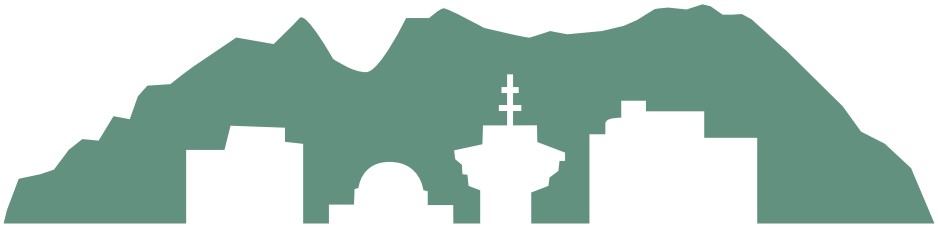

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The Growing Culture of Exclusion:
Trends in Canadian Refugee Exclusions

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METROPOLIS BRITISH COLUMBIA

Centre of Excellence for Research on Immigration and Diversity

Working Paper Series

The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions*

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I. Introduction

In 1987, a Sri Lankan man pled guilty to conspiracy to traffic in a narcotic in a Canadian court. Upon his release, he filed a claim for refugee status. In 1993, the relevant tribunal found the man to be excluded from refugee status under Article 1F(c) of the 1951 Convention relating to the Status of Refugees[1]: drug trafficking was contrary to the purposes and principles of the United Nations. The Supreme Court of Canada quashed the original decision, agreeing that conspiring to traffic drugs was not a violation of the purposes and principles of the United Nations.[2]

Almost ten years after the first refugee determination hearing, in 2002, a second tribunal heard the man's claim for refugee status. This time, the tribunal excluded the man from refugee status for supporting a terrorist organization, namely the Liberation Tigers of Tamil Ealem (LTTE).[3] The Federal Court upheld this characterization, agreeing that his drug trafficking conviction amounted to financing the crimes against humanity of a terrorist organization.[4] This shift in analysis – from viewing the harm as drug trafficking to viewing it as terrorism – reflects a broader discursive turn in refugee law. The significance of this turn and its relationship to the loaded concept of terrorism is the subject of this paper. Over the past decade, exclusions have shifted from being a minor topic within refugee law to being a focus of considerable analysis and attention. One of the objectives was to investigate the empirical basis for this attention and to analyze the extent to which it is primarily a reflection of contemporary security politics.

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1 Convention relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150; Protocol relating to the Status of Refugees, January 31, 1967, 606 U.N.T.S. 267 [1951 Convention].
2 Pushpanathan v. Canada (MCI), [1998] 1 S.C.R. 982 [Pushpanathan].
3 The LTTE is a Tamil liberation movement that was engaged in a civil war with the repressive Sri Lankan government. The LTTE has been widely characterized as a terrorist organization.
4 Pushpanathan v. Canada (MCI), [2002] F.C.J. No. 1207 at paras. 40 and 55.

At a broad level, this article traces how the prescient words of the United Kingdom's Immigration Appeal Tribunal have come to pass: refugee claimants now exist in a 'culture of exclusion', where exclusion is too frequently equated with terrorism.[5] This trend began years before September 11, 2001, although the events of 9/11 certainly forced terrorism and those who perpetrate terrorist acts onto centre stage.[6] State concerns about the entry of terrorists and the conditions that foster them belie larger fears about the security and safety of those already snugly within the borders.[7] These larger concerns are the basis for several international and domestic initiatives to surveil, exclude and detain individuals, particularly those that find themselves at the borders of the nation. Refugee claimants often bear the brunt of these restrictive measures, and the discourse surrounding refugees is increasingly hostile. In Canada and around the Western world, claims for refugee status have become synonymous with concerns about abuse of the refugee determination system and the entry of terrorists and international criminals.

This article investigates how state security concerns play out in refugee exclusions in Canada. Article 1F of the *1951 Convention* excludes individuals who have committed international crimes, serious non-political crimes, and acts contrary to the purposes and principles of the United Nations from refugee protection.[8] These provisions have been subject to increasing scrutiny as governments employ them instrumentally to guard against the entry of terrorists and criminals. The result is an evolution of the exclusion clauses

5 Gurung v. SSHD, [2002] UKIAT 04870, 14 Int'l J. Refugee L. 382 (2002).

6 It is worth noting that not a single perpetrator of the 9/11 terrorist attacks in the United States was a refugee or a refugee claimant. The persistence of the discursive linkage between refugees and the 9/11 attacks is discussed in Catherine Dauvergne, "Security and Migration Law in the Less Brave New World" (2007) 16:3 Soc. & Leg. Stud. 533 [Dauvergne, Less Brave New World]; see also Catherine Dauvergne Making People Illegal: What Globalization Means for Migration and Law (Cambridge and New York: Cambridge University Press, 2008) at 99-101 [Dauvergne, Making People Illegal].

7 Geoff Gilbert, "Current Issues in the Application of the Exclusion Clauses" UNHCR Background Paper (2002) at 478 [Gilbert].

8 Article 1F, 1951 Convention, supra note 2.

over time and circumstance that has reshaped both refugee law doctrine and several important concepts in the field of refugee law, including sovereignty, morality and humanity.

These shifts and revisions are examined by interrogating annual statistics and case law. The principal empirical contribution of this paper is an analysis of patterns of refugee exclusion in Canada from 1998-2008. First the numbers are examined, and then trends in the jurisprudence of exclusion are identified. Particular attention is paid to the subset of exclusion cases that make overt or oblique references to terrorism, and within these the influence of contemporary security politics is traced. This approach yields both quantitative and qualitative conclusions. While exclusion numbers have increased dramatically in our time frame, it remains the case that, political rhetoric notwithstanding, an infinitesimally small number of refugee claimants are actually excluded. In analyzing the jurisprudence accompanying these exclusions, it was found that the concept of terrorism has expanded considerably over our eleven year time frame. The final section of the paper examines the consequences of this expansion.

II. The Meaning of Exclusion in Refugee Law

The *1951 Convention* disqualifies individuals from refugee status for serious transgressions committed, in principle, prior to seeking asylum.[9] Exclusion is the most extreme sanction in international refugee law: it is an exception that precludes recognition of the claimant's refugee status, thus denying protection against *refoulement* to a country where one is at risk of being persecuted.[10] This is separate from the state's power to deport or "refouler" once

9 Michael Kingsley Nyinah, "Exclusion Under Article 1F: Some Reflections on Context, Principles and Practice", (2000) 12 Int'l J. Refugee L. 295 [Kingsley Nyinah].

10 In contrast, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibition against refoulement applies without exception.

refugee status has been recognized. Article 1F allows states to exclude from refugee status any individual 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.[11]

There are various rationales offered for the exclusion clauses. The primary, overarching rationale is that the perpetrators of these acts are *undeserving* of protection as refugees.[12] A second rationale is that the clauses ensure that perpetrators of ordinary crimes or acts contrary to the purposes and principles of the UN do not escape prosecution.[13] Finally, there is the implicit rationale of safeguarding the country of refuge from dangerous individuals.[14]

A. The Role of External Standards

The content and application of the exclusion clauses depend upon other fields of international and national law.[15] Each one of the three exclusion

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11 Article 1F, 1951 Convention; States may also exclude persons from the scope of the Convention by Articles 1D and E. Article 33(2) of the Convention is not an exclusion clause; it permits states to refoule a recognized refugee who is a danger to the security or community of the country.

12 Gilbert, supra note 8; James Hathaway, The Law of Refugee Status (Toronto: Butterworths, 1991) at 189 et seq.

13 Gilbert, supra note 8.

14 UNHCR, The Exclusion Clauses: Guidelines on their Application (December 1, 1996) at para. 41 et seq. (superseded by UNHCR, Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (September 4, 2003) HCR/GIP/03/05) but see James C. Hathaway & Colin J. Harvey, "Framing Refugee Protection in the New World Disorder" (2001) 34 Cornell Int'l L. J. 257 [Hathaway & Harvey] (arguing that concerns about the safety and security of the asylum state should be considered under Article 33(2) as part of the protection decision).

15 Peter J. van Krieken, "Introduction" in Peter J. van Krieken, ed., Refugee Law in Context: the Exclusion Clause (The Hague: T.M.C. Asser Press, 1999) [van Krieken].

clauses contains external standards and cannot be interpreted without reference to international treaties and domestic statutes. Article 1F(a) makes explicit reference to the international instruments defining international crimes. These include instruments of international criminal law and international humanitarian law.[16] For example, the meaning of "crime against humanity" is derived from the International Military Tribunal at Nuremburg and, more recently, from the statutes of the international criminal tribunals. Article 1F(b) relies on both bilateral extradition law and domestic criminal law.[17] The serious nature of a non-political crime is determined by recourse to whether it constitutes an extraditable crime and whether it would be considered a serious offence under Canadian law. Article 1F(c) is the broadest in scope and the least applied of all the clauses, at least in Canada. It covers acts rather than crimes but requires that the individual be guilty of them. It depends on standards of international law generally and international human rights law in particular. In Pushpanathan, the Supreme Court simultaneously extended the application of 1F(c) to individuals (despite the fact that United Nations instruments enumerate principles that govern the conduct of their member states) and to "sufficiently serious and sustained violations of fundamental human rights so as to amount to persecution".[18]

Historical state practice reveals, and our review confirms, that all three categories of exclusion are bleeding into criminal law. An individual accused of crimes against humanity, a serious non-political crime, or terrorism is subject to much of the weight of the criminal law apparatus without any of its concomitant protections. Refugee law selectively incorporates and applies criminal law concepts but employs a very low standard of proof, requiring only

16 Gilbert, supra note 8.
17 Gilbert, supra note 8. Some suggest that the political offence exception in extradition law should overlap with the political crime exception in Article 1F(b): see Hathaway & Harvey, supra note 15.
18 Pushpanathan, supra note 3.

"serious reasons for considering", a threshold lower than the civil standard of balance of probabilities and far below the threshold required in international or domestic criminal law. Courts have been easily satisfied that there are "serious reasons" for excluding a claimant.[19] To some extent, "it is laxity with the standard of proof that calls into question how States have implemented Article 1F".[20] The growing pool of excluded claimants is thus enabled by the selective use of criminal concepts together with a very low standard of proof.

This trend is accompanied by emphasis on what might be called the "penal function" of exclusion clauses. It does not make sense to use refugee law for prosecution or punishment, nor is it logical for states to use non-criminal law mechanisms to punish international and serious non-political crimes, which is arguably the current posture of the exclusion clauses.[21] States may permit excludable claimants to stay without bestowing impunity. The international law principle of aut dedere aut judicare requires states to prosecute or extradite potential offenders. Developments in international criminal law mean that individuals suspected of committing international crimes may be prosecuted by the ad hoc criminal tribunals established by the Security Council, the International Criminal Court, or the use of universal jurisdiction in domestic courts.[22] In Canada, universal jurisdiction is now written into the Criminal Code, and some prosecutions have taken place under these provisions.[23] Despite this, Canada rarely responds with prosecution to concerns of serious or international criminality by refugee claimants. Instead, the individual is typically returned to

19 Gilbert, supra note 8 at 471.
20 Gilbert, supra note 8.
21 For a description of non-criminal remedies, see Joseph Rikhof, "War Criminals Not Welcome; How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context" (2009) 21 Int'l J. Refugee L. 453 [Rikhof].
22 Gilbert, supra note 5 at 430.
23 Criminal Code of Canada R.S. 1985, c. C-46, s. 418.2; Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24. Canada's first successful prosecution under this Act occurred in the Quebec Superior Court in 2009: R. c. Munyaneza 2009 QCCS 2201.

their country of nationality without considering either their risk of being persecuted or their likelihood of escaping criminal consequences.

