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Resisting Criminal Organizations: Reconceptualizing the "Political" in International Refugee Law

Amar Khoday

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Article abstract

This article examines and reconstructs the term "political" in the 1951 *Convention Relating to the Status of Refugees*. Individuals may be eligible for refugee status if they can prove that they have a well-founded fear of persecution for, amongst other reasons, their political opinion. At the same time, individuals are excluded from obtaining refugee status where there are serious reasons for considering that they have committed a serious non-political crime. For those resisting persons or entities wielding oppressive power, the meaning of the term "political" in these provisions has particular importance. Where the targets of resistance are criminal organizations, however, courts and tribunals have been, for the most part, reluctant to recognize such resistance as manifesting a political opinion.

Given the demonstrated power of criminal organizations, this article contends that opposition to these entities should be viewed as being "political". Through an examination of the text, context, and purpose of the *Refugee Convention*, it argues that a broader understanding of the term "political" is reasonable if not compelling. The article examines the conflicting jurisprudence and discourse surrounding "political opinion" and "political crimes". Despite some strong voices in support of a more traditional state-centric interpretation, others have advanced more robust articulations that account for the dynamic nature and diversity of power transactions between citizens and powerful non-state actors. Finally, the article examines the substantial power of drug cartels and youth gangs in particular Central American states to illustrate that they exercise de facto control in substantial geographic spaces. As such, resistance to such entities should properly be viewed as "political" within the meaning of the *Refugee Convention*.

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Resisting Criminal Organizations: Reconceptualizing the "Political" in International Refugee Law

*Amar Khoday**

This article examines and reconstructs the term "political" in the 1951 *Convention Relating to the Status of Refugees*. Individuals may be eligible for refugee status if they can prove that they have a well-founded fear of persecution for, amongst other reasons, their political opinion. At the same time, individuals are excluded from obtaining refugee status where there are serious reasons for considering that they have committed a serious non-political crime. For those resisting persons or entities wielding oppressive power, the meaning of the term "political" in these provisions has particular importance. Where the targets of resistance are criminal organizations, however, courts and tribunals have been, for the most part, reluctant to recognize such resistance as manifesting a political opinion.

Given the demonstrated power of criminal organizations, this article contends that opposition to these entities should be viewed as being "political". Through an examination of the text, context, and purpose of the *Refugee Convention*, it argues that a broader understanding of the term "political" is reasonable if not compelling. The article examines the conflicting jurisprudence and discourse surrounding "political opinion" and "political crimes". Despite some strong voices in support of a more traditional state-centric interpretation, others have advanced more robust articulations that account for the dynamic nature and diversity of power transactions between citizens and powerful non-state actors. Finally, the article examines the substantial power of drug cartels and youth gangs in particular Central American states to illustrate that they exercise de facto control in substantial geographic spaces. As such, resistance to such entities should properly be viewed as "political" within the meaning of the *Refugee Convention*.

Cet article examine et reconstruit le terme « politique » tel qu'il apparait dans la *Convention relative au statut des réfugiés* de 1951. Un individu est admissible à l'obtention du statut de réfugié lorsqu'il craint, avec raison, d'être persécuté du fait de ses opinions politiques. Cependant, certains individus se voient privés du statut de réfugié lorsqu'il existe des raisons importantes de croire qu'ils ont commis un crime non politique grave. La signification du terme « politique » revêt donc une importance critique, particulièrement pour ceux qui sont engagés dans des actions de résistance contre des personnes ou des entités exerçant un pouvoir oppressif. Les cours et les tribunaux sont généralement réticents à caractériser de politique les activités de résistance aux organisations criminelles.

Considérant le pouvoir important que possèdent les organisations criminelles, cet article soutient que les activités de résistances à ces organisations criminelles devraient être considérées comme étant « politiques ». À travers un examen du texte, du contexte et de l'objectif de la *Convention*, l'auteur avance qu'une construction moins étroite du terme « politique » est à tout le moins raisonnable, sinon probante. Cet article examine la jurisprudence et les discours contradictoires relatifs à la compréhension des termes « opinion politique » et « crime politique ». Malgré un appui vocal pour l'interprétation traditionnelle limitant ce qui est politique au domaine de l'État, plusieurs soutiennent une articulation plus robuste tenant compte de la nature dynamique et des sources diverses du pouvoir. Enfin, cet article examine le pouvoir substantiel des cartels de drogues et des gangs de rue dans certains états de l'Amérique centrale de manière à illustrer comment ces organisations exercent un contrôle *de facto* sur de nombreux territoires. En ce sens, la résistance à de telles entités devrait être caractérisée de « politique » tel que défini par la *Convention*.

* Assistant Professor, Faculty of Law, University of Manitoba. The article is partly based on his DCL thesis completed at McGill University's Faculty of Law and supervised by Dr. Frédéric Mégret. The thesis was completed with the generous financial assistance of a Social Sciences and Humanities Research Council doctoral fellowship and the O'Brien Fellowship in Human Rights and Legal Pluralism. The author thanks the Legal Research Institute at the University of Manitoba for providing research funding, Steven Falkingham for providing research assistance on this article, and Dr. Umut Özsu, Yassir Alnaji, Kamala Sundararajan, and JiHyun Youn for their helpful reviews.

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> Political opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, *society*, or policy may be engaged.[1]
>
> United Nations High Commissioner for Refugees

> The [*Refugee Convention*] was intended to operate in a wider world. It was adopted to address the realities of "political crimes" in societies quite different from our own.[2]
>
> Justice Michael Kirby, High Court of Australia

Introduction

There is a long and established history[3] of individuals and communities[4] engaging in various forms of resistance[5] with the aim of confronting dominant or hegemonic[6] power.[7] In numerous instances, states—and the

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1 UNHCR, *Guidelines on International Protection*: *Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/01 (2002) at para 32 [UNHCR, *Guidelines*] [emphasis added].

2 *Minister for Immigration and Multicultural Affairs v Singh*, [2002] HCA 7 at para 106, 209 CLR 533 [*Singh*].

3 See Walter Kälin & Jörg Künzli, "Article 1F(b): Freedom Fighters, Terrorists, and the Notion of Serious Non-Political Crimes" (2000) 12:5 Intl J Refugee L 46; Gene Sharp, *Sharp's Dictionary of Power and Struggle: Language of Civil Resistance in Conflicts* (New York: Oxford University Press, 2012) at 1–2.

4 Communities can be defined in numerous ways. They may be constructed in relation to a cause. In addition, communities may be defined by particular or intersecting identities. However defined, communities have banded together to engage in collective acts of resistance (see e.g. Yongshun Cai, *Collective Resistance in China: Why Popular Protests Succeed or Fail* (Stanford: Stanford University Press, 2010); Steve Crawshaw & John Jackson, *Small Acts of Resistance: How Courage, Tenacity, and Ingenuity Can Change the World* (New York: Union Square Press, 2010); Nechama Tec, *Resistance: Jews and Christians Who Defied the Nazi Terror* (New York: Oxford University Press, 2013)).

5 Some forms of resistance are clearly overt while others may be subtler, but nevertheless undermine another's authority or power (see e.g. James C Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (New Haven: Yale University Press, 1990) at 136–82; James C Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (New Haven: Yale University Press, 1985) at xv–xvi [Scott, *Weapons of the Weak*]).

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

7 Resistance can often be conceptualized as the challenging of "power" held by elite groups (see e.g. Steve Pile, "Introduction: Opposition, Political Identities and Spaces of Resistance" in Steve Pile & Michael Keith, eds, *Geographies of Resistance* (London: Routledge, 1997) 1 at 1). In more recent years, some human geographers have reframed the discourse arguing that "power is operative in moments of both domination and resistance" (Joanne P Sharp et al, "Entanglements of Power: Geographies of Domina-

authority they wield—often serve as the main source of oppression against which resistance is mounted.[8] Yet, not all power exerted and imposed within a society resides in the authority of the state or is perpetrated by state actors. As political scientist and resistance scholar Gene Sharp asserts, "[a]t times the existing informal and noninstitutionalized power capacities and networks may modify, rival, or even surpass the actual power capacities of the official power structure."[9] Power is also situated within and is exercised in numerous social contexts by non-state actors—including within families,[10] social groups and communities,[11] work contexts,[12] and other social spaces.[13] The state in such circumstances is not necessarily directly involved.[14] Within such varied social contexts, power may be deployed oppressively and through the use or threat of force. A nuanced understanding of resistance must account for power that is situ-

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tion/Resistance" in Joanne P Sharp et al, eds, *Entanglements of Power: Geographies of Domination/Resistance* (New York: Routledge, 2000) 1 at 3). "[D]ominating power" can be defined as "that power which attempts to control or coerce others, impose its will upon others, or manipulate the consent of others" (*ibid* at 2). Furthermore, "dominating power can be located within the realms of the state, the economy and civil society, and articulated within social, economic, political and cultural relations and institutions" (*ibid*). By contrast, "resisting power" might be defined as "that power which attempts to set up situations, groupings and actions which resist the impositions of dominating power" (*ibid* at 3).

