(2) as a last option only if the risk to the state is particularly high and due process norms are respected.

It makes practical sense to respect the historical division of responsibility between the Refugee Convention's rules on peremptory exclusion in Article 1(F)(b) and its requirements for removal of dangerous refugees under Article 33(2). This approach imposes a requirement of ethical symmetry on states, denying them the right to exclude summarily from refugee status an asylum seeker for reasons they define as insufficiently compelling to justify a refusal of extradition. States may still deny protection on the grounds of a more broad-ranging set of safety and security concerns, but only if a serious risk to the host state or its community is established. Because the absence of an international supervisory mechanism means that each state is ultimately the arbiter of its own compliance, refugee law simply cannot afford to lose this self-regulating structure of justification.