Interpretations of Article 1F in light of these external standards, particularly in the criminal context, have coalesced around the rationales for exclusion to suggest a simplistic, moralistic bind. Public and legal discourse presents exclusion as a binary choice: states cannot meet their moral and legal obligations to fight human rights violations and crimes against humanity while simultaneously granting refugee status to individuals who may have been perpetrators.

> [O]bligations toward the international community to prosecute the perpetrators, *by definition mean* that we cannot extend the benefits of the refugee convention to that particular group.[24]

This binary, of course, casts good on the side of human rights and evil on the side of the perpetrators of abuse. It has not shifted significantly since the inception of the Convention. What appears to have changed, however, is the states' interests in exclusion, and thus the complexity of circumstances which are compressed into these binary categories.

B. The Numbers

Refugee claimants may be prevented from remaining in Canada at multiple points in the determination process by any of three government entities working separately or in concert: the Canada Border Services Agency (CBSA), Citizenship and Immigration Canada (CIC), or the Immigration and Refugee Board (IRB)[25] However, refugee claimants may only be formally excluded within the meaning of the 1951 Convention by the IRB. Exclusion

24 Dr. Cohen, "Opening Address", cited in van Kreiken, supra note 16 at IX [emphasis added].

25 The government views its powers to prevent entry and to deport as complementary: see Canada's War Crimes Program, Sixth Annual Report, 2002-2003.

means that the protections of the 1951 Convention are not available. This determination occurs in the context of adjudicatory proceedings in front of the Refugee Protection Division of the IRB, the tribunal which determines refugee status at first instance and which is also charged with adjudication when the government applies to "vacate" someone's refugee status. This article focuses on the IRB in this paper because it is the body that employs a jurisprudence of exclusion.[26]

The exclusion issue at the IRB is usually raised by the Minister of Citizenship and Immigration based on the nature of an organization to which the claimant belonged or the nature of the claimant's crime. The tribunal considers the testimony of the refugee claimant and any evidence presented by any party to the theoretically non-adversarial process.[27] Based on this evidence, the IRB makes findings of fact and credibility. These are crucial determinations, which include the nature of the organization, the terrorist acts committed by the organization, and the nature of an individual's involvement in the organization. There is no merit-based appeal of IRB decisions.[28] The decisions may be judicially reviewed by the Federal Court and the Federal Court of Appeal but this review is limited in both coverage (because the Federal Court must first grant leave to hear the case, which is granted in only a small number of cases)[29] and in scope (because the Federal Court may only review the decision

26 The dataset of Federal Court decisions that we collected included primarily judicial reviews of IRB decisions, but also included some decisions at other stages of the process including Pre-Removal Risk Assessment (PRRA) applications, Humanitarian and Compassionate (H&C) applications, and applications to vacate refugee status. Both PRRA applications and H&C applications, neither of which allow for review of a refugee determination, have been used as avenues for unsuccessful refugee claimants. Despite this original array, once we culled the dataset for references to terrorism, our review of Federal Court decisions ended up consisting almost exclusively of judicial reviews of IRB decisions, with 2 PRRA decisions and 1 H&C decision.

27 Other witnesses may be called but typically are not.

28 Beginning in December 2011, a merit based appeal will be possible through the new Refugee Appeal Division of the IRB. This Division comes into force 18 months following the passage of the Balanced Refugee Reform Act, S.C. 2010, c.11, in June 2010. Throughout the time frame of our dataset, there was no merit appeal provision in operation.

29 Leave was granted in approximately 13 percent of cases during the time frame of our data set. This estimate is generated from the statistics reported on the Federal Court of Canada website: http://cas-ncr-

for unreasonableness and errors of law).[30] The story of the refugee claimant, then, is typically final at the tribunal level.

We began this study by filing Access to Information Act requests for the numbers of refugee claimant exclusions for the eleven-year period from 1998 to 2008.[31] The IRB numbers revealed a dramatic increase in exclusions, which peaked in 2004 before slowly returning to 2002 levels by 2008.

Table 1: Immigration & Refugee Board Exclusion Numbers.

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Total Exclusions	2	24	63	71	74	87	114	99	79	65	79

These numbers show the establishment of a higher median over the years of the study. The decrease in numbers since 2005, albeit to levels still higher than the year immediately following 9/11, may be explained by several factors, including Canada's Safe Third Country agreement with the United States,[32] changes in source countries, and lower overall claim numbers from 2005 to 2007. China had the highest number of exclusions with fifty one exclusions over the data period, followed by Colombia, Pakistan, and then Lebanon, Mexico, Sri Lanka, Peru and Cuba.[33] Approximately half of the individuals were excluded under Article 1F(a).

nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Statistics.

30 Dunsmuir v New Brunswick, [2008] 1 S.C.R. 190, in which the Supreme Court of Canada held that there should be only "two standards of review, those of correctness and reasonableness", and that reasonableness "is a deferential standard".

31 R.S.C. 1985, c. A-1.

32 Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries, C.T.S. 2004/2, entry into force December 29, 2004.

33 IRB data on file with authors.

TABLE 2: IMMIGRATION & REFUGEE BOARD ARTICLE 1F(A) EXCLUSION NUMBERS.

	1998–2008
Total Exclusions	757 claimants
Exclusions under Article 1F(a)	269 claimants
Exclusions under Article 1F(a) and 1F(b) or 1F(c), *where Article 1F(a) is claimed in combination with either Article 1F(b) or 1F(c)*	95 claimants

Despite rising numbers, the overarching story of these figures is that refugee exclusions are very rare in Canada. In each of these years total claimant numbers are in the neighbourhood of 25,000. It would be instructive to find out how often the Minister argued for exclusion of a refugee claimant and lost, but this information was not available.

The numbers for refugee claimant ineligibility determinations for the same period were also requested. Ineligibility is a summary determination made after an initial interview with an immigration officer, often at the border.[34] Ineligibility is determined by reference to a number of statutory provisions that overlap with the exclusion provisions. Potential refugee claimants may be ineligible on various grounds, including "grounds of security, violating human or international rights, serious criminality or organized criminality".[35] In the wake of 9/11, the Canadian government transferred authority over border eligibility determinations from Citizenship and Immigration Canada (CIC) to the new Canada Border Service Agency (CBSA). This occurred in December 2004, midway through our dataset.[36]

The CBSA *Access to Information Act* request yielded little useful information. The agency provided only total numbers for the relevant four-year pe-

34 If an individual makes a refugee claim after arriving in Canada, the initial interview will be held at a CIC or CBSA office.

35 See Immigration and Refugee Protection Act, S.C. 2001, c. 27 at s. 101(1)(f) [IRPA or Immigration Act].

36 The Canada Border Services Agency Act, (2005, c. 38) received Royal Assent on November 3, 2005. It establishes the CBSA, which was created by Order in Council on December 12, 2003. The enabling authority for CBSA is set out in section 4(2) of the IRPA.

riod, which do not permit a sense of the evolution over time, and several of the spreadsheets provided were monthly numbers obtained from CIC. However, the spreadsheets disclose that CBSA has found 2,401 individuals ineligible from its inception in October 2004 to December 2008. Although much higher than the IRB's exclusion numbers, this is *below* the number of individuals found ineligible by CIC, even removing the 2004 numbers from the calculation.[37] Refugee eligibility screening can occur either at the border[38] or weeks, months or years later at a CIC office. The legislative criteria for ineligibility are the same in both cases.

Ineligibility findings are vitally important to understanding the exclusion landscape. Eligibility decisions are made without a right to counsel and without reasons. Judicial review is even rarer at this stage than for a refugee determination at the IRB. Indeed, the 2002 introduction of this legislative framework in the *Immigration and Refugee Protection Act* highlighted the benefits of front-end limits on 'undeserving' claimants. The eligibility criterion most likely to encompass concerns about terrorism is s. 101(1)(f), which renders a claim ineligible if the claimant is inadmissible on grounds of security, violating human or international rights and serious criminality or organized criminality. Only 60 individuals were excluded by CIC on this basis between 2002 and 2008. In contrast, the singularly most frequent basis for ineligibility by CIC over the same time period was the Safe Third Country Agreement under s. 101(1)(e), followed by prior rejection by the IRB under s. 101(1)(b).[39]

37 Citizenship and Immigration Canada found 2626 individuals ineligible for the years 2005-2008, inclusive.

38 Theoretically, this occurs on arrival, but in practice the eligibility interview is often scheduled when an individual arrives at the port of entry, but takes place a day or two later at the same border post.

39 During the years 2002-2008, the CIC found 1857 claimants ineligible under the Safe Third Country Agreement, which did not take effect until the end of 2004. During the years 2002-2008, the CIC found 709 claimants ineligible because a prior claim for refugee protection had been rejected by the IRB.

TABLE 3: CITIZENSHIP & IMMIGRATION CANADA INELIGIBILITY NUMBERS.

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Total	97	90	102	83	232	256	234	473	577	687	889
Article 101(1)(f)	0	1	1	2	11	6	9	4	11	12	7

The CIC numbers are also much higher than the exclusion numbers. This is not surprising since the ineligibility finding is made by a single officer and does not require a hearing. In fact, it is codified ministerial policy to favour ineligibility findings over exclusion-based intervention before the IRB.[40] Unlike in the exclusion forum, these numbers have continued to rise steadily since 9/11, with only a slight dip in 2004.

In addition to looking at the numbers, all exclusion cases at both the tribunal and court level were also searched. Every case decided and made public during the 11 year time frame was identified using the commercial databases of Quicklaw and LexisNexis, as well as the Federal Court website and the IRB's Reflex database. All Federal Court, Federal Court of Appeal and Supreme Court of Canada decisions are available. Only a small number of the thousands of IRB decisions each year are made publically available. The method used involved a comprehensive survey and analysis, rather than a selection of most interesting or provocative decisions. In tota approximately 610 cases were examined.[41]

In the dataset the issue of exclusion is most often raised by the Minister. Tables 4 and 5 divide the total case dataset by year to show the total number of exclusion cases by year. These two Tables also set out the number of cases per year in which the state received the outcome sought. This result is de-

40 Citizenship and Immigration Canada, ENF 24: Ministerial Interventions (Dec. 2, 2005) at 8.

41 There is a small amount of double counting in this figure because some cases appear at several levels of the tribunal and court system. For example, a claimant may apply to the Federal Court for review of his/her exclusion decision, and then later for review of his/her PRRA decision.

scribed in the row "Outcomes Sought by State". At the IRB level, since exclusion may only be raised by the Minister, cases where the IRB excluded the claimant were classified as outcomes sought by the Minister. At the Federal Court level, the judicial review process leads to two primary outcomes: the application may be dismissed or the case may be sent back for redetermination by a newly constituted panel. Cases where the refugee claimant sought review and the case was dismissed, or where the Minister sought review and the Federal Court ordered redetermination were classified as outcomes sought by the state. In short, the row "Outcomes Sought by State" seeks to calculate the number of claimants who are excluded once the exclusion issue has been raised by the Minister.[42] As Table 4 demonstrates, the state is highly successful at the tribunal level and considerably less so at the point of judicial review. It is important to consider the role of the leave provision: judicial review only proceeds when a judge has found something of interest in the application for leave.

Table 4: Results of Total Case Dataset at IRB and Federal Court Levels.