8 It should be noted that resistance to state authority does not always take place because the state's power is exercised oppressively. Indeed, the state's policies may be viewed as "progressive" but face resistance from conservative segments of the population. An example would include white resistance in the United States to the passage of civil rights legislation concerning racial discrimination.

9 Sharp, *supra* note 3 at 233.

10 See generally Rebecca Jaremko Bromwich, "Flight: Woman Abuse and the Hague Convention" in Ellen Faulkner & Gayle MacDonald, eds, *Victim No More: Women's Resistance to Law, Culture and Power* (Winnipeg: Fernwood, 2009); Allan Wade, "Small Acts of Living: Everyday Resistance to Violence and Other Forms of Oppression" (1997) 19:1 Contemporary Family Therapy 23.

11 See generally *Alli v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 479, 20 Imm LR (3d) 252; *Jonan v Canada (Citizenship and Immigration)*, 2009 FC 1219, 187 ACWS (3d) 516; Ruby Rohrlich, ed, *Resisting the Holocaust* (New York: Berg, 1998); Rachel L Einwohner, "Identity Work and Collective Action in a Repressive Context: Jewish Resistance on the 'Aryan Side' of the Warsaw Ghetto" (2006) 53:1 Social Problems 38.

12 See generally Scott, *Weapons of the Weak*, *supra* note 5; Robin DG Kelley, *Race Rebels: Culture, Politics, and the Black Working Class* (New York: Free Press, 1994).

13 These spaces may include educational institutions such as schools and universities. In the case of schools, see e.g. Donn Short, *"Don't Be So Gay!": Queers, Bullying, and Making Schools Safe* (Vancouver: UBC Press, 2013).

14 Though clearly state norms have an impact on intrafamilial relations (particularly with respect to dissolution of marriages, custody, and support payments) and work environments (through labour legislation and worker safety regimes).

ated in social environments and institutions outside of, and unaffiliated with, the state. Accordingly, in this article, I define resistance to include individual and/or collective acts that challenge the dominant or hegemonic power and authority of another individual, group, and/or entity—regardless of whether such authority is rooted in, or affiliated with, state power.[15]

Working from this recognition of non-state actors holding power, this article looks at the notion of resistance toward particular types of non-state oppression perpetrated by wealthy and well-armed criminal organizations and gangs. Such criminal organizations exercise considerable power in several countries. They impose their own unofficial norms and rules on those whom they control.[16] Annette Idler and James Forest assert that "[n]on-state actors—violent or otherwise—who have power over a local populace often play by a different set of rules than the formal governments of nation-states. Trust is established not by a legal system or formal contract between a leader and those governed, but by informal systems of traditional customs and moral codes."[17] In using the term "criminal organizations", I am not referring to organizations and groups with

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15 There are alternative definitions (see e.g. Sharp, *supra* note 3 defining resistance as "[o]pposition to a policy, activities, structure, domination, aggression, or attack by direct action. The opposition may be conducted by social, economic, or political forms of nonviolent struggle or by sabotage, guerrilla warfare, or military means" at 253). Of course there are some who argue that defining resistance can diminish it. Paul Routledge has pointed out that theorizing resistance is a problematic exercise, positing that "[t]he complex, contradictory, and lived nature of resistance is frequently erased, or at best generalized, in theoretical approaches" (Paul Routledge, "A Spatiality of Resistances: Theory and Practice in Nepal's Revolution of 1990" in Pile & Keith, *supra* note 7, 68 at 68). Furthermore, "attempts to theorize resistance have been fraught with an intellectual taming that transforms the poetry and intensity of resistance into the dull prose of rationality" (*ibid* at 68–69). Despite the hesitation and misgivings, Routledge explains that resistance refers to "any action, imbued with intent, that attempts to challenge, change, or retain particular circumstances relating to societal relations, processes, and/or institutions. These circumstances may involve domination, exploitation, subjection at the material, symbolic or psychological level" (*ibid* at 69).

16 That unofficial rules can be imposed on regular individuals is consistent with the teachings of legal pluralism. Legal pluralism recognizes that society is governed by more than the official norms of the state. See generally Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44:1 Osgoode Hall LJ 167 ("[l]aw is what the participants in social fields consider to be obligatory, the rules that they believe govern their conduct. Legal pluralism necessarily involves, then, a measure of deference to the internal perspective of the participants. Law is what carries a sense of obligation within the particular social setting—what operates as a standard for evaluating and controlling the conduct of participants in a social field" at 171–72); Sally Engle Merry, "Legal Pluralism" (1988) 22:5 Law & Soc'y Rev 869; Roderick A Macdonald, "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism" (1998) 15:1 Ariz J Intl & Comp L 69.

17 Annette Idler & James JF Forest, "Behavioral Patterns among (Violent) Non-State Actors: A Study of Complementary Governance" (2015) 4:1 Stability 1 at 2.

explicit aims or aspirations to overthrow the state or government in a particular country or to create an independent state. Such organizations are increasingly referred to as terrorist organizations—particularly where they employ violence—and, as such, could be viewed as a type of criminal organization.[18] In this article, my focus is on criminal organizations that have as their principal objectives the continuation of their unlawful business practices but which are not aimed at overthrowing a government or assuming the formal reins of power.[19]

The dominant power and oppression of such criminal organizations do not go unopposed. While governments confront such power, private citizens have also done so through various means: the use of force;[20] refusal to be forcibly conscripted;[21] rebuffing demands to carry out certain commands;[22] or by reporting such organizations' activities to the authorities.[23]

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18 See generally Geoff Gilbert, "Running Scared Since 9/11: Refugees, UNHCR and the Purposive Approach to Treaty Interpretation" in James C Simeon, ed, *Critical Issues in International Refugee Law*: *Strategies Toward Interpretative Harmony* (New York: Cambridge University Press, 2010) 85; Amar Khoday, "Tough on Terror, Short on Nuance: Identifying the Use of Force as a Basis for Excluding Resisters Seeking Refugee Status" (2015) 4:2 Can J Hum Rts 179.

19 There are scholars, however, who argue that criminal organizations like the Mexican drug cartels share certain similarities with terrorist organizations vis-à-vis their use of violent tactics against civilians. Indeed, some go so far as to argue that they should be designated as such (see Shawn Teresa Flanigan, "Terrorists Next Door? A Comparison of Mexican Drug Cartels and Middle Eastern Terrorist Organizations" (2012) 24:2 Terrorism & Political Violence 279; Sylvia M Longmire & John P Longmire IV, "Redefining Terrorism: Why Mexican Drug Trafficking is More than Just Organized Crime" (2008) 1:1 J Strategic Security 35).

20 See Patricio Asfura-Heim & Ralph H Espach, "The Rise of Mexico's Self-Defense Forces: Vigilante Justice South of the Border", *Foreign Affairs* (11 June 2013), online: <www.foreignaffairs.com/articles/mexico/2013-06-11/rise-mexico-s-self-defense-forces>; Catherine E Shoichet, "Mexican Forces Struggle to Rein in Armed Vigilantes Battling Drug Cartel", *CNN* (17 January 2014), online: <www.cnn.com/2014/01/17/world/americas/mexico-michoacan-vigilante-groups/>; Ioan Grillo, "Mexican Vigilantes Beat Back Ruthless Knights Templar Cartel", *Time* (29 January 2014), online: <time.com/5755/mexico-vigilantes-knights-templar-cartel-michoacan>; Nicole Crowder, "Vigilante Justice in the Heart of Southern Mexico's Drug War", *The Washington Post* (8 December 2014), online: <www.washingtonpost.com/news/in-sight/wp/2014/12/08/vigilante-justice-in-the-heart-of-mexico-drug-war/>.

21 See e.g. *Rodas-Orellana v Holder*, 780 F (3d) 982 (10th Cir 2015); *Umana-Ramos v Holder*, 724 F (3d) 667 (6th Cir 2013); *Matter of S-E-G*, 24 I&N Dec 579, Interim Decision 3617 (BIA 2008), online: <www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3617.pdf>; *Banegas v Canada (Citizenship and Immigration)*, 2015 FC 45, 249 ACWS (3d) 413.