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
IRB Cases	23	25	49	47	24	24	57	34	30	14	10
Outcomes Sought by State (Minister)	21	23	35	43	21	20	51	30	29	13	8
% successful	91%	92%	71%	91%	88%	83%	89%	88%	97%	93%	80%
Federal Court Cases	16	19	15	21	25	21	15	49	34	36	19
Outcomes Sought by State (Minister)	12	13	8	8	22	14	14	31	22	25	9
% successful	75%	68%	53%	38%	88%	67%	93%	63%	65%	69%	47%

42 It is impossible to accurately track the number of cases in which claimants are definitively excluded for two reasons: first, it is important to remember that this is a dataset of publicly available decisions–there are an unknown number of exclusion cases that are not available in the public realm; and second, once a case has been sent back for redetermination, it is not possible to track the second decision and its corollary review applications. Some cases sent back for redetermination may wind their way through the review process again, but the results of that process may not be publicly available.

The next step was to cull the data set for references to terrorism. All cases referring to a refugee exclusion clause and terrorism were reviewed. This sought to identify the relevant universe of cases and then parse them for changes in reasoning and results, which would require a sense of judicial discourse over time and across cases. For the Article 1F exclusion provisions, there were 270 Federal Court cases and 337 IRB cases.[43] There were almost twice as many cases under Article 1F(a) and (c) than under Article 1F(b).[44] Of the exclusion cases, 56 of the Federal Court cases and 117 IRB cases contained references to terrorism. Some of these references to terrorism were peripheral and thus the cases that feature in our substantive analysis are somewhat fewer.

Table 5: Results of "Terrorism" Case Sub-Dataset at IRB and Federal Court Levels.

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
IRB 'Terrorism' Cases	8	8	15	16	7	13	17	16	8	7	2
Outcomes Sought by State (Minister)	7	7	14	15	6	12	14	16	8	6	1
% successful	88%	88%	93%	94%	86%	92%	82%	100%	100%	86%	50%
Federal Court 'Terrorism' Cases	1	2	3	5	6	4	3	12	11	5	4
Outcomes Sought by State (Minister)	1	2	1	1	4	2	2	9	8	4	2
% successful	100%	100%	33%	20%	67%	50%	67%	75%	73%	80%	50%

43 There were exactly 270 Federal Court cases and 337 IRB cases for Article 1F. Sometimes, the references to Article 1F were peripheral so the relevant universe of cases is actually slightly smaller for each pool of results.

44 Article 1F(a) and (c) were grouped together because Article 1F(c) was rarely argued alone. Of the cases in this combined category, the vast majority were Article 1F(a) cases, and the vast majority of those concerned crimes against humanity. It is important to recall that the majority of IRB decisions are not made public and are not therefore included in our dataset.

There are a number of conclusions to draw from this data. Our review reveals that growing numbers of refugee claimants are excluded and that the group covered by the exclusion clauses is widening. Article 1F(a), in particular, now covers the senior officer as well as the ordinary soldier, the bomber as well as the accomplice, and the planner as well as the fundraiser. Our analysis also showed the increasing unacceptability of violent means, even when directed toward political ends. These findings appear to confirm statements by government officials: the Canadian government has aggressively pursued exclusion by intervening in IRB cases and it has employed 'creative' arguments at all levels of adjudication.[45]

The increasing numbers of ineligible and excluded claimants map onto two trends which undoubtedly contribute part of the explanation for this rise. While the securitization of refugee law is a familiar condition, the sharpening of state security agendas in the wake of terrorist attacks provided new momentum. Concerns about terrorism as a threat from outside were brought into sharp relief when Islamist extremists attacked the World Trade Centre in 1993 and then again in 2001.[46] In a parallel development, the conflicts of the Great Lakes, ex-Yugoslavia, Sierra Leone and Sri Lanka all created situations in which both 'perpetrators' and 'victims' had cause to seek asylum.[47] The creation of international criminal tribunals in their aftermath lent legitimacy to state concerns about admitting and punishing the perpetrators.[48] These phenomena have intensified the focus on mechanisms to identify and exclude

45 Gerry van Kessel, "Canada's Approach Towards Exclusion Ground 1F" in Peter J. van Krieken, ed., Refugee Law in Context: The Exclusion Clause (The Hague: TMC Asser Press, 1999) at 287.

46 Matthew J. Gibney, "Security and the Ethics of Asylum After 11 September" (2002) 12 Forced Migration Rev. 40.

47 Kingsley Nyinah, supra note 10 at 302.

48 See Note on the Exclusion Clauses, UNHCR paper presented to Executive Committee of the High Commissioner's Programme, Standing Committee, 8th Meeting, UN Doc EC/47/SC/CRP.29 (1997) [Note on the Exclusion Clauses].

undeserving claims, and have informed the interpretation of the exclusion categories.

III. Terrorism: The Framework

A. International

This study has focused on references to terrorism in analyzing the jurisprudence because this term reflected the shift in public and political discourse that it aimed to track. Pressure to exclude terrorists from asylum emanates from the declarations of United Nations bodies, regional organizations, states and even the UNHCR.[49] This is problematic within refugee law for two reasons. Despite its frequent invocation by politicians, the public, and even the judiciary in the context of asylum seekers, the word "terrorism" does not appear in the *1951 Convention* and is not a listed ground of exclusion.[50] This would not be such an obstacle if there was a settled definition of the term, but there is no internationally accepted legal definition of terrorism. Instead, the international community has taken a functional approach, rejecting umbrella definitions in favour of listing specific acts.[51]

There are thirteen international conventions that identify specific categories of violent acts that amount to terrorism.[52] Such acts include hijacking,

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49 Ben Saul, "Exclusion of Suspected Terrorists from Asylum: Trends in International and European Refugee Law" IIIS Discussion Paper No. 26 (July 2004) [Saul].

50 The 1946 Constitution of the International Refugee Organization excluded "persons who participated in any terrorist organization". As Ben Saul points out, the drafters of the 1951 Convention decided not to explicitly exclude terrorists.

51 Sharryn Aiken, "Of Gods and Monsters: National Security and Canadian Refugee Policy" (2001) 14 R.Q.D. Int'l 7 at 15 [Aiken, Of Gods and Monsters].

52 Convention on Offences and Certain Other Acts Committed on Board Aircraft, 704 U.N.T.S. 219; 2 ILM 1042 (1963); Convention for the Suppression of Unlawful Seizure of Aircraft, 860 U.N.T.S. 105; 10 ILM 133 (1971); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 974 U.N.T.S. 177; 10 ILM 1151 (1971); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1035 U.N.T.S. 167; 13 ILM 41 (1974); International Convention against the Taking of Hostages, GA res. 34/146 (XXXIV), 18 ILM 1456 (1979); Convention on the Physical Protection of Nuclear Material, 1456 U.N.T.S. 101; 18 ILM 1419 (1979); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation,

hostage taking, terrorist bombing and financing terrorist offences. For these acts, the motives of the perpetrators are irrelevant for the purposes of the conventions.[53] The functional approach to defining terrorism reveals the difficulty of addressing its root complexities. The labelling process is highly political and thus subjective; the term has been used to describe "rebellion, street battles, civil strife, insurrection, rural guerrilla war, coups d'etat", with the result that it covers almost any kind of violence.[54] Moreover, the breadth of the term is overwhelming: terrorism may be equated with non-state political subversion but it may also be employed by governments, terrorist acts may be prompted by a wide range of motives, and the inherent manipulability of the label depends heavily on both politics and timing. The transition of both Yasir Arafat and Nelson Mandela from terrorists to Nobel Peace Prize winners is instructive here.

While the twelve conventions do not mention refugee claimants, more recent United Nations resolutions and directives have not shied away from connecting the two categories. In 1997, the General Assembly passed a declaration that expressly linked terrorism to refugees:

> States should take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, *before granting refugee status, for the purpose of ensuring that the asylum-seeker has not participated in terrorist acts*, considering in this regard relevant information as to whether the asylum-seeker is subject

1589 U.N.T.S. 473; 27 ILM 627 (1988); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1678 U.N.T.S. 221; 27 ILM 668 (1988); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1678 U.N.T.S. 304; 27 ILM 685 (1988); Convention on the Marking of Plastic Explosives for the Purpose of Detection, 30 ILM 721 (1991); International Convention for the Suppression of Terrorist Bombings, U.N. Doc. A/RES/52/164; 37 ILM 249 (1998); International Convention for the Suppression of the Financing of Terrorism, U.N. Doc. A/RES/54/109; 39 ILM 270 (2000); and International Convention for the Suppression of Acts of Nuclear Terrorism, UN Doc. A/RES/59/290 (2005).

53 van Krieken, supra note 16 at 37, fn 55.

54 Walter Laqueur, "Terrorism – A Balance Sheet" in Walter Laqueur, ed., The Terrorism Reader (Philadelphia: Temple University Press, 1978) at 262.

> to investigation for or charged with or has been convicted of offences connected with terrorism.[55]

The Declaration also identified terrorism as a violation of the purposes and principles of the United Nations. As the dust of 9/11 settled, the Security Council passed Resolution 1373 on September 28, 2001, urging states to take appropriate measures "for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts" and to ensure that "refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts" and that "claims of political motivation are not recognized as grounds for refusing requests for the extradition".[56] Less than two months later, the Security Council underlined the obligation of states to refuse safe haven to terrorists and those supporting terrorism, and reiterated that any form of support for terrorism is contrary to the purposes and principles of the Charter of the United Nations.[57]

None of these instruments provide a definition of terrorism, which permits states to resort to political considerations and broad national definitions. Further, the language of the resolutions reinforces the dual impression that "the institution of asylum is somehow a terrorist's refuge" and that states are required to exclude terrorists.[58] This is a misunderstanding of the legal matrix governing asylum: it is far easier for terrorists to enter states either illegally, or legally as students or temporary workers because the degree of scrutiny and the accompanying restrictions are lower than for refugee claimants.[59] It is also a mischaracterization of the exclusion categories: "the question is not

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55 See Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, 49/60 of December 9, 1994, annexed to General Assembly Resolution 51/210 (A/RES/51/210, December 17, 1996) at para. 3. See also UN Security Council Resolution 1269 (S/RES/1269, October 19, 1999).

56 UN Security Council Resolution 1373 (S/RES/1373, September 28, 2001).

57 UN Security Council Resolution 1377 (S/RES/1377, November 12, 2001).

58 Monette Zard, "Exclusion, Terrorism and the Refugee Convention" 13 Forced Migration Rev. 32 at 32 [Zard]; Saul, supra note 50 at 3.

59 Dauvergne, Less Brave New World, supra note 7.

whether the appellant can be characterized as a terrorist, but whether the words of the exemption clause apply to him".[60] The primary consequence is that terrorism may be fit into any category of exclusion. The danger (since realized) is that the label of terrorist will denote almost automatic exclusion without reference to the wording of the exclusion clauses or the context of the refugee claimant.

B. Canadian Domestic Law

In light of this international lacuna, domestic legislators are free to adopt broad and far-reaching definitions of terrorist acts. In the United Kingdom, this has included defining a terrorist to be any individual with 'links' to a terrorist group, where links means 'supports or assists'.[61] This comes close to labelling someone a terrorist based on their political or ethnic ties. Indeed this was a vital issue in Canada in late 2009, and again in 2010, when boatloads of Tamil asylum seekers arrived on the west coast were subjected to lengthy detention on suspicion of terrorism.[62] In the United States, the so-called "material support bar" bars asylum (and the related but lesser category of withholding of deportation) for persons who have engaged in terrorist activity, which includes providing any material support, including humanitarian support, or funding to an individual who has already committed or plans to commit, a terrorist act.[63]

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60 Thayabaran, quoted in Gurung v SSHD [2002] UKIAT 04870, October 15, 2002 14 Int'l J. Refugee L. 382 at para. 98.