22 See e.g. *Olvera v Canada (Citizenship and Immigration)*, 2012 FC 1048, 417 FTR 255 [*Olvera*]; *Correa v Canada* (*Citizenship and Immigration*), 2014 FC 252, 450 FTR 175 [*Correa*].

23 See e.g. *Olvera*, *supra* note 22; *Correa*, *supra* note 22.

Predictably, the story does not always end well for resisters. They are often subjected to or threatened with retribution including physical harm or death. Some flee and seek protection in a third party state and seek refugee status under the 1951 *Convention Relating to the Status of Refugees*[24] and/or the 1967 *Protocol Relating to the Status of Refugees*.[25] Resisters of criminal organizations, however, have not met with tremendous success in securing refugee status.[26]

In order to qualify for refugee status under article 1A(2) of the *Refugee Convention*, an individual must demonstrate, among other criteria, that they have a "well-founded fear" of persecution "for reasons of race, religion, nationality, membership in a particular social group or political opinion," and are unwilling or unable to return to their country of nationality or place of last habitual residence on account of such fear.[27] Many resisters may seek to obtain refugee status by asserting that they have a well-founded fear of persecution based on their political opinion—which may be imputed from their actions[28]—or membership in a particular social group.[29] With respect to proving an asylum claim based on political opinion, a resister must show that the persecutor seeks to persecute her because of her political opinion.[30]

Also relevant to those who have committed criminal acts as part of their resistance, article 1F(b) excludes individuals about whom there are serious reasons to consider have committed "serious non-political

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24 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) [*Refugee Convention*].

25 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) [*Protocol*].

26 See Ariadna Estévez, "The Endriago Subject and the Dislocation of State Attribution in Human Rights Discourse: The Case of Mexican Asylum Claims in Canada" (2015) 36:6 Third World Q 1160; James Racine, "Youth Resistant to Gang Recruitment as a Particular Social Group in *Larios v. Holder*" (2011) 31:2 Boston College Third World LJ 457.

27 *Refugee Convention*, *supra* note 24, art 1A(2).

28 See *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 103 DLR (4th) 1 [*Ward* cited to SCR] (stating that the "political opinion at issue need not have been expressed outright. In many cases, the claimant is not even given the opportunity to articulate his or her beliefs, but these can be perceived from his or her actions. In such situations, the political opinion that constitutes the basis for the claimant's well-founded fear of persecution is said to be imputed to the claimant" at 746–47); *Li v Gonzales*, 416 F (3d) 681 (7th Cir 2005) (defining a political opinion as "one that is expressed through political activities or through some sort of speech in the political arena" at 685).

29 It is worth noting that many may also attempt to assert that they have a well-founded fear of persecution based on their membership in a particular social group (see e.g. *Larios v Holder*, 608 F (3d) 105 (1st Cir 2010)).

30 See e.g. *Immigration and Naturalization Service v Elias-Zacarias*, 502 US 478, 112 S Ct 812 (1992) ("[t]he ordinary meaning of the phrase 'persecution on account of ... political opinion' in § 101(a)(42) is persecution on account of the *victim's* political opinion, not the persecutor's" at 482 [emphasis in original]).

crime[s]."[31] By implication, the phrasing permits those who have engaged in political crimes to avail themselves of the protections of the *Refugee Convention*, assuming all other requirements have been met and no other exclusion clauses apply.[32]

In law, the interpretation of a word or distinct phrase can have a substantial impact on whether an individual may successfully assert her legal rights[33] and/or access certain remedies or benefits.[34] An important aspect to many claims by resisters seeking refugee status on the basis of a political opinion is the interpretation of the term "political" as it modifies the words "opinion" and "crime" in articles 1A(2) and 1F(b) respectively. A court or tribunal's conceptualization or interpretation of "political" in the context of these provisions can affect the lives of asylum seekers in profound ways. As I shall discuss in this article, such interpretations of the term "political" are particularly relevant to those opposing powerful criminal organizations.

Constructing definitions for these and other terms in the *Refugee Convention* has been left to institutions of contracting states—typically a state's legislature, courts, tribunals, and officials. There is of course a role for international and regional organizations or agencies to play in the in-

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31 *Refugee Convention*, *supra* note 24, art 1F(b).

32 It is perhaps important to note here that numerous jurisdictions, through legislative means, have placed significant limits on the political crimes definition either directly or indirectly (see generally Khoday, *supra* note 18).

33 See e.g. *Canada (Attorney General) v Mossop*, [1993] 1 SCR 554, 100 DLR (4th) 658 (interpreting the breadth of "family status" under federal human rights legislation to determine whether it includes discrimination of common law same-sex spouses); *Canada (Attorney General) v Johnstone*, 2014 FCA 110, [2015] 2 FCR 595 (construing the scope of "family status" under federal human rights law to ascertain whether it incorporates denial of an individual's childcare needs through workplace scheduling arrangements); *Canada (Citizenship and Immigration) v B472*, 2013 FC 151, [2014] 3 FCR 510 (assessing the meaning of "membership in a particular social group" under federal immigration legislation and whether it encompasses Tamils on a ship arriving in Canada and seeking refuge); Doug Coulson, "British Imperialism, the Indian Independence Movement, and the Racial Eligibility Provisions of the Naturalization Act: *United States v. Thind* Revisited" (2015) 7:1 Geo JL & Modern Critical Race Perspectives 1 (examining the controversy surrounding the scope of the term "white persons" in citizenship legislation).

34 See e.g. *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471 [*Mowat*] (concluding that the term "expenses" does not incorporate "costs"); *King v Burwell*, 135 S Ct 2480, 192 L Ed (2d) 483 (2015) (determining that the United States government's establishment of an exchange in Virginia qualified as an "Exchange established by the State" such that taxpayers who enrolled in that system would earn tax credits for purchasing health insurance).

terpretation process.[35] At the international level, there is the United Nations High Commissioner for Refugees (UNHCR). However, while the UNHCR has a supervisory role with respect to the application of the *Refugee Convention*, pursuant to article 35, its interpretations are by no means binding[36] (though they have been accepted as highly persuasive in some jurisdictions[37]). In the absence of a centralized international institution (e.g., a court, tribunal, or committee) that is properly constituted to adjudicate and resolve differences amongst state interpretations of the key terms of the *Convention*, domestic officials, courts, and tribunals have the primary task of interpreting its terms.[38]

In the case of individuals resisting the power of criminal organizations, a number of courts and tribunals have concluded that persecution of resisters by such organizations is not on account of the resisters' political opinion. In many cases, resisters' opinions are not seen as "political" but rather concern opposition to criminal conduct. While refugee law jurisprudence recognizes that non-state actors may be considered agents of

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35 Regional organizations have played a role in developing refugee protection mechanisms. For example, the Organization of African Unity created the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974) [*OAU Refugee Convention*]. As an example of how such bodies may redefine or expand the definition of certain terms, see article 1(2) of the *OAU Refugee Convention*, which defines "refugee" in terms broader than those which are found in the 1951 *Refugee Convention*. The *OAU Refugee Convention*, for example, does not confine the conferral of refugee status solely to those fleeing because of a well-founded fear of persecution, but also extends protection to those compelled to flee on account of "external aggression, occupation, foreign domination or events seriously disturbing public order" (*ibid*, art 1(2)). See also Marina Sharpe, *The 1969 OAU Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status Determination* (Geneva: UNHCR, 2013), online: <www.unhcr.org/50f9652e9.pdf>.

36 See James C Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge: Cambridge University Press, 2014) at 3.

37 See *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at para 46, 128 DLR (4th) 213; *Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at para 37, 282 DLR (4th) 413; *T v Secretary of State for the Home Department*, [1996] UKHL 8, [1996] AC 742 at 786 [*T v Home Secretary*]; *R v Secretary of State for the Home Department, Ex parte Adan*, [2000] UKHL 67, [2001] 2 AC 477 at 520; *Horvath v Secretary of State for the Home Department*, [2000] UKHL 37, [2001] 1 AC 489 at 515; *Immigration and Naturalization Service v Cardoza-Fonseca*, 480 US 421 at 439, 107 S Ct 1207 (1987).