61 United Kingdom, Anti-Terrorism, Crime and Security Act, 2001, c. 24, s. 21(2)(c) and s. 21(4).

62 These arrivals were covered extensively in the national press at the time. A few examples of the coverage concerning the first boat include: Colin Freeze, 'Ships of fleeing Tamils stir fear of hidden Tigers' October 23, 2009, The Globe and Mail p. A18; Jane Armstrong, 'Expert claims migrants are Tamil Tigers; lawyer argues they're refugees being maligned by the Sri Lankan government' November 12, 2009, The Globe and Mail p. A9; Jane Armstrong, 'Ottawa fights order to free five more Tamil migrants; Department of Justice suspicious men may be terrorists' December 18, 2009, The Globe and Mail, p. A6. The August 2010 arrival of a boat called the MV Sun Sea was a direct catalyst for the government's introduction of Bill C-49, An Act to Prevent Human Smugglers from Abusing Canada's Immigration System, ostensibly aimed at people smugglers but its provisions sharply restrict asylum seeker rights. This bill is before Parliament as this article goes to press.

63 8 U.S.C. § 1182(a)(3)(B) (2005) (INA § 212(a)(3)(B)).

Terrorism is defined more broadly, *inter alia,* to include intention to coerce *any* third party, rather than a government or international organization.[64]

Canada responded to UN Security Council Resolution 1373 and the post-9/11 fracas with an omnibus anti-terrorism law in December 2001 that amended several existing statutes.[65] The legislative definition of terrorism comes from the *Anti-Terrorism Act*, which became part of the Canadian *Criminal Code*. Section 83.01 defines both "terrorist activity" and "terrorist group":

> The definition of terrorism is in two parts, incorporating a number of specific offences set out in various international conventions or protocols as well as providing a more general definition. The general definition of terrorism involves an act or omission motivated in whole or part by a "political, religious or ideological" purpose[19] with the primary intention ... of either intimidating part of the public regarding security or economic security, or compelling any government, "person," or organization inside or outside Canada to do or not do "any act." This act must be accompanied by one of five secondary intentions: causing death or serious bodily harm to a person by the use of violence, endangering a person's life, causing serious risk to public health or safety, causing substantial property damage of a sort likely to result in serious bodily harm, risk to life or public health or safety, or causing serious interference with any essential "service, facility or system" other than disruption resulting from advocacy, protest, dissent, or work stoppage that is not intended to result in harm or threat to life, body, health, or safety of the public.[66]

The *Criminal Code* also contains provisions related to the financing of terrorism, the establishment of a list of terrorist entities, the freezing and for-

64 Hathaway & Harvey, supra note 15 at 269-70; Andrew I. Schoenholtz & Jennifer Hojaiban, Institute for the Study of International Migration, "International Migration and Anti-Terrorism Laws and Policies: Balancing Security and Refugee Protection" (2008) Policy Brief 4.

65 Kent Roach, "The Role and Capacities of Courts and Legislatures in Reviewing Canada's Anti-Terrorism Law" (2008) 24 W.R.L.S.I. 5 (noting that: "[t]he ATA was not used until 2004, and in the meantime Canada relied on immigration law security certificates as its prime response to terrorism even though these instruments were not included in the ATA or subject to substantial debate after 9/11").

66 See Criminal Code, R.S.C. 1985, c. C-46, s. 83.01 [Criminal Code]. See also W. Wesley Pue, "The War on Terror: Constitutional Governance in a State of Permanent Warfare" (2003) 41 Osgoode Hall L.J. 267 at para. 9 [Pue].

feiture of property, and participating, facilitating, instructing and harboring of terrorism.[67] It is remarkable in its breadth and has been criticized for catching both non-violent dissent and ordinary violent behaviour within its net.[68]

In 2002, the Supreme Court of Canada weighed in with the *Suresh* decision.[69] Manickavasagam Suresh was a Tamil from Sri Lanka who was found to be a refugee in 1991. Despite having refugee status, when he applied for permanent resident status, the Canadian government found him inadmissible on security grounds and filed a security certificate against him.[70] The certificate was based on his fundraising activities for the World Tamil Movement, an organization that supports the Liberation Tigers of Tamil Ealem (LTTE). Suresh protested that he would be tortured if returned to Sri Lanka, and the Court agreed that he had proven a *prima facie* risk of torture.

The Supreme Court considered the meaning of terrorism in the immigration and refugee law context. Legislative reforms had made terrorism a category of inadmissibility to Canada in 1992.[71] The term was not defined, and the Federal Court had thus far preferred the "I know it when I see it approach".[72] At issue in *Suresh* was the definition of terrorism for the purpose of interpreting the inadmissibility provision. Despite the Supreme Court's acknowledgement that "the absence of an authoritative definition means that, at least at the margins, 'the term is open to politicized manipulation, conjecture, and polem-

67 Criminal Code, supra note 54 at s. 83.01. See Public Safety Canada website for public list of terrorist organizations at http://www.publicsafety.gc.ca/prg/ns/le/cle-en.asp.

68 Pue, supra note 67 at para. 9.

69 Suresh v. Canada (MCI), [2002] 1 S.C.R. 3 [Suresh].

70 This procedure is used when the Canadian government seeks to deport someone on serious grounds of inadmissibility and has evidence that it would like to keep secret. The procedure was modified following the Supreme Court of Canada's 2007 ruling in Charkaoui that most aspects of it are constitutional, including the possibility of indefinite detention: see Charkaoui v. Canada (Citizenship and Immigration), [2007] 1 S.C.R. 350.

71 This was accomplished through amendments to the former Immigration Act R.S.C. 1985, c. I-2 contained in Bill C-86 of 1992. See discussion in Aiken, Of Gods and Monsters, supra note 52.

72 Audrey Macklin, "Mr. Suresh and the Evil Twin" (2002) 20 Refuge 15.

ical interpretation'"[73], it proceeded to adopt the stipulative definition from the *International Convention for the Suppression of the Financing of Terrorism*.[74] For the purposes of the former *Immigration Act*, terrorism means:

> Any ... 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, when 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.[75]

The Supreme Court preferred this definition to the functional approach of international law, which prohibits specific acts.[76] It rejected the argument that, undefined, the term was so vague as to be unconstitutional under Canada's Charter of Rights and Freedoms.

Ultimately, the justices held that a refugee could be deported to torture in exceptional circumstances, provided that the Minister certified that he was a substantial danger to Canada and he was linked to terrorism (both inherently discretionary certifications). It did not explain how fundraising for the WTM made Suresh a member of the LTTE, adding to the uncertainty surrounding membership. The Supreme Court ultimately ordered the Minister to reconsider the case for reasons of procedural fairness. Mr. Suresh faced the great misfortune of having argued his case in May 2001. The 9/11 attacks occurred while the Court was deliberating and the ruling was handed down in January 2002. This is a low point for Canadian jurisprudence regarding terrorism and

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73 Suresh, supra note 70 at para. 94.

74 Ibid.; see also International Convention for the Suppression of the Financing of Terrorism, General Assembly Resolution 54/109 (A/RES/54/109, February 25, 2000).

75 Ibid. at para. 98. This approach is followed in inadmissibility cases under the present legislation as well: see, e.g., Jalil v. Canada (MCI), [2006] 4 F.C.R. 471 and Naeem v. Canada (Minister of Citizenship Immigration), [2007] 4 F.C.R. 658.

76 Suresh, supra note 70 at para. 97.

it is a marked departure from the international law of the Convention Against Torture. The case has, of course, attracted significant attention.[77]

Similar tensions are visible in Canadian terrorism legislation and international refugee law with respect to breadth, discretion, and the significant scope for interpretation. The distinction between legitimate and illegitimate resistance animates both fields. Definitions are given meaning only in application, and resort to political considerations inevitably occurs when decision makers interpret the concept of terrorism. And where Canada's criminal approach to anti-terrorism now situates the statute within a broader trend of the "criminalization of politics", refugees in general, and refugee exclusion law in particular, have always been aligned with security and criminality concerns.[78] It makes sense, then, that immigration and refugee law mechanisms have become the instruments of choice to combat terrorism wherever the suspects are non-citizens.

IV. Refugee Exclusion and Terrorism: Interpretative Developments

The evolution of a "culture of exclusion" has affected the interpretation of the exclusion categories in a number of ways. This section turns to the substantive content of the cases examined and outlines the principal interpretative developments with particular focus on the roles played by terrorism. The

77 Some contributions to this discussion include: David Jenkins, "Rethinking Suresh: Refoulement to Torture under Canada's Charter of Rights and Freedoms" (2009) 47 Alta. L. Rev. 125; Gerald P. Heckman, "Securing Procedural Safeguards for Asylum Seekers in Canadian Law: An Expanding Role for International Human Rights Law?" (2003) 15:2 Int'l J. Refugee L. 212; Obiora Chinedu Okafor,& Pius Lekwuwa Okoronkwo, "Reconfiguring Non-refoulement? The Suresh Decision, 'Security Relativism', and the International Human Rights Imperative" (2003) 15:1 Int'l J. Refugee L. 30; Kent Roach, "Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism", (2002) 47:4 McGill L. J. 893; Dauvergne, Less Brave New World, supra note 7.

78 Kent Roach, "The Dangers of a Charter-Proof and Crime-Based Response to Terrorism" in Ronald J. Daniels, Patrick Macklem and Kent Roach, eds., The Security of Freedom: Essays on Canada's Anti-Terrorism Bill (Toronto: University of Toronto Press, 2001) at 138-9. Arguably, the restrictive atmosphere toward refugees since 9/11 provided the impetus required for Canada and the United States to conclude a 'safe third country' agreement.

next section considers the subtle but pervasive effects of these developments on the dynamic notions of morality, sovereignty and humanity that underlie the field of refugee law.

A. Dynamic Interpretations: Redefining the 'Political'

The meaning and operation of the political in the refugee exclusion context matters both for the application of 1F(b) and for judicial interpretation more generally. The cases and trends observed in this section originate in the difficult task of distinguishing between political acts of resistance and protest, on the one hand, and acts of terrorism, on the other. Two broad findings were made with respect to the interpretation of the political in Canadian refugee exclusion jurisprudence. First, courts and the tribunal characterize legal issues as political ones with increasing frequency. This characterization effectively removes the issue from their purview. Second, courts and the tribunal have been defining violent acts as non-political acts. This definition redefines the political to exclude any acts of violence.

In the refugee exclusion context, the first and most obvious location for the political is Article 1F(b), which expressly excludes individuals because of "serious, non-political crimes". The clear implication is that claimants will not be excluded where their crimes are political in nature. Canadian courts and tribunals employ a four-part test which requires political motivation, a political uprising, a rational connection between the offence and the uprising, and a proportionality of means as measured against the nature of the regime.[79] As Ben Saul points out, terrorist acts often fail these tests for being disproportionate, remote or barbarous.[80] The difficult interpretation issues arise in

79 Gil v. Canada, [1994] 1 F.C. 508 (FCA).
80 Saul, supra note 50 at 6.

instances of severe state repression and legitimate resistance, as well as in instances where the targets of abuses use their status as victims to justify their own persecutory actions. An asylum seeker from Sri Lanka or Turkey may be both a victim of abuse and a perpetrator of the same.[81] The line-drawing exercise in these situations is inherently political and thus coloured by the discourses of security and terrorism that follow the refugee claimant in the post-9/11 world.

The characterization of legal issues as political ones amounts to the politicization of certain issues in the refugee determination. This re-description is most prevalent in cases where the Canadian judiciary has refused to differentiate between freedom fighters and terrorists, and has not sought guidance in international humanitarian law to delineate the conditions in which national liberation movements may resort to force.[82] In Suresh, the Federal Court refused to consider expert testimony concerning the characterization of the LTTE as a liberation movement entitled to self-determination, or to distinguish between the organization's attacks on military sites and those that targeted civilians. This would have required the Court to "resolve political issues that exist between groups of people in another country".[83] But the conduct of a liberation struggle is very much a legal issue, involving questions of international law.[84] In any case, refugee determination nearly always involves this invidious dilemma.