38 See Hathaway & Foster, *supra* note 36 at 3; Gilbert, *supra* note 18 ("[t]here is no International Refugee Court or Tribunal to oversee treaty interpretation. This means that protection of refugees through the 1951 Convention is dependent on domestic legislation and national judges" at 93). Hathaway and Foster also point out that because the terms of the *Refugee Convention* are interpreted through various political, cultural, and social lenses, diverging interpretations could dangerously lead to fragmentation and inconsistent interpretations (Hathaway & Foster, *supra* note 36 at 3–4).

persecution, there has generally been some connection between such persecutors and the state, even if such a connection is antagonistic and adversarial.[39] In some cases, criminal activity permeates state action.[40] Absent such connections, criminal activity and political power are viewed as almost mutually exclusive.[41]

In this article, I argue that what constitutes the term "political" within the context of articles 1A(2) and 1F(b) of the *Refugee Convention* needs to account for the substantial power held by criminal organizations within particular societies, and that challenges to their power can be considered "political" in their own right.[42] A broader interpretation is justified when accounting for the human rights purpose underlying the *Convention*, contextual support, as well as textual silence (given that the *Convention* does not specifically forbid a broader interpretation).

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39 Where opposition is mounted against a non-state organization that explicitly advances political goals, such opposition may be seen as manifesting a political opinion (see e.g. *Gonzales-Neyra v Immigration and Naturalization Service*, 122 F (3d) 1293 (9th Cir 1997) [*Gonzales-Neyra*]; *Delgado v Mukasey*, 508 F (3d) 702 (2nd Cir 2007) [*Delgado*]; *Borja v Immigration and Naturalization Service*, 175 F (3d) 732 (9th Cir 1999); *Tarubac v Immigration and Naturalization Service*, 182 F (3d) 1114 (9th Cir 1999); *Ward*, *supra* note 28). In some cases, where the state has been significantly diminished in terms of its control over a given territory, organizations now controlling that space may be seen as substituting the state and any persecution that is committed by the organization may be seen as political (see e.g. Federal Constitutional Court, *Afghanistan Political Persecution Case*, Case Nos 2 BvR 260 and 1353/98, 130 ILR 687 (Germany) [*Afghanistan Case*]; Federal Constitutional Court, *Tamils' Political Persecution Case*, Case Nos 2 BvR 502, 961 and 1000/86, 130 ILR 587 (Germany)).

40 See e.g. *Vassiliev v Canada (Minister of Citizenship and Immigration)*, 131 FTR 128, 1997 CanLII 5394 [*Vassiliev*]; *Demchuk v Canada (Minister of Citizenship and Immigration)*, 174 FTR 293, 1999 CanLII 8677; *Klinko v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FCR 327, 184 DLR (4th) 14 [*Klinko*].

41 See *Yoli v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1329, 226 FTR 48 [*Yoli*]; *Neri v Canada (Citizenship and Immigration)*, 2013 FC 1087, 441 FTR 206; *Bencic v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 476, [2002] FCJ No 623 [*Bencic*]; *Cyriaque v Canada (Citizenship and Immigration)*, 2010 FC 1077, 194 ACWS (3d) 1232; *Lozano Navarro v Canada (Citizenship and Immigration)*, 2011 FC 768, 392 FTR 239; *RPD File No TB1-01602*, [2012] RPDD No 640 (QL), 2012 CanLII 100181 (IRB); *Moreno Sandoval v Canada (Citizenship and Immigration)*, 2012 FC 1273, 221 ACWS (3d) 946. But see *Vargas v Canada (Citizenship and Immigration)*, 2011 FC 543, 202 ACWS (3d) 805. In *Vargas*, the Immigration and Refugee Board's (IRB) decision turned on whether there was an internal flight alternative. The Federal Court held that the IRB had unreasonably concluded that there was an internal flight alternative because the IRB did not properly address documentary evidence that the drug cartels have substantial power over areas that they control.

42 I hasten to add that various jurisdictions may provide other forms of protection not based in the *Refugee Convention* and which may afford alternative protections to the types of actors discussed in this article. While it may be worthwhile to examine the application of those provisions for such resisters, an examination of this type is outside the scope of this article.

This article is divided into four parts. Drawing from the *Vienna Convention on the Law of Treaties*,[43] Part I examines the text, context, and purpose of the *Refugee Convention*. Specifically, I examine the text of articles 1A(2) and 1F(b) to determine whether there are any textual or contextual limitations to a broader interpretation of the term "political". I then proceed to examine whether a broader interpretation of "political" is supported by the purpose(s) of the *Refugee Convention*. In recent years, when engaging in legal or statutory interpretation, the Supreme Court of Canada has also explicitly turned to three broad categories for analytical assistance: text, context, and purpose. Where human rights legislation is being interpreted, there is typically a broad and purposive interpretation given. However, a broad and purposive interpretation will not supersede textual limitations supported by contextual sources—including legislative history as well as domestic and foreign jurisprudence interpreting the relevant legal terms in question.[44] As will be argued below, the textual silence and broad purpose of the *Refugee Convention* support a generous interpretation of "political". However, the contextual evidence is more mixed and will be discussed in two of the three remaining parts of the article.

Parts II and III discuss some of the current interpretations of what is considered "political" with respect to the terms "political opinion" and "political crimes" within the *Refugee Convention*.[45] As I illustrate in Part II, the narrower interpretations of "political opinion" or "political crimes" require some connection between the object or target of the opinion or crime and the state. This needed connection to the state is contrasted with other interpretations, discussed in Part III, which take a much broader view of the term "political" and focus on the exercise of power, regardless of whether it is the state exercising it. As such, in connection with articles 1A(2) and 1F(b), what is "political" may also relate to opinions concerning, or crimes that are directed at, non-state actors, groups, or organizations that hold and exercise power within a given society.

In the fourth and final part, I examine the growing power exercised by certain criminal organizations that engage in dominant and oppressive power, namely drug cartels and youth gangs. Their control is increasingly all-encompassing in certain areas of the countries in which they are situ-

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43 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) [*Vienna Convention*].

44 See *Mowat*, *supra* note 34 at para 62.

45 In focusing on the term "political", I do not intend to suggest that there may not be other controversies surrounding whether the refugee definition has been met. There may be issues surrounding the credibility of the asylum seeker, the existence of a well-founded fear of persecution, the availability of an internal flight alternative, or reasons to exclude them on the basis of non-political criminal activity.

ated. Given this power, I argue that resistance against such criminal organizations should be given recognition under the *Convention* as political acts that serve as a manifestation of a political opinion and/or a political crime as the case may be.

I. Text, Context, and Purpose

How does one undertake the process of interpreting the provisions of an international treaty? Typically, state and international institutions rely on the *Vienna Convention on the Law of Treaties* for such guidance.[46] Article 31 provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[47] The *Vienna Convention* states that the context is comprised of the preamble and annexes to a treaty.[48] The *Vienna Convention* also provides that certain other materials together with context shall be taken into account when interpreting treaties. They include: "(a) [a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; [and] (c) [a]ny relevant rules of international law applicable in the relations between the parties."[49] Lastly, the *Vienna Convention* allows for recourse to

> supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) [l]eaves the meaning ambiguous or obscure; or (b) [l]eads to a result which is manifestly absurd or unreasonable.[50]

Drawing from the *Vienna Convention*, Hathaway and Foster emphasize that a key component to interpreting the *Refugee Convention* is that it must be undertaken in good faith as provided for in article 31(1). Rooted in their readings of International Court of Justice decisions, Hathaway and Foster argue that a good faith interpretation "requires an effort to en-

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46 *Supra* note 43.

47 *Ibid*, art 31(1).

48 *Ibid*, art 31(2). The article also provides that context includes: "(a) [a]ny agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; [and] (b) [a]ny instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." No such agreement or instrument plays a role here.

49 *Ibid*, art 31(3).

50 *Ibid*, art 32.

sure that the treaty can continue to function within its *present social reality and contemporary legal context*."[51] It also requires attention toward ensuring the *Refugee Convention*'s effectiveness.[52] Such considerations demand, following the International Law Commission, that where a treaty is open to two interpretations, one of which enables the "appropriate effects, good faith, and the objects and purposes of the treaty" and the other which does not, the former should be chosen.[53]

Given the importance of the *Refugee Convention* as an international human rights instrument, some jurists have also argued for a purposive and "living instrument" approach to its interpretation.[54] For instance, Lord Bingham of the House of Lords wrote: "It is ... plain that the convention must be seen as a living instrument in the sense that while its meaning does not change over time its application will."[55] He then quoted Lord Sedley who asserted that unless the *Convention* "is seen as a living thing, adopted by civilised countries for a humanitarian end which is constant in motive but mutable in form, the Convention will eventually become an anachronism."[56]

In arguing for a broader definition of the word "political" as it appears in article 1 of the *Refugee Convention*, and in light of the foregoing, I shall briefly examine the text, context, and purpose of the *Refugee Convention*. With respect to the text, it is worth noting that neither article 1A(2) nor article 1F(b) (nor surrounding provisions) provide any explicit definitions for the terms "political", "political opinion", or "serious non-political crimes". The text itself is silent. Drawing from this silence, one can plausibly argue that the terms "political opinion" or "political crimes" do not, by textual necessity, have to be tied solely to the policies or activities of

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51 Hathaway & Foster, *supra* note 36 at 6 [emphasis in original].