The definition of violent acts as non-political is an extension of existing jurisprudential agreement that terrorist acts cannot be political. This extension stems largely from public and political pressure to locate and punish interna-

81 Kingsley Nyinah, supra note 10 at 303.
82 This observation parallels Sharryn Aiken's findings in Of Gods and Monsters, supra note 52 at 17; See also United Nations Convention for the Suppression of the Financing of Terrorism, Article 21, supra note 53.
83 Re Suresh, [1997] F.C.J. No. 1537 (TD).
84 Aiken, Of Gods and Monsters, supra note 52 at 19.

tional criminals and terrorists. The political is reserved for civilly disobedient individuals whose circumstances are free from complexity and thus clearly reside on the side of good. Mahatma Ghandi would fit the box.

The law constructs refugees as terrorists in several ways. Under the exclusion clauses, decision makers have redefined the political as criminal.[85] The most common move is to locate the violence of a political act or organization, and then use that violence to characterize the act or organization as non-political, criminal, and terrorist. This ignores the legitimate uses of violent resistance under international law. The terrorist label is thus a "political choice rather than legal analysis", used for the purpose of distinguishing the act from other, possibly acceptable conduct by the freedom fighter.[86] Other times, the characterization follows from the manipulability of the Article 1F(b) test. In *Zrig,* the tribunal found MTI/Ennahda to be a terrorist organization engaged in terrorist acts.[87] Ultimately, this characterization meant that despite the repressive nature of the Tunisian regime, there could be no close and direct causal link between the arson at issue and the political objective of establishing an Islamist state.[88] It was "grossly disproportionate" and not "an acceptable form of protest".[89] Similarly, in *M96-04265*, the tribunal found that the claimant acted out of political conviction and the crimes were committed during a political uprising but there was no objective rational nexus between the crimes and a change in government.[90] The nexus between the crime and the political objective is very malleable.

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85 Prakash Shah, "Taking the "Political" Out of Asylum: The Legal Containment of Refugees' Political Activism" in F. Nicholson & P. Twomey, eds., Refugee Rights and Realities (Cambridge: Cambridge University Press, 1999).

86 Gilbert, supra note 8 at 440.

87 IRB Case M92-10133 (2000), [2002] 1 F.C. 559 (T.D.), [2003] 3 F.C. 761 (C.A.).

88 Zrig v. Canada (MCI), [2001] F.C.J. No. 1433. On the repressive nature of the Tunisian regime, see Jaouadi v. Canada, (2006) 305 F.T.R. 122 at paras. 39-40.

89 Ibid. at para. 114.

90 M96-04265 (March 8, 2002).

Thus, there are two contradictory dynamics operating in the interpretation of the exclusion clauses. On the one hand, there is an effort to *politicize* the legal determinations integral to the exclusion clauses. This is accomplished by characterizing legal issues as political ones, thereby removing the examination of organizations and conflicts from the purview of tribunals and courts. The result is the space for legitimate resistance in Article 1F is further circumscribed by the judicial refusal to tackle complex questions about the nature of organizations and conflicts. This politicization of legal determinations applies to all of the exclusion categories and is employed selectively by the courts. On the other hand, there is a nearly unanimous effort to *depoliticize* terrorist and violent crimes to remove them from the protective sub-clause within Article 1F(b). This is accomplished by making "political crime" and "non-violent" coeval. Violence is increasingly cast as irrational and disproportionate, rendering it non-political regardless of motive. The result is that it is nearly impossible to commit a political crime of violent resistance within the terms of Article 1F(b). For refugee claimants, one consequence is that political activity that is lawful for citizens may be the basis for their exclusion.[91] This is one of the many places in refugee law where we seem to expect refugee claimants to be better than ourselves.

B. Conflationary Interpretations: the Content of International Crimes

The cases demonstrate an increasingly broad characterization of who should be excluded. Many of these trends began before 9/11; the significance of 9/11 lies in the manner in which it solidified what Audrey Macklin calls the "exteriorization of threat and the foreigner as the embodiment of its

91 Sharryn J. Aiken, "Manufacturing "Terrorists": Refugees, National Security, and Canadian Law" 19 Refuge 54 at 55 [Aiken, Manufacturing Terrorists].

infiltration".[92] This shift in discourse meant that certain factual characterizations and legal interpretations of the refugee gained and maintained traction over others. The emphasis on the insecure and menacing refugee 'Other' is accommodated through the broad discretion present in the legal framework.[93] Existing terms are broadened and reinterpreted, exceptions became the rule, and references to terrorism become predictors that exclusion will follow.

The underlying characterization here, one of refugees as terrorists, is enabled by the new place of terrorism in the legal realm. At base, terrorism is a political position, not a legal definition. It is embedded in a particular cultural, social and tactical context.[94] Rosalyn Higgins writes:

> Terrorism is a term without legal significance. ... It is at once a short-hand to allude to a variety of problems with some common elements, and a method of indicating community condemnation for the conduct concerned.[95]

While it may be possible to legally describe a specific act as terrorist in nature, the term itself does not have any broader legal purchase. In contrast, the term "refugee" *is* the legal definition of an individual fleeing persecution on certain grounds. Specific acts or specific grounds of persecution only serve to support the legal finding of refugee status. In the refugee context, terrorism acquires the cloak of legality in two frames: from the labelling of specific acts of violence as terrorist and from the superimposition of terrorism onto crimes against humanity.[96]

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92 Audrey Macklin, "Borderline Security" in Ronald J. Daniels, Patrick Macklem & Ken Roach, eds., The Security of Freedom (Toronto: University of Toronto Press, 2001) 383 at 392.

93 Catherine Dauvergne, "Evaluating Canada's New Immigration Act" (2003) 41 Alta. L. Rev. 725 at para. 27.

94 Joseba Zulaika and William A. Douglas, Terror and Taboo: The follies, fables, and faces of terrorism (New York: Routledge, 1996) at 96-99.

95 Rosalyn Higgins, "The General International Law of Terrorism" in Rosalyn Higgins & Maurice Flory, eds., Terrorism and International Law (London: Routledge, 1997) at 28.

96 See also Nancy Weisman, "Article 1F(a) of the 1951 Convention Relating to the Status of Refugees in Canadian Law", (1996) 8 Int'l J. Refugee L. 111 at 125; Aiken, Manufacturing Terrorists, supra note 92 at 126.

1. The Expanding Category of Crimes Against Humanity

Article 1F(a) is now the site of most refugee exclusions in Canada, and crimes against humanity is the most frequently referenced category of harm under that article.[97] Scholarly articles and case law suggest that 1F(b) is the appropriate category for excluding terrorists or at least the most 'traditionally relevant'.[98] But Canada's current exclusion numbers and cases contradict this tradition. Instead, acts characterized as terrorist in nature are being adjudicated as crimes against humanity. This is particularly surprising given the Supreme Court pronouncement in Pushpanathan that terrorist acts had been declared contrary to UN purposes and principles and generally fell under Article 1F(c).[99]

Crimes against humanity have been defined in several international law instruments.[100] In 2005, the Supreme Court established the parameters of such crimes for the purposes of Canadian law in the Mugesera decision.[101] The case concerned the Rwandan genocide and the Supreme Court hewed closely to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda. Crimes against humanity consist of four elements: (1) one of the enumerated proscribed acts is committed; (2) the act occurs as part of a widespread or systematic attack; (3) the attack is primarily directed against any civilian population or any identifiable group;

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97 See Table 2: Immigration & Refugee Board Article 1F(a) Exclusion Numbers. It is important to re-emphasize that we are talking about the universe of publicly available decisions.

98 Zard, supra note 59; Guy Goodwin-Gill & Jane McAdam, The Refugee in International Law, 3rd ed. (Oxford: Oxford University Press, 2007).

99 Pushpanathan, supra note 5at para. 66.

100 Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (1998); Statute of the International Criminal Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. Doc. S/RES/955 (1994); Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by S.C. Res. 827, U.N. Doc. S/RES/827 (1993) (see also updated Statute); Charter of the International Military Tribunal, Annex of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 U.N.T.S. . 279.

101 Mugesera v. Canada (MCI), [2005] 2 S.C.R. 100. See also Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24.

and (4) the accused has knowledge of the attack and that her acts comprise part of it or takes the risk that her acts will comprise part of it. International law now accepts that crimes against humanity may be committed in conflict and non-conflict contexts.[102] Further, exclusion for crimes against humanity does not require a connection with state authority, permitting the scrutiny of guerrillas or militias for exclusion.

From the point of view of international criminal law, the legal characterization of terrorism as a crime against humanity is problematic. Terrorism offences have not been categorized as crimes against humanity at the international level, and Article 1F(a) is an international standard. None of the international efforts to define terrorism have equated it with crimes against humanity.[103] Recently, when some states proposed that terrorism be considered an international crime subject to the jurisdiction of the International Criminal Court as a crime against humanity, many countries objected.[104] These objections included several of the findings of our research: the offence is not workably defined, it would politicize the court, some acts of terrorism are not sufficiently serious to warrant prosecution by an international tribunal, and there should be a distinction between terrorism and national struggles for self-determination.[105]

The problem is that crimes against humanity are not necessarily the same as terrorist crimes. The primary specific feature of terrorism is the intent to

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102 International Law Commission Draft Code; In Ramirez v. MCI, [1992] 2 FC 306 (FCA) [Ramirez] and Sivakumar v. MCI, [1994] 1 F.C. 433, the Federal Court of Appeal held that crimes against humanity do not need to be committed during war and may be committed by both government and non-government organizations well before international criminal tribunals came to the same conclusion (see Duko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction before the Appeals Chamber of the ICTY, Case No. IT-94-1-AR72 (1995)).

103 Aiken, Manufacturing Terrorists, supra note 92 at 126.

104 Antonio Cassese, "Terrorism is Also Disrupting Some Crucial Legal Categories of International Law" (2001) 12 E.J.I.L. 993 at 994.

105 Ibid. at 994.

spread terror among civilians.[106] Close examination of acts defined as terrorist crimes show that they include many lesser offences than those contained in Article 1F, such as extortion, theft, robbery, damage to public utilities and supporting a terrorist group. The conflation began in the Federal Court level Suresh decision, and it has persisted through similar findings regarding extortion[107], video recording the broadcasts of a 'terrorist' organization[108], and providing logistical support (taking food, medication and sometimes weapons to the FMLN and finding locations for meetings).[109] The broad basis for domestic definitions of terrorism seems to be bleeding into refugee exclusion interpretations of Article 1F(a).

Crimes against humanity involve the infliction of massive brutalities and bring to mind conflicts such as the Nazi Holocaust, the Cambodian killing fields, and the Rwandan genocide. The manner in which Canadian courts and tribunals have interpreted the refugee exclusion clauses to include lesser offences and situations where there is no evidence of personal or individual responsibility for the specific acts expands the category of crimes against humanity well beyond its meaning in international law. Indeed, the international criminal tribunals deal in leaders and individuals in positions of authority rather than membership responsibility.

The Rome Statute Explanatory Memorandum cautions:

> They are not isolated or sporadic events, but are part either of a government policy ... or of a wide practice of atrocities tolerated or condoned by a government or a de facto authority. However, murder, extermination, torture, rape, political, racial, or religious persecution and other inhumane acts reach

106 Ibid. at 995.
107 IRB Case MA3-00620 (2005).
108 IRB Case VA4-00258 (2004): the Federal Court did not uphold the RPD's exclusion for active participation in terrorist activities.
109 Aguilar v. Canada (MCI), [2000] F.C.J. No. 1289.