52 See *ibid*.

53 International Law Commission, "Draft Articles on the Law of Treaties with Commentaries" (1996) 2 YB Intl L 187 at 219.

54 However, it should be noted that other jurists have combined a "living instrument" approach with examining contextual documents such as the preparatory works (see Joseph Rikhof, *The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law* (Dordrecht: Republic of Letters, 2012) at 93–95).

55 *Sepet (FC) and another (FC) v Secretary of State for the Home Department*, [2003] UKHL 15 at para 6, [2003] 3 All ER 304.

56 *Ibid*, citing *R v Immigration Appeal Tribunal, Ex parte Shah*, [1997] Imm AR 145 at 152. See also *Gomez v Secretary of State for the Home Department*, No HX/52680/2000, [2000] INLR 549 (UK IAT) [*Gomez*] ("[i]n keeping with the proper interpretation of an international treaty a broad purposive construction must be accorded to all five Convention grounds, including the political opinion ground" at para 21).

state actors and/or institutions.[57] Indeed, as I discuss in Part III of this article, the UNHCR has advanced a more robust interpretation of "political opinion".

A more generous interpretation of the term "political" that connects political crimes committed against, or political opinions held about, non-state actors or entities by the resister coheres with the broad purposes of the *Refugee Convention* as set out in its preamble (the context). Such purposes include the protection of human rights in the face of a well-founded fear of persecution. Evidence of this connection to human rights can be found in the first clause of the preamble, which states: "the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination."[58] This commitment to human rights protections was echoed in part in *Canada (Attorney General) v. Ward*, where the Supreme Court of Canada asserted that underlying the *Refugee Convention* "is the international community's commitment to the assurance of basic human rights without discrimination,"[59] particularly where there is a lack of state protection one should be able to expect from one's own state.[60] When interpreting the notion of "membership in a particular social group"—a separate ground within the *Refugee Convention*—the Supreme Court explained that the meaning assigned to this ground "should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative."[61] This broad human rights-centric approach should apply equally to defining political opinions or political crimes within the framework of the *Convention*. In a "starred" precedential decision by the United Kingdom's Immigration Appeals Tribunal (IAT), the IAT asserted that, with

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57 See Andreas Zimmermann & Claudia Mahler, "Article 1 A, para. 2" in Andreas Zimmermann, Felix Machts & Jonas Dörschner, eds, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*: *A Commentary* (Oxford: Oxford University Press, 2011) 281 (a "liberal interpretation of the term 'political' is not only indicated by the ordinary meaning of 'political opinion', but further confirmed by the fact that Art. 1 A, para. 2 does not contain any explicit restriction of the term 'political opinion'" at 399).

58 *Refugee Convention*, *supra* note 24, preamble, para 1 [footnotes omitted].

59 *Ward*, *supra* note 28 at 733.

60 *Ibid* at 709. See also Guy S Goodwin-Gill & Jane McAdam, *The Refugee in International Law*, 3rd ed (New York: Oxford University Press, 2007) ("[e]ssential as it is to the preservation of life and liberty, the right to seek asylum from persecution and the threat of torture or other relevant harm is no substitute for the fullest protection of human rights at home" at 4).

61 *Ward*, *supra* note 28 at 739. The Supreme Court of Canada reaffirmed this purpose when interpreting the scope of article 1F(c) in *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 56, 160 DLR (4th) 193.

respect to an interpretation of political opinion, an interpretation "must not narrow the definition of political beyond recognition nor rely on intricate distinctions of definition that might deny political opinion status in contexts where a broad usage would accord it."[62]

The *Vienna Convention*, as mentioned above, permits the consultation of preparatory work (*travaux preparatoires*) to a treaty. There appears to be little direct discussion about the definition of the term "political" in the preparatory work to the *Refugee Convention*. With respect to "political opinion", there was consensus that political opinions were not limited to opinions by members of a political elite (e.g., diplomats who have fallen into disgrace with their own government or party members whose political party had been outlawed by the governing party), but also included members of the general public when, for example, they were fleeing a revolution.[63] There is little to suggest any explicit limitations to the term "political" with respect to "political crimes" such that the targets had to be state actors or those vying to be state actors.

An analysis of the text, context, and purpose of the *Refugee Convention* suggests that a more expansive interpretation of the term "political" could be sustained. There is nothing in the *Refugee Convention* that explicitly limits a broader interpretation of the term "political". Furthermore, given the broad human rights-focused purpose of the *Convention*, a more generous interpretation might be supported. However, given that there is a lack of a centralized international tribunal, court, or committee to provide authoritative pronouncements on such definitional issues, one cannot ignore any relevant legislation as well as jurisprudence of courts and tribunals of various contracting states to the *Refugee Convention*.[64] I turn to these sources next.

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62 *Gomez*, *supra* note 56 at para 21.

63 See Zimmermann & Mahler, *supra* note 57 at 400.

64 Domestic courts have a role to play in the development of international law, particularly in connection with international refugee law (see e.g. *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678, where the Supreme Court of Canada, examining the concept of complicity as it applies to article 1F(a) of the *Refugee Convention*, looked not only to international judgments but also those of domestic courts). Such examinations of domestic jurisprudence are also reflected in *R (on the application of JS) (Sri Lanka) v Secretary of State for the Home Department*, [2010] UKSC 15, [2011] 1 AC 184. See also Rikhof, *supra* note 54 at 245–46, 253.

II. Assessing the State of the "Political"—Narrow Frames

A. Political Opinions

A substantial number of courts and refugee tribunals have dealt with cases relating to persecution on the basis of "political opinion" in the context of the *Refugee Convention*.[65] As noted above, there is no definition of political opinion located in the *Refugee Convention* itself. Despite the lack of an established definition, the Supreme Court of Canada has nevertheless adopted an explicit definition of political opinion that emphasizes the connection between the state and the term "political".[66] While other jurisdictions have not specifically defined the meaning of the term "political", there is a considerable and perhaps unsurprising emphasis in court and tribunal decisions that the concept of political opinion is, at the very least, concerned with express or imputed opinions about state or government matters. The Australian Refugee Review Tribunal, for example, states that "the phrase 'political opinion' includes instances where the Applicant holds political opinions not tolerated by the authorities, which are critical of their policies and/or methods."[67] The Tribunal concluded that a "'[p]olitical opinion' within the terms of the Convention includes the perception by the authorities that an applicant has political opinions hostile to those of the *government* of their nationality."[68] Within the narrower parameters of understanding political opinions as opinions relating to the state, courts have been willing to adopt a broad definition as to what constitutes the "state" for the purpose of interpreting political opinions. Australian and United States courts, for example, have explained that political opinions do not have to refer to or solely fit within the sphere of party politics as understood in parliamentary democracies, but can relate to the actions of instrumentalities or institutions of the state, including its police and armed forces.[69]

Yet, is it possible for legal interpretations of political opinions to contemplate opinions (or acts from which political opinions may be imputed) about the policies and/or conduct of non-state actors, groups, or organizations that exercise substantial power within a given society? Court and

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65 As the United Kingdom's Immigration Appeal Tribunal asserted, political opinion is the most commonly invoked ground under the *Refugee Convention* (see *Gomez*, *supra* note 56 at para 18).

66 See *Ward*, *supra* note 28 at 746.

67 *N93/00933*, [1995] RRTA 23 at 5 (Australia RRTA).

68 *Ibid* [emphasis added].

69 See e.g. *C and S v Minister for Immigration and Multicultural Affairs*, [1999] FCA 1430, 94 FCR 366; *Desir v Ilchert*, 840 F (2d) 723 (9th Cir 1988).

tribunal decisions suggest that while some recognition is given to this possibility, any developments in this direction are still largely restrained and tentative. Fundamentally, the jurisprudence suggests that where opposition to non-state actors is considered to be a manifestation of a political opinion, it is where the non-state actor or entity seeks to overthrow or challenge the government.[70] As I shall explain below, and drawing from Canadian jurisprudence as an illustration, the spectre of the state still looms large when contemplating the meaning of the term "political opinion".