> the threshold of crimes against humanity only if they are part of a widespread or systematic practice. *Isolated inhumane acts of this nature may constitute grave infringements of human rights, or depending on the circumstances, war crimes, but may fall short of meriting the stigma attaching to the category of crimes under discussion*. ... Consequently when one or more individuals are not accused of planning or carrying out a policy of inhumanity, but simply of perpetrating specific atrocities or vicious acts, in order to determine whether the necessary threshold is met one should use the following test: one ought to look at these atrocities or acts in their context and verify whether they may be regarded as part of an overall policy or a consistent pattern of an inhumanity, or whether they instead constitute isolated or sporadic acts of cruelty and wickedness.[110]

The case law in our dataset reveals several different moves made by the judiciary. One method is described above, namely the conflation of terrorism with crimes against humanity, which elevates the former and waters down the latter. For example, in MA2-07509, the claimant was a member of the Students' Islamic Movement of India (SIMI).[111] The panel excluded the claimant for complicity in a terrorist act. Although SIMI issued no public statement of responsibility, one of its members was the prime suspect in the bombing of the Sabarmati Express in August 2000. This grounded the panel's consideration of "this terrorist act as a 'crime against humanity' ".[112] In V97-00349, there is no mention of the term "crimes against humanity" despite the finding of exclusion under Article 1F(a).[113] The claimant was a Sunni member of the Sipah e Sahaba (SSP) organization in Pakistan. The panel found that he had to be excluded due to his participation in an "extreme terrorist organization" and later, an "extremist religious, terrorist organization".[114] Similarly,

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110 Explanatory Memorandum to the Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998).
111 MA2-07509 (2003).
112 Ibid. at 5.
113 V97-00349 (2000)
114 Ibid. at 6.

in T98-09991, the claimant acted a driver for Ejercito Popular Revolucionario (EPR). On one occasion, he transported EPR members whom he believed were carrying weapons. The panel determined that "the claimant personally participated in the activities of a group involved in terrorism" and "the claimant was part of an organization that committed acts of terrorism, on a continuous basis, as part of its raison d'etre".[115] On this basis, the panel concluded – without any analysis of the content of crimes against humanity or the specific acts constituting such crimes – that "the claimant had, at the least, actively aided the EPR in the commission of crime against humanity and, therefore, as an accomplice, may be held responsible for the crime".[116]

A second strategy involves reliance on the documentary evidence as the basis for finding terrorist acts and crimes against humanity and for contradicting the testimony of the claimant, as in the case of VA5-01324. Although the Minister, who typically makes the argument for exclusion in the Canadian context, argued that there was insufficient evidence to find exclusion under Article 1F(a), the panel disagreed, primarily on the basis of documentary evidence. The claimant was a member of the Peruvian armed forces. The panel used the documentary evidence to draw inferences and conclusions such as this one: "on a balance of probabilities, the mandated fate of these captured guerrillas, whether wounded or not, would have been torture and extrajudicial execution", and then to implicate the claimant in those probable acts.[117] Also, in *Ali*, the Federal Court used documentary evidence to discredit the claimant's testimony that he was unaware of violence or that such violence did not exist. The applicant was a member of the Muttahida Quami Movement (MQM). The Federal Court found that the Minister's documentary evidence established the

115 T98-09991 (2000) at page 3.
116 Ibid. at 4.
117 VA5-01324 (2006) at para. 30.

MQM's reputation for violence, mistreatment of dissidents, extortion, murder and torture, and that this evidence was to be preferred to the applicant's unawareness and denial.[118]

Finally, the term terrorism is used as a proxy for an organization directed toward a "limited, brutal purpose" for the purposes of finding membership sufficient to require exclusion. Exclusion through membership accounts for an important subset of the cases, and we turn to these below.

2. Membership Filtered through the Lens of Complicity

The cases reveal a troubling state of affairs: it is who you are or who are associated with, rather than what you have done, that often provides the basis for exclusion. This results from the way that the concepts of membership and complicity have been applied. Complicity is the most frequent basis for exclusion. It is exceedingly rare that the refugee claimant participated directly in a crime against humanity; more often, the refugee claimant was part of an organization that was involved in violent acts; most often, the claimant did not commit any violence. Ultimately, it is not the nature of the claimant's crimes which leads to exclusion, but the nature of the crimes alleged against the organization.[119]

Complicity is sufficient to exclude. What does this mean? First, refugee claimants need not be directly engaged in the terrorist activity and the threshold of individual responsibility is no longer stringently required.[120] There is no need to show that the claimant had close or direct responsibility for the crimes or was actively associated with them. Second, refugee claimants need not have participated in any violence. The basis for exclusion is most frequently indirect

118 Ali v. Canada (Solicitor General), [2005] F.C.J. No. 1590 at para. 50.
119 Harb v. Canada (MCI), [2003], 238 F.T.R. 194 at para. 11.
120 Zard, supra note 59; Aiken, Of Gods and Monsters, supra note 52 at 22.

and based on complicity. This comes dangerously close to attributing guilt on the basis of association and is at odds with the individual character of the exclusion procedure.[121]

The test established by the Federal Court in Ramirez requires: (1) voluntary membership in a violent, criminal organization, (2) personal and knowing participation in its acts, and (3) failure to disassociate from the group at the earliest safe opportunity.[122] Over the years, complicity has become a bloated container for any kind of involvement with a violent organization. For example, witness these statements: "it is not working within an organization that makes someone an accomplice to the organization's activities, but knowingly contributing to those activities in any way or making them possible, whether from within or from outside the organization"[123] or "a tolerance of such crimes is sufficient to be held liable".[124]

There are now four ways to be complicit under Canadian refugee law: presence at an international crime if combined with authority; membership in a limited, brutal purpose organization; personal and knowing participation; and having a shared purpose.[125] The difference between participation and shared purpose lies in the proximity between the individual and the organization.[126] Common purpose is exceedingly malleable and has been held to mean "sharing the goal of protecting the security zone" and sharing the purpose of "remaining in power and winning the next election".[127] Complicity has been found where the claimant: turned people over to organizations commit-

121 Zard, ibid.
122 Ramirez, supra note 103. For an organization that is not "principally directed toward a violent and brutal purpose", the Minister must demonstrate complicity through the six factor analysis (personal knowledge, method of requirement, rank, length of membership, disassociation).
123 Bazargan v. Canada (MEI) (1996), 205 N.R. 232 (FCA) at para. 11.
124 Fabela v. Canada (MEI) (2005) FC 1028 at para. 19.
125 Rikhof, supra note 22 at 459.
126 Ibid. at 459.
127 See IRB Case T98-06563 (El Hasbani, 2000); IRB Case MA4-03233 at para. 63.

ting crimes against humanity with knowledge that they would come to harm; provided information to organizations which might result in harm to those about whom this information pertained; provided support functions, including being a guard or a driver; increased the efficiency of the organization or lent effective support, including being an administrative officer in a government anti-terrorist unit; and financed the organization.[128] These understandings of complicity go beyond the findings of international criminal tribunals, which "only dealt with persons most responsible for international crimes".[129] In this way, refugee law is being used to assign culpability at a far lower threshold than international criminal law.

Intention is required for complicity. The individual must either intend to perpetrate the act, intend to be complicit in the perpetration of the act, or be wilfully blind to the act.[130] It is settled that lesser forms of actual knowledge, such as wilful blindness, may suffice. However, there is a broad exception where the organization is "directed toward a limited, brutal purpose". For such organizations, simply belonging may be sufficient for exclusion. In Harb, the Federal Court found that once an organization has committed crimes against humanity and the claimant "meets the requirements for membership in the group, knowledge, participation or complicity imposed by precedent, the exclusion applies even if the specific acts committed by the appellant himself are not crimes against humanity as such."[131] Other cases have found that there is no need to identify specific acts in which the individual was involved.[132] The troubling consequence of requiring identification with the purposes of the or-

128 Rikhof, supra note 22 at 463-5; Loayza v. Canada (MCI), [2006] 288 F.T.R. 250.
129 Ibid. at 506.
130 Ibid. at 466.
131 Harb, supra note 120 at para. 11.
132 Canada (MCI) v. Hajialikhani (1998), 156 F.T.R. 248; Pushpanathan, supra note 5; but see El-Hasbani v. Canada (MCI), 2001 FCT 914; Magan v. Canada (MCI), 2007 FC 888.

ganization rather than the specific acts performed is heightened by the tendency to presume knowledge.

The cases show an increasing tendency to presume or impute the requisite knowledge or intention based on other factors. One such factor is the role of the individual in the organization.[133] In fact, this notion of imputed knowledge is at the crux of the exception for organizations principally directed toward a limited, brutal purpose. Consider these examples from judgments rendered over the last three years of our dataset. Members of such organizations are presumed to know of its "limited, brutal purpose". Similarly, sometimes the abuses were of "such a multitude and magnitude that the claimant had to know" or "could not have been unaware".[134] This imputation holds even if the claimant held an administrative role, was posted to a rural area guarding a village or was a devout evangelical member of the army who did not read newspapers and lived off the army base.[135] Knowledge will also be imputed where human rights organizations have published reports on abuses, making them "a matter of public record".[136] Amit Chowdhury became a member of the Awami League in Bangladesh during the time it formed the national government. The tribunal found that, "[i]t is unbelievable that the Applicant was an exception from the rest of his party, given the record of injured and killed people in politically motivated violence".[137]

The tendencies described above are heightened in the case of organizations principally directed toward a limited, brutal purpose. After 9/11, the

133 See, for example, Thomas v. Canada (MCI), (2007) 317 F.T.R. 6; Akramov v. Canada (MCI) 287 F.T.R. 93; Petrov v. Canada, 2007 FC 465; IRB Case VA5-01324 (2006); IRB Case AA2-01119, Loayza, supra note 129; Chowdhury v. Canada, 2006 FC 139 at para. 23.

134 Acevedo v. Canada (MCI), 2006 FC 480; Akramov, ibid.; La Hoz v. Canada (MCI), (2005) 278 F.T.R. 229.

135 Loayza, supra note 129 at para. 10 (administrative job); IRB Case TA3-04657 (2007) (Minister withdrew intervention in case of an evangelical Christian, agreeing that claimant was unaware of the crimes, but RPD found knowledge).

136 IRB Case TA2-17942 (2007) at para. 83.

137 Chowdhury v. Canada (MCI), (2006) 287 F.T.R. 1.

UNHCR confirmed this controversial reasoning, stating that voluntary membership in a notoriously violent group gives rise to a rebuttable presumption of personal and knowing participation in the group's activities.[138] The cases frequently employ the terms "limited, brutal purpose" and "terrorist" as equivalent legal findings.[139] The Federal Court held in 2002 that an organization may be principally directed to a limited, brutal purpose even if it does not engage *exclusively* in acts of terrorism.[140] The dangers are that the presumption amounts to criminalizing membership, leads to automatic exclusion, and overlaps with other aspects of the determination, which amounts to a denial of procedural fairness. It has already led the courts to dispense with tests for membership, finding that association or support of the organization is sufficient to base complicity. The result is that the individual who brings foodstuffs to the rebels is accorded the same treatment as the individual who personally participated in attacks on civilians.