The Supreme Court of Canada adopted Guy S. Goodwin-Gill's definition of a "political opinion" as "any opinion on any matter in which the machinery of state, government, and policy may be engaged."[71] In adopting this formulation, the Court rejected a narrower definition constructed by Atle Grahl-Madsen, who characterized political opinions as those "contrary to or critical of the policies of the government or ruling party."[72] In the Court's view, the Goodwin-Gill definition offered more protection, particularly to persons threatened by non-state groups not allied to and perhaps even opposed to the government because of their real or perceived political perspectives.[73]

Even accounting for the broad nature of this definition, the presence of the state and its association with what is "political" still persists. While the Supreme Court of Canada's chosen definition does not require that a political opinion concern the state directly, it must still be on a matter in which the state, government, and policy may be engaged. Thus a political opinion can be directed at the actions or policies of a non-state entity provided it is at least on a matter in which the state may be engaged. The facts of the *Ward* case illustrate this state-centric approach even where the opinion directly relates to the conduct of non-state actors.

In *Ward*, the asylum applicant (a national of both Britain and Ireland) was a former member of the Irish National Liberation Army (INLA).[74] The INLA was a paramilitary group that was dedicated to the reunifica-

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70 See e.g. *Delgado*, *supra* note 39; *Gonzales-Neyra*, *supra* note 39.

71 *Ward*, *supra* note 28 at 746. Others reject the idea of even formulating a definition of "political opinion" (see e.g. *Refugee Appeal No 76339* (23 April 2010) (NZ RSAA), online: <forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref_20100423_76339.pdf> [*Refugee 76339*] ("[t]he better view is that what is a political opinion is not a matter of definition but depends on the context of the case" at para 88)).

72 *Ward*, *supra* note 28 at 746.

73 *Ibid*.

74 *Ibid* at 699–701, 751.

tion of Northern Ireland with the Republic of Ireland.[75] Ward voluntarily joined the INLA and was assigned soon after to guard two hostages kidnapped by the group.[76] After being ordered to execute these hostages, however, Ward disobeyed the orders as an act of conscience and furthermore helped these hostages to escape.[77] After the police informed an INLA operative that one of its members helped the hostages escape, the group suspected Ward of being this member.[78] Subsequent to torturing him, the INLA "prosecuted" Ward in a "court proceeding" and finally sentenced him to death.[79] Ward, however, managed to escape and sought police protection.[80] The government then prosecuted Ward for his role in the kidnapping of the two British hostages while his wife and children were themselves taken hostage by the INLA to ensure that Ward did not reveal information.[81] After being released, Ward fled to Canada fearing persecution by the INLA.[82]

The Supreme Court of Canada held that Ward may be eligible for refugee status on the basis of a well-founded fear of persecution in connection with his political opinion.[83] It determined that Ireland, by its own acknowledgement, lacked the capability to protect Ward.[84] The case was to be remanded in order to determine whether Britain was capable of providing state protection.[85] In recognizing his potential eligibility for refugee status, the Court observed that from his act of helping the hostages to escape, "a political opinion related to the proper limits to means used for the achievement of political change can be imputed."[86] While Ward's political opinion was directly related to the INLA's activities and policies in seeking such political change, it was still inexorably connected to matters in which both Great Britain and the Republic of Ireland were en-

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75 See *ibid* at 745.

76 See *ibid* at 699–700.

77 See *ibid* at 700. Ward stated in *viva voce* testimony, "[t]hey were innocent people. ... I could not live with my own conscience if I permitted this to go on. The decision I came to in my own mind was to try to release him" (*ibid* at 748).

78 See *ibid* at 700.

79 *Ibid*.

80 See *ibid*.

81 See *ibid* at 700–01.

82 See *ibid*.

83 See *ibid* at 745–50.

84 See *ibid* at 722–23.

85 See *ibid* at 754.

86 *Ibid* at 747.

gaged.[87] Although the Court never specifically identified what these matters were, they would reasonably include the matter of Northern Ireland's secession from Britain and reunification with the Republic of Ireland[88] as well as matters of national security and public safety posed by the actions of the INLA and other groups like the Provisional Irish Republican Army.

In maintaining a conceptual nexus between the state and what is "political", the *Ward* Court sought to emphasize that "[n]ot just any dissent to any organization will unlock the gates to Canadian asylum; the disagreement has to be rooted in a political conviction."[89] The Court articulated that this emphasis on political conviction as applied in the *Ward* case "would preclude a former Mafia member, for example, from invoking it as precedent."[90] By using the Mafia metaphor, it signals the Court's refusal to accord opposition to criminal entities that are presumptively unconnected to the state (or the exercise of state power) as falling within the parameters of the "political".[91] Lower courts in Canada following *Ward* have similarly held that opposition to criminality or criminal organizations does not constitute a political opinion.[92] In *Vassiliev v. Canada (Minister of Citizenship and Immigration)*, the Federal Court observed: "Refusing to participate in criminal activity, while laudable, has often been found not to be an expression of political opinion."[93] The judge posited that the Federal Court's jurisprudence has "found that opposition to criminal activity

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87 See *ibid* at 751 (both countries were identified as countries of nationality since Ward held citizenship in both Britain and Ireland).

88 The Federal Court of Appeal would later identify secession as a matter in which the British and Irish governments may have been engaged for the purposes of the Goodwin-Gill definition (see *Klinko*, *supra* note 40 at para 26).

89 *Ward*, *supra* note 28 at 750.

90 *Ibid*.

91 Where a non-state political entity is able to exercise control over a particular geographic area and effectively displace the state, opposition to that entity can be seen as a manifestation of a political opinion. In connection with this point, the German Federal Constitutional Court has emphasized that opposition to non-state groups which exercise state-like functions where the state has been displaced and control has effectively been assumed by "state-like" organizations, persecution by such organizations can be considered "political" (see *Afghanistan Case*, *supra* note 39 at 692). See also *Re X*, 2003 CanLII 55294 (IRB) (holding that it was a manifestation of political opinion when a Tamil Sri Lankan asylum seeker refused to give information to the Liberation Tigers of Tamil Eelam regarding arms sales to the Sri Lankan government).

92 See e.g. *Averine v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1395, 2000 CanLII 16073 at paras 18–21; *Bencic*, *supra* note 41 at paras 16–18; *Yoli*, *supra* note 41 at paras 26–28; *Ivakhnenko v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1249, 134 ACWS (3d) 131; *Suvorova v Canada (Citizenship and Immigration)*, 2009 FC 373 at para 14, [2009] FCJ No 443; *Refugee 76339*, *supra* note 71.

93 *Supra* note 40 at para 13.

per se is not political expression."[94] The court proceeded to indicate that an example of this opposition included informing the authorities about the activities of drug traffickers.[95]

Judicial resistance to recognizing an asylum seeker's opposition to a criminal organization as an expression of a political opinion finds voice in *Yoli v. Canada (Minister of Citizenship and Immigration)*.[96] In *Yoli*, an asylum seeker was targeted by a youth gang for leaving the outfit because of his opposition and refusal to take part in their criminal conduct, which included murder, extortion, and drug dealing. While the Immigration and Refugee Board (IRB) concluded that the group Yoli feared was a criminal gang, it believed there was no persuasive evidence that Yoli's opposition to the gang's criminal activities was, according to the *Ward* definition, a "matter in which the machinery of the state, government and policy may be engaged."[97] The IRB also asserted that although the criminal gang in question may have been used by some political parties as part of a "rent-a-mob" strategy, there was no evidence that the gang and the state were so intertwined such that a failure to cooperate with the gang implied "opposition to the state apparatus."[98] This decision was affirmed by the Federal Court as being reasonable. The court reiterated the prevailing Canadian jurisprudential understanding that "[r]efusing to participate in criminal activity, witnessing and/or reporting a crime have generally been found by this Court not to be in and of themselves expressions of political opinion attracting Convention refugee protection."[99]

This prevailing attitude was also applied in a case of resistance against a powerful drug cartel in Colombia. In *Suarez v. Canada (Minister of Citizenship and Immigration)*, the asylum seeker had informed on the cartel and subsequently experienced retaliation.[100] The IRB concluded, and the Federal Court agreed, that Suarez's fear was not on account of his perceived political opinion.[101] The court stated that there "was no political content or motivation to his action, comparable to that which existed in the *Ward* case."[102] It is worth noting that Ward's opposition to killing innocent persons (criminal acts) was predicated on a sense of moral con-

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94 *Ibid*.

95 See *ibid*.

96 *Supra* note 41.

97 *Ibid* at para 11.

98 *Ibid*.

99 *Ibid* at para 27.

100 64 ACWS (3d) 1196 at para 1, 1996 CarswellNat 1221 (WL Can).

101 *Ibid* at paras 2, 5.

102 *Ibid* at para 5.

science[103] while Suarez's act of informing on the cartel was (according to the Minister) based, in part, on his moral and ethical opposition to drug cartel activity (activity which Suarez was asked to support). Both the INLA and the cartel exercised power but the former was clearly motivated by a traditional political objective, namely, one that is connected to overthrowing the state. As I demonstrate later in this article, drug cartels and youth gangs are not apolitical actors and in many ways are recognized as de facto political actors.

Not all opposition to criminality, however, is seen as apolitical. Resisting criminality may be construed as an act of political opposition where there is a strong nexus between non-state criminal actors and the state, including its agencies and actors. As such, courts and tribunals have recognized that opposition to criminal activity may be considered a manifestation of a political opinion. For instance, in *Berrueta v. Canada (Minister of Citizenship and Immigration)*, two organized crime figures were significantly tied to a local governor (one served as the secretary to the governor) and controlled the police. Both individuals were viewed as being able to act with impunity.[104] The question that the IRB failed to determine was whether, in light of this jurisprudence, opposition to the two criminals was in fact opposition to the government, and the court remanded the case back to the IRB to make a determination.

Thus while violence or threats of violence in response to opposition to state actors engaged in criminal activity (e.g., whistleblowing on the corrupt activities of state actors) will be encompassed within the rubric of a political opinion, the same reaction garnered by whistleblowing on criminals with no connection to the state may not. This exclusion is regardless of the extent of the actual power such criminal actors may exercise. Accordingly, a non-state entity's connection to the state is a necessary piece of the political opinion analysis (whether because it is allied to the state or in opposition and seeking to overthrow it).[105]

In the next section, I examine whether this connection to the state is as significant within the framework of interpreting the notion of "political crimes" based in article 1F(b) of the *Refugee Convention*.

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[103] See *Ward*, *supra* note 28 at 700.

[104] 109 FTR 159 at para 1, 1996 CarswellNat 321 (WL Can).

[105] This line of reasoning is not unproblematic. Even if one does not recognize such non-state criminal actors as political, it could be reasonably argued that opposition to criminal organizations or gangs manifest an opinion on matters concerning criminal activity, crime reduction, and crime prevention and, furthermore, that these are matters in which the state, government, and policy may be engaged. Accordingly, they may be seen as manifesting a political opinion.

B. Political Crimes

The nexus between the state and what is deemed "political" has been just as, if not more, pronounced in connection with "political crimes", under article 1F(b) of the *Refugee Convention* and under extradition law (where the political crimes doctrine first originated), as it has been in the case of political opinions under article 1A(2) of the *Convention*. For instance, as an express statement of this connection within the extradition context, the Supreme Court of India proclaims that "politics are about Government and therefore, a political offence is one committed with the object of changing the Government of a State or inducing it to change its policy."[106] Similarly, the British House of Lords has asserted that a crime is political in relation to article 1F(b) if, among other factors, "it is committed for a political purpose, that is to say, with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy."[107] As part of the overall evaluation, the majority posited that an examination must be made as to whether the targets were government or military targets on the one hand or civilian on the other.[108]

With respect to the conceptual nexus between the "political" and the state in the context of political crimes, the connection dates back to its earliest inception. Throughout the history of the political crimes doctrine within both refugee law and extradition law, the concept of political crimes has been strongly tied to protecting individuals opposing their own governments.[109] Of course, it is not just any government. As one United States federal court posited, the political crimes doctrine was specifically

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106 *Rajendra Kumar Jain v State Through Special Police Establishment*, 1980 SCR (3) 982 at 998–99, 1980 AIR 1510 (India). The British House of Lords articulated a very similar formulation in an earlier extradition case (see *Cheng v Governor of Pentonville Prison*, [1973] AC 931 at 945, [1973] 2 WLR 746).

107 *T v Home Secretary*, *supra* note 37 at 786–87.

108 See *ibid* at 787. There appears to be some support for this position amongst Canadian courts (see *Sing v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125 at para 62, 253 DLR (4th) 606).

109 The political crimes exception was first incorporated into extradition treaties. When the *Refugee Convention* was being drafted, some state delegates felt that refugee protection should not be extended to ordinary criminals but should extend to those who have engaged in political crimes (see e.g. *Ordinola v Hackman*, 478 F (3d) 588 at 595–97 (4th Cir 2007) [*Ordinola*]). For the development of the political offence exception more generally, see *Quinn v Robinson*, 783 F (2d) 776 at 792–810 (9th Cir 1986); *Gil v Canada (Minister of Employment and Immigration)*, [1995] 1 FCR 508 at 518–32, 119 DLR (4th) 497 [*Gil*]; Hathaway & Foster, *supra* note 36 at 554–62; Khoday, *supra* note 18.

designed "to protect the right of citizens to rebel against unjust or oppressive government."[110]

As further evidence of the connection, courts have identified certain crimes as "pure" political offences—specifically treason, sedition, and espionage.[111] All three crimes target the state or state actors. Few, if any, would dispute that, as per a traditional understanding, treason, sedition, and espionage are political in nature given their relation to the state or state actors as the main targets of these acts. Where the greatest amount of litigation has transpired is with respect to what are called "relative political crimes". These involve common law crimes, such as murder, which are committed with a political objective in mind. In cases of relative political crimes, whether in the context of extradition law (the legal context where it first originated) or with respect to article 1F(b) under the *Refugee Convention*,[112] courts have only accepted the application of the political crimes doctrine where the factual circumstances relate to where the gov-

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[110] *United States v Pitawanakwat*, 120 F Supp (2d) 921 at 929 (D Or 2000) [*Pitawanakwat*]. However, in applying the political crimes doctrine to a case of a First Nations Canadian challenging extradition, the *Pitawanakwat* court signalled that armed resistance toward a democratic state was not excluded. See also *Gil*, *supra* note 109 at 535.

[111] See *Ordinola*, *supra* note 109 at 596.

[112] There are reasonable questions as to whether the political crimes doctrine in extradition law should play a role in the interpretation of the doctrine in refugee law. While a comprehensive history of the development of the political crimes doctrine is outside the scope of this article, a few observations can be made. The doctrine first developed in extradition law in the nineteenth century for reasons noted above. The concept of the political crimes doctrine was eventually incorporated into refugee law through article 1F(b) of the *Convention*. There are differences between extradition law and refugee law and debates continue concerning the relationship between the political crimes doctrine as it plays out in each area. Some authors like Hathaway and Foster contend that article 1F(b) was intended to closely connect with extradition law by preventing fugitives from escaping prosecution, with an exception where the individual engaged in political crimes (Hathaway & Foster, *supra* note 36 at 541–42). Others such as Gilbert and Kälin and Künzli argue that while there is no evidence to indicate that extradition law and jurisprudence were intended to govern the interpretation of article 1F(b), they should nevertheless influence its development and interpretation (Geoff Gilbert, "Current Issues in the Application of the Exclusion Clauses" in Erika Feller, Volker Türk & Frances Nicholson, eds, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (New York: Cambridge University Press, 2003) 425 at 448; Kälin & Künzli, *supra* note 3 at 69). As a practical matter, it might be said that there is little practical difference between these two perspectives. At the other end of the spectrum, the New Zealand Supreme Court and scholars such as Goodwin-Gill and McAdam question whether the political crimes doctrine under article 1F(b) was intended to be influenced by extradition law at all (see *AG (Minister of Immigration) v Tamil X*, [2010] NZSC 107 at para 87, [2011] NZLR 721 [*Tamil X*]; Goodwin-Gill & McAdam, *supra* note 60 at 173; Khoday, *supra* note 18 at 187–91).

ernment or state actors were being attacked or those challenging the state were the target of the attack.[113]

In one of the first cases dealing with the political crimes doctrine in the extradition context, *Re Castioni*, a British court denied Switzerland's request for the extradition of a man who was part of an attack on the local government's headquarters.[114] Those involved in the attack were angry that local officials denied their request for a vote to modify the local government's constitution.[115] Castioni and others subsequently launched an armed attack on government buildings which resulted in the killing of a local official.[116] In deciding that the request for extradition should be denied, the court held that Castioni's killing of the official was incidental to and formed part of political disturbances and qualified as a political crime.[117]

A subsequent British extradition case decided within three years of *Castioni* also established the necessary connection between "political crimes" and the state. In *Re Meunier*, an individual caused two explosions—one at a café in Paris and the second at a French military barracks.[118] He fled to England and France sought his extradition. The court held that the crimes were clearly non-political. It observed that in order to constitute a political crime, "there must be two or more parties in the

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[113] See e.g. *Re Matter of the Requested Extradition of Doherty by the Government of the United Kingdom*, 599 F Supp 270 (SD NY 1984) (denying extradition on account of the political crimes exception to a member of the Provisional Irish Republican Army who participated in a violent assault on a British military convoy killing a soldier); *Pita-wanakwat*, *supra* note 110 (denying extradition on account of the political crimes exception to a First Nations political activist who participated in violent resistance to the Canadian government); *Singh*, *supra* note 2 (recognizing that a Khalistani separatist's involvement in the revenge killing of an Indian police officer could qualify as a political crime under article 1F(b)); *Tamil X*, *supra* note 112 (recognizing that a Tamil asylum seeker assisting the cause of the Liberation Tigers of Tamil Eelam by scuttling an LTTE sea vessel carrying munitions from being captured by the Indian Navy and possibly endangering the lives of the Indian sailors qualified as a political crime under article 1F(b)); *Refugee Appeal No 70656/97* (10 September 1997) at 12–13 (NZ RSAA), online: <forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref_19970910_70656.pdf> (granting refugee status by concluding that the passing of military secrets to the National Liberation Army of Iran committed with the object of overthrowing, subverting, or changing the government was a political crime and a manifestation of a political opinion); *S* (25 January 2007), 552944 (France CRR); Rikhof, *supra* note 54 at 330.