The current Canadian case law has proscribed membership in a violent organization without regard to the obligations of membership or the range of the organization's other activities. This is in direct contradiction to the caution set out by the Federal Court in *Al Yamani* in 1996.[141] To take the first inquiry, obligations of membership, the cases reveal that any support or association with a terrorist organization entails exclusion. In *Ali,* nine years later, the claimant was found to have "lent his effective support" to the Mutlahida

138 Saul, supra note 50 at 9; UNHCR, Background Note on the Application of the Exclusion Clauses: Article
1F of the 1951 Convention relating to the Status of Refugees, an integral part of the Guidelines on International Protection No. 5, supra note 15.
139 IRB Case MA4-03350 (2007) at para. 124, IRB Case TA2-17942 (2007) at para. 79; Canada (MCI) v. Nallaiya, 2007 FC 1197; Diasonama v. Canada (MCI), 2005 FC 888 at para. 19; Canada (MCI) v. Maan, 2005 FC 1682 (terrorism engages all three exclusion clauses).
140 Pushpanathan, supra note 5.
141 Al Yamani v. Canada, [1996] 1 FC 174. Al Yamani was seeking review of the security certificate issued against him.

Quami Movement (MQM).[142] MQM was a political party that formed part of the coalition government in Pakistan. The claimant attended meetings, collected donation and wrote slogans. These acts excluded him from refugee status. In *Nagamany*, the Federal Court found that the LTTE in Sri Lanka resorted to terrorist methods and that the claimant participated in propaganda and finance, "two of the most vital functions of any organization".[143] Indeed, financing an organization directed toward a "limited, brutal purpose" leads to exclusion. In *Hajialikhani,* in 1998, the Federal Court confirmed, "there is no doubt that financing crimes makes one complicit therein".[144] In the second *Pushpanathan* case four years later, the Federal Court connected two new dots, finding that: "the trafficking of narcotics—which is essentially the financing of crimes—makes him complicit in supporting the LTTE".[145] This permitted an inference of guilt:

> It has been established that the applicant is complicit due to his financing of crimes through the trafficking of narcotics in Canada and that the LTTE is infamous for committing crimes against humanity, accordingly, this Court can infer that the applicant was complicit in crimes against humanity.[146]

With respect to the second inquiry, the range of activities, the cases refuse to consider the separation of violent and non-violent, or humanitarian and military, objectives or branches of an organization. Where an organization has dual or multiple purposes, those purposes are not considered to be severable. In 2000, the South Lebanon Army's mandate to provide governance as well as security within the security zone precluded a finding that it was an organization directed toward a "limited, brutal purpose".[147] However, in the

142 Ali, supra note 119.
143 Nagamany v. Canada (MCI), 2005 FC 1554.
144 Hajialikhani, supra note 133 at para. 41.
145 Pushpanathan, supra note 5 at para. 48.
146 Pushpanathan, ibid. at para. 55.
147 IRB Case T98-06563 (2000) ("The SLA had administrative, educational, health, security, military, and political functions to perform within the security zone"). But see IRB Case V97-00349 (2000) for the

years following, it is not possible to support the humanitarian efforts of a violent organization; "supporting "good deeds" within a terrorist organization is providing support to the terrorists".[148] In TA0-09663, the tribunal considered Hamas in the years before it came to power in Palestine.[149] It acknowledged the organization's dual role as a social, political, religious organization and a violent organization, and agreed that 95 percent of its budget went toward social service activities; nonetheless, the tribunal found Hamas to be a terrorist organization that committed crimes against humanity.[150] The claimant was excluded as complicit because he shared the goal of liberating Palestine, received financial support, attended lectures, and recruited Palestinian youths. Again, the contextual shortcomings are evident: Hamas existed as a pseudo-state apparatus with an arm that included violent resistance. Its means may be suspect, but in such cases, closer scrutiny should attach to the nature of personal involvement and the separability of purposes.

Similarly, the tribunal has found that the lack of proof that the funds went to rehabilitation activities necessitates the assumption that they funded military and terrorist operations.[151] Several cases have considered the Mohajir Quami Movement (MQM) in Pakistan, a political party with a militant wing. They consistently find that the MQM is a terrorist organization which uses terrorist methods to achieve its political objectives, and that those objectives cannot be separated from its militaristic activities.[152] In 2004, the Federal Court confirmed this reasoning with respect to the Mojahedin-e Khalq:

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opposite result.

148 IRB Case MA2-07509 (2003).

149 IRB Case TA0-09663 (2001).

150 Ibid.

151 IRB Case T98-08052 (2001) at 16.

152 IRB Case MA3-00620; TA1-18022 (2003).

> It was therefore open to the Board to find as it did, that the MEK is a terrorist organization even though some of its goals were lofty democratic and consistent with international principles.[153]

The test has been rearticulated in various ways: "what is the organization's *sine qua non*" or "would the organization exist only for benign projects" or "can the political objectives be separated from the militaristic activities".[154] These are all different tests and none of them provide a metric that permits involvement without exclusion from refugee status. Where violent activities cannot be neatly separated from other objectives, this will ground complicity and often provide confirmation of the organization's "limited, brutal purpose".[155]

3. The Problem with the Interpretation of International Crimes

Fifteen years ago, the Federal Court interrogated the role of a national army as a terrorist organization. In the *Balta* case, the Court asked whether the particular goal of the Serbian army was the commission of international crimes.[156] Without disputing the atrocities committed by Serbian forces, the Court stated:

> While the Serbian army may be utilizing terrorist means to achieve political ends, I think it is significant that there are political ends, namely Serbian control of Bosnia.

This suggests a distinction between a terrorist organization and an organization that engages in terrorist practices.[157] It is possible, on this view, to employ terrorist means for political ends, and presumably it was also possible, at that

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153 Bitaraf v. Canada (MCI), 2004 FC 898.
154 Mehmoud v. Canada (MCI), (1998) 46 Imm. L.R. (2d) 39; Pushpanathan, supra note 5; Thomas, supra note 134.
155 Pushpanathan, supra note 5; Nagamany, supra note 144 at para. 35.
156 Balta v. Canada (MCI), (1995) 91 F.T.R. 81. Note that even in this decision, the Federal Court conflated "international crimes" with "terrorist".
157 Aiken, Manufacturing Terrorists, supra note 92 at 120.

time, to be a member of the Serbian army without being a terrorist. In the years since *Balta,* the IRB and also the Federal Court have resorted to broad brush strokes and blanket characterizations in their interpretation of the international crimes, bringing Canadian refugee law into ever closer alignment with the material support bar in the United States.[158] A considerable number of more recent cases show no distinction in this analysis between state agencies (armies, police forces, etc.) and non-state agencies, not even in assessing the 'limited and brutal purpose' criterion. We discuss this further below.

After the close of our dataset, and while this article was under review, the Federal Court issued a decision which tackles the problem identified here head on. In *Ezokola* the exclusion issue concerned a former reasonably high ranking diplomat of the Democratic Republic of Congo.[159] Here the Court stated that is was not enough to be a member of a government that had committed crimes against humanity, nor could complicity be proven by 'simple knowledge' of the international crimes.[160] This decision, therefore, signals a possibility of a clearer jurisprudence more closely tied to international standards and to the original wording of the Convention, but it is too soon to tell whether this direction will be endorsed by a higher level court or noticed by parallel members of the Federal Court.

All apart from the apolitical clarity imposed upon terrorism by its incestuous relationship with crimes against humanity, there are also issues of judicial discretion placed in the service of a broader security agenda and a ju-

158 Schoenholtz & Hojaiban, supra note 65. The material support bar bars a refugee claimant who provides any support to an organization, even where that organization opposes a repressive government that is not recognized as legitimate by the US government. In 2007-2008, the discretionary authority to waive terrorism-related bars was clarified and extended. See, e.g.: Jonathan Scharfen, Deputy Director of US Citizenship and Immigration Services, "Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations", Interoffice Memorandum (May 24, 2007); US Congress, Consolidated Appropriations Act, 2008, Pub. L. 110-161, 121 Stat. 1844 (December 26, 2007).

159 Ezokola v Canada (MCI), 2010 FC 662.

160 This is an unofficial translation of the French 'la simple connaissance' at para 4.

dicial failure to engage in the difficult questions of lawmaking. This approach falls into the error described by Gerald Neuman as neglecting to parse what relationship to terrorist activity makes an organization terrorist.[161] He states further,

> Few organizations exist solely for the purpose of engaging in terrorist activity. Terrorism is usually a means to an end and usually not the only means ... employed for that end".[162]

The cases contain bald statements that an organization is engaged in terrorism, and sometimes there is a list of terrorist activities. There is rarely, however, a clear picture of what terrorism means and how that understanding applies to the organization in question, nor are there explanations of how the list of specific acts meets the definition.[163] Acts such as kidnapping, assault and murder are undoubtedly criminal, but they are not necessarily acts of terrorism, and decision makers must make their case.[164] This problem is heightened by the factual nature of the complicity analysis, so that "everything becomes a question of fact" and thus effectively unreviewable by the Federal Court.[165]

V. Reshaping the Concepts of Morality and Sovereignty

These interpretative developments have echoed in many spheres. Their effects on the concepts of morality and sovereignty are explored in this section, as these concepts are close to the core of refugee law. Their evolution demonstrates that refugee law remains close to its post Second World War roots: it functions to reinscribe the large scale political concerns of the day onto individuals. In this way, we see that although refugee law has grown

161 Gerald L. Neuman, "Humanitarian Law and Counterterrorist Force" 14 E.J.I.L. 283 [Neuman].
162 Ibid. at 289.
163 Jalil, supra note 76 at paras. 22-25 and 30-32 (in the context of inadmissibility).
164 Naeem, supra note 76 at para. 46.
165 See Harb, supra note 120 at para. 19; Bazargan, supra note 124 at para. 11.

enormously over the past 50 years, including broadening understandings of particular social groups and categories of persecution, the aims of asserting Western sovereignty and policing exclusion remain central.

A. Morality: the Individual in Refugee Law

The development of Article 1F was spurred by experiences with international crimes during the Holocaust and Article 14(2) of the Universal Declaration of Human Rights. The Universal Declaration requires that the right to asylum "may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations".[166] Article 1F thus originates in concerns about international morality.[167]

The notion that certain acts are "beyond the pale"[168] and that some individuals are undeserving of asylum is linked to ideas about morality and humanity. The notion of granting asylum to those characterized as serious criminals is juxtaposed against the "humanitarian and peaceful nature of the concept of asylum".[169] In this frame, refugee status is a "special humanitarian privilege" and so must be reserved for deserving victims of persecution. These ideas played out in the mandatory nature of the exclusion mechanism. During the drafting process, both France and Israel objected to the suggested discretionary nature of the exclusion mechanism based on "disturbing moral consequences" and "on moral grounds", respectively.[170]

166 General Assembly Resolution 217A, Article 14(2), U.N. Doc. A/810 at 74 (1948). According to Hathaway & Harvey, an early version of Article 1F simply referred to Article 14(2).
167 Hathaway & Harvey, supra note 15 at 263.
168 Ibid.
169 UNHCR Note on the Exclusion Clauses, supra note 49.
170 Hathaway & Harvey, supra note 15 at fns 24 and 25.

These notions of morality are built into the legal tests for exclusion under Article 1F(a). In fact, the UNHCR Guidelines suggest that it is a prerequisite for exclusion that a moral choice was in fact available to the individual.[171] Refugees are thus excluded based on the moral choices they make.[172] The exclusion tests for membership and complicity measure morality through voluntary membership in the organization, knowledge and sympathy for its purposes, and disassociation from the organization at the earliest opportunity.[173] A true refugee, accordingly, would not make the immoral choice to voluntarily join a terrorist organization, or to sympathize with terrorist purposes. The corollary of this logic is that as Western morality shifts, it is incorporated directly into the exclusion jurisprudence.

The key criterion, however, is failure to disassociate at the first possible opportunity. Continued membership is the largest failure of conscience and morality. The truly moral refugee is required to dissociate at the earliest opportunity, and not because of a threat to her family and certainly not because of fear for her own well-being, but because of a crisis of conscience. In Loayza, the Court repeated the tribunal's reasoning:

> I agree with the submission of the Minister -- "that is a copout." The principal claimant preferred to maintain his position in the PNP, hoping to raise to the rank of General rather than listen to his voice of conscience.[174]

Thus, it is both possible and impossible to reconcile contemporary refugee exclusion law with the Supreme Court's 1993 decision in *Ward,*[175] which remains the seminal ruling in Canadian refugee law. Patrick Francis Ward joined

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171 UNHCR Guidelines (1996), supra note 15 at para. 41 et seq.

172 Ronald C. Slye, "Refugee Jurisprudence, Crimes against Humanity, and Customary International Law" in Anne F. Bayefsky, ed., Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton (Boston: Martinus Nijhoff, 2006) at 255.

173 Ibid. at 255, citing Ramirez.

174 Loayza, supra note 129, upholding the RPD decision.

175 Patrick Francis Ward v. AG, [1993] 2 S.C.R. 689.

the Irish National Liberation Army (INLA), a paramilitary terrorist organization seeking the political union of Ulster and the Irish Republic, to protect his family from the Irish Republican Army. In the words of the Court, the INLA was a "...ruthless paramilitary organization more violent than the Irish Republican Army".[176] His first task was to guard hostages. When the INLA ordered their execution, Ward had a "predicament of moral conscience" and released the hostages.[177] Ward's decision is exalted by the Court as a triumph of his conscience and it is the foundation of his well-founded fear of persecution for reasons of political opinion:

> To Ward, who believes that the killing of innocent people to achieve political change is unacceptable, setting the hostages free was the only option that accorded with his conscience. The fact that he did or did not renounce his sympathies for the more general goals of the INLA does not affect this. [178]

The contours of contemporary refugee law are visible here: Ward dissociated at arguably his first opportunity and he did so for reasons of conscience. It seems simple to construct him as a highly moral figure, an example for refugee claimants everywhere. However, it is not at all clear that the same decision could follow from contemporary refugee exclusion law. Today, refugee claimants must be untainted by proximity to a terrorist organization or to its violent means. The cases show that several of the excluded were never permitted the opportunity to have a crisis of conscience because they never personally and individually participated in acts of hostage-taking. It is a great irony that Ward gets to be a hero for a situation that today would almost certainly preclude any consideration of his act of conscience; the courts would not even have to engage in the membership inquiry because Ward's direct involvement as a

176 Ibid. at para. 2.
177 Ibid. at para. 3.
178 Ibid.at paras. 84-86.

guard in a terrorist act, namely hostage taking, would be considered a crime against humanity. He would be excluded before he became the hero. There is a remote possibility that Ward could claim ignorance of the INLA's terrorist acts but this is unlikely because of the manner in which knowledge is imputed and presumed in the complicity context. The terrorist nature of the INLA was well-documented and publicly known—the act of joining the INLA manifested his support and common purpose. Moreover, the fine distinction between the terrorist nature of the INLA and Ward's political act of conscience would not survive the contemporary tendency to depoliticize terrorism.

The *Ward* case reveals the continuum present in the exclusion determination. There is arguably a high threshold of egregiousness implicit in the exclusion clauses, suggesting that refugees are not expected to be "morally pure or criminally blameless".[179] The complexity lies in the multiplication of spaces for morality in the exclusion determination. It plays into complicity and the nature of the political. Terrorism as a moral and political label provides yet another pathway into the character of the refugee. Through the exclusion clauses, contemporary public and political discourses are translated directly into refugee law. For those who are concerned that refugee law allows terrorists entry to Canada and other Western states, this analysis should provide some solace. As with other contemporary discourses, Canadian refugee law is demonstrably expanding the category of terrorism and including more and more individuals within it on the basis of less and less detailed scrutiny. For those who are concerned about whose human rights refugee law is protecting, the concern is of course the opposite. The effect of recent changes in the law on individual claimants is mirrored in how these changes reflect on states, and the question of sovereignty.

179 Kingsley Nyinah, supra note 10 at 297.

B. Sovereignty: Refugee Law and 'Good' States

When it comes to migration, sovereignty is most frequently discussed as an attribute belonging to the state of refuge that justifies the policing of its borders. In the refugee exclusion context, sovereignty exists in two frames: that of the state of origin and that of the state of refuge. Their sovereignties exist in a mild tension, to the extent that the *1951 Convention* delimits the state's sovereign control over its borders, "interpreting the available exceptions to the duty to admit refugees emerges as a site for reclamation of control".[180] Conversely, becoming a source country for refugee claimants through violent internal conflict or failed state status bespeaks a lesser, wounded sovereignty. In exclusion decisions, this tension resides in the reaffirmation of the state of refuge's sovereign right to exclude while simultaneously abbreviating the sovereignty of the state of origin. The former's reaffirmation is *at the expense of* the latter; indeed, the reassertion is marked by a complete failure to recognize the sovereignty of the Other.

The cases reveal a certain readiness to find members of the police force, army, navy and even government ministries subject to exclusion. These are state agencies that sit very close to the heart of state sovereignty; military and police forces are legal entities and may be presumed to have at least some legitimate aims.[181] Yet these arms of the state are frequently found to have a "limited, brutal purpose" or to engage in terrorism, pre-empting further examination of the claimant's involvement and requiring exclusion. In other cases, it is acknowledged that the arm of the state may have legitimate purposes but the claimant is still excluded on the basis of that state agency's crimes against humanity. In all cases, the conclusion that the army or police

180 Dauvergne, Making People Illegal, supra note 7 at 63; Macklin, supra note 93.
181 IRB Case T98-04448 (1999) (stating that the army is the heart of sovereignty).

force of the state is illegitimate, that the state cannot control the defenders of its own sovereignty, is a controversial and highly political determination. At bottom, it amounts to a finding that some states are not entitled to the basic markers of statehood. In *Bouasla*, a case about Algeria, the tribunal found that:

> The various documents that the panel has cited above indicate that the acts and activities of the police administration, the military administration and the penitentiary administration are utterly reprehensible and *inconsistent with what one can expect of a State*.[182]

Under current judicial analyses, national police forces or military forces may be characterized as organizations principally directed to a limited, brutal purpose if they commit crimes against humanity "as a continuous and regular part of the operation" despite continuing to fulfill legitimate functions.[183] The Federal Court has agreed that the Angolan army is an organization principally directed to a limited, brutal purpose because, despite the army maintaining a legitimate purpose of national defence, it terrorized the citizens of Angola,[184] that the Agence Nationale de Renseignements (ANR) in the Democratic Republic of the Congo, another state agency with legitimate functions, was an organization principally directed to a limited, brutal purpose,[185] and that members of the Punjabi police force were complicit in crimes against humanity despite their legitimate purpose of maintaining law and order.[186] In Thomas, the Court found that the Armed Forces Revolutionary Council (AFRC) in Sierra Leone that formed the military government in 1997 was an organization with a lim-

182 IRB Case MA0-03931 (Bouasla, 2005) at para. 39.
183 IRB Case TA2-17942 (2007) at para. 78.
184 IRB Case TA1-12866 (Antonio, 2004). But compare to IRB Case TA1-10691 (Castelo, 2004, finding that the army is a legal entity protected by the Constitution).
185 Diasonama, supra note 118.
186 Grewal v. Canada (MCI), [1999] F.C.J. No. 1170; Khera v. Canada (MCI), [1999] F.C.J. No. 1120.

ited, brutal purpose.[187] The decision dismissed the "inherent political aspect" of the AFRC.

The Bengi case demonstrates the inherently political and sometimes surprising nature of this inquiry. Bengi was a member of Turkish Air Force with high-level clearance from the North American Treaty Organization (NATO), a military alliance of democratic states in Europe and North America.[188] He trained NATO forces in radar operations. Turkey was engaged in a violent armed conflict with the Kurdistan Workers Party (PKK), a terrorist group. Human Rights Watch documentation stated that the Air Force was an integral part of Turkey's military effort. Bengi was excluded as complicit in the crimes against humanity committed by the Turkish Air Force. Turkey's conduct in its battle against the minority Kurds should undoubtedly be censured, but this case stands for a larger point about the hopeless bind of the refugee claimant.

In Turkey, Peru, Pakistan, Colombia and several other sites of conflict between the government and the 'terrorist' group, people exist in a condition of violence and insecurity where both sides commit crimes against humanity and terrorist acts. The issue lies in the failure of contemporary refugee exclusion law to investigate political context and to probe the nature of specific acts. This means that the refugee cannot be a freedom fighter or a state official. A claimant involved as a member of a violent resistance organization, even against a state with a limited, brutal purpose, cannot be a refugee. Similarly, a claimant involved as a state agent in the state's fight against terrorism where the state employed violent means of suppression cannot be a refugee. In combination with the traditional bias in refugee law towards protection for those involved in political action, this trend strictly limits the possibility of 'being'

187 Thomas, supra note 134 at para. 47.
188 IRB Case TA2-01622 (2004).

a refugee at all. In such states, the claimant's participation on either side of the conflict makes it nearly impossible to successfully claim refugee status. In these cases, "terrorism" is used to describe state methods of intimidating and harming civilians. It is used to ground a finding that the state of origin is not sovereign. Alternately, the term is used to mark the illegitimacy and non-political nature of a violent resistance organization. In both cases, "terrorist" indicates acts categorized as crimes against humanity while simultaneously connoting a sense of threat and lack of control.

VI. Conclusion

This review of the numbers and cases of refugee exclusion and the reasoning and discourses that undergird them reveal that Canada, like most Western countries, has not yet struck an acceptable balance between security and asylum. This article is not a plea to admit terrorists as refugees but, rather, a plea for thoughtful standards about who may be considered a terrorist, for what acts, and in what circumstances. Instead, the tribunal and the courts are engaging in backdoor reasoning, slipping concerns about terrorism into existing categories by conflation and blanket characterizations. This fails to conform to the humanitarian requirements of international refugee law and to international human rights law, and it ignores the fact that many of the excluded claimants have never participated in violence or specific crimes, and would not have been excluded a decade ago.

While external fields of law inform the refugee exclusion categories, the field of international human rights law exists in a deeper, often tense, relationship with international refugee law. Returning an individual to persecution for suspected commission of international crimes places international refugee

law in direct tension with international human rights law. International human rights law requires states to protect individuals from violations of their rights. Some of these rights are so basic that they cannot be forfeited. These rights have been referred to as "bedrock" human rights, and they are owed even to proven terrorists and international criminals. Yet, exclusion places individuals beyond the reach of any human rights protection whatsoever, proclaiming that their fate is not the concern of the international community.

Refugee law operates as surrogate human rights protection. It is available to those whose home states will not, or cannot, protect them. As surrogate protection it is not robust: some human rights abuses will not qualify as 'persecution' within refugee law. The protection of refugee law aims at the most serious and discriminatory human rights infringements. To exclude an individual from this 'back up' protection system is a serious step indeed. It amounts to banishment from the community of the 'human' as defined by human rights. While Giorgio Agamben has asserted that the figure of the refugee is that of homo sacer – bare life without political community – this evocative analysis is not legal. For the international lawyer, the bare life figure is the individual excluded from even the refugee category. Like the earlier penalty of banishment, exclusion removes an individual to a space beyond community concern about even 'bare life'. This step must not be taken lightly or unknowingly. The exclusion creep evidenced in Canadian refugee jurisprudence is a human rights concern of the highest order.