[114] (1890), [1891] 1 QB 149 at 150–51 [*Castioni*].

[115] See *ibid* at 150.

[116] See *ibid* at 150–51.

[117] See *ibid* at 153.

[118] [1894] 2 QB 415 at 415 [*Meunier*].

State, each seeking to impose the Government of their own choice on the other, and that, if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not."[119] The court identified Meunier as an anarchist whose main target was not the state but the general body of civilians.[120]

Drawing from the facts of *Castioni* and other extradition and refugee cases, violent attacks on government (including state actors and institutions) by resisters are eligible to be considered political crimes.[121] Indeed, to target an authoritarian government or military has been deemed to carry a certain exalted meaning. As one panel of the Immigration and Refugee Board of Canada asserted, the "freedom fighter, or the resistance fighter, attempts to achieve his aim by going after military and government targets."[122] Conversely, crimes directed against non-state actors are generally deemed to fall outside of the political crimes exception, and thus result in the denial of refugee status or the granting of extradition.[123] Attacks on non-state actors are not considered political but mere common law crimes, and are sometimes characterized by courts as acts of anarchy or terrorism.[124]

There appear to be two discernible exceptions to this rule when the targets are non-state actors. First, where the particular non-state actors are part of an active and violent political uprising against the government and are killed in the process of its suppression, such conduct may be considered a political crime.[125] In *Re Ezeta*, the government of Salvador sought extradition of an individual who led a revolution that overthrew a former government of Salvador.[126] After overthrowing the government, Ezeta was then faced with having to combat an effort to in turn overthrow his new regime.[127] In the course of doing so he committed or ordered the commis-

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[119] *Ibid* at 419.

[120] *Ibid*.

[121] See cases cited in *supra* note 113.

[122] *Gil*, *supra* note 109 at 515.

[123] See e.g. *Immigration and Naturalization Service v Aguirre-Aguirre*, 526 US 415 at 431, 119 S Ct 1439 (1999); *McMullen v Immigration and Naturalization Service*, 788 F (2d) 591 at 597–98 (9th Cir 1986); *Meunier*, *supra* note 118; *Eain v Wilkes*, 641 F (2d) 504 at 519–24 (7th Cir 1981); *Matter of Extradition of Atta*, 706 F Supp 1032 at 1039–43 (ED NY 1989); *Gil*, *supra* note 109; *T v Home Secretary*, *supra* note 37 at 772–73, 776, 787; *AC v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1500, 243 FTR 194; *T* (25 July 2006), 538535 (France CRR).

[124] See *Meunier*, *supra* note 118; *Gil*, *supra* note 109.

[125] See e.g. *In Re Ezeta*, 62 F 972 (ND Cal 1894).

[126] *Ibid* at 976–78.

[127] See *ibid* at 977–78.

sion of certain crimes against members of the former regime (now formally non-state actors engaged in the uprising against him and his new government).[128] The court held that Ezeta's crimes fell within the scope of the political crimes exception.[129]

The second instance is where the political crimes are committed against non-state actors who are closely tied to, but not formal members of, the government. In *Re Extradition of Singh*, India sought extradition of a Sikh nationalist who engaged in violent actions against the governments of India and Punjab in order to establish a Sikh state.[130] Although the United States district court granted extradition in connection with certain crimes that were deemed to be of a non-political nature, it denied extradition with respect to several others.[131] Of those actions designated to be political crimes, the court held that Singh's separate attacks on a former elected member of the legislature (an attack which also included killings of his police security detail) and three paramilitaries who were not formal members of the government or agency but connected with and supportive of the government were deemed political crimes.[132] The court notably emphasized that the former legislator was a "well known pro-India figure, who was a known enemy and persecutor of Sikh militants, acting in support of anti-Sikh government actions after he left political office."[133] While Singh had been involved in crimes against other former state politicians or agents, in those instances there was no evidence of their continued involvement in politics at the time of the crimes or existence of a police escort. As such, extradition was granted for those offences.[134]

What these cases suggest is that where courts may be willing to recognize a violent attack on non-state actors as political crimes, the victims must be persons themselves seeking to overthrow or challenge the state through violence as in *Ezeta* or have strong ties and involvement with the state as in *Extradition of Singh*. It is rather unlikely, under current interpretations, that these exceptions would extend to recognizing political crimes against criminal non-state actors who exercise substantial power in a given country. As the discussion below will argue, there are valid reasons why such persons should nevertheless be considered political actors.

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128 See *ibid.*

129 See *ibid* at 1004–05.

130 2005 WL 3030819 (ED Cal 2005) [*Extradition of Singh*].

131 See *ibid* at 59–65.

132 See *ibid* at 61–62.

133 *Ibid* at 61.

134 See *ibid* at 65.

Having discussed how courts and tribunals tend to link what is "political" with the state, I shall next argue for an expanded definition of what constitutes the "political" in the context of international refugee jurisprudence.

III. Substance over Form? Power as the Central Feature of the "Political"

Notwithstanding the traditional inclination within refugee and extradition law to define or associate what is "political" with the state or those opposing the state, the notion of what is "political" should not be limited to institutions or actors that hold or seek to hold government power. If politics are in large part about power, the state is not the only source of it in a given society. Political scientist and resistance scholar Gene Sharp describes political power as "the totality of means, influences, and pressures available to determine and implement policies and governance of a society. This especially refers to the institutions of government, the State, and those who oppose them."[135] Though a great deal of attention is directed in this definition toward the state or those who oppose it, the word "especially" is not equivalent to exclusivity. Sharp also recognizes that politics extend beyond the state. He posits that while the term "politics" includes the activities of the state, it is not restricted to such conduct and processes.[136] Sharp asserts that politics "can include non-State governmental action and bodies" which may encompass "corporate extragovernmental action ... to change social or political practices."[137] As such, narrowly defining political opinions or crimes as those solely directed at government actors or institutions, or those non-state actors seeking to displace them, fails to account for deeper and more sophisticated understandings of what qualifies

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[135] Sharp, *supra* note 3 at 2. Sharp later states that political power has sources within society. He enumerates six sources of political power. The first source is "[a]uthority" where "[p]ersons or institutions with authority are seen to have the right to command and be obeyed or followed" (*ibid* at 4). The second source includes "[h]uman resources", which concerns "the number of persons who obey, cooperate with, and assist the rulers, and their proportion in the population" (*ibid*). The third source involves "[t]he skills and knowledge of those persons, and how those capacities relate to the needs of the rulers" (*ibid*). A fourth source includes "[i]ntangible factors" such as "the habits and attitudes of the population towards obedience and submission" (*ibid*). A fifth source involves "[m]aterial resources" that "help to determine the extent of the power of the rulers" (*ibid*). A final and sixth source of political power is "the type and extent of sanctions [or punishments] that rulers have available to enforce obedience by the population" (*ibid*).

[136] *Ibid* at 231. Though as observed by the UK's IAT, in conventional political science and theory, the term "political" is "confined to matters pertaining to government or governmental policy" (*Gomez*, *supra* note 56 at para 27).

[137] Sharp, *supra* note 3 at 231.

as "political", as well as for the different types of power transactions that can take place in different societies.[138]

What constitutes a political opinion or crime will often be viewed through the juridico-cultural lenses of those making legal determinations. Similarly, what constitutes legitimate political action or resistance will be contingent on the particular lenses through which the actions are perceived. As Zimmermann and Mahler observe, "what may be non-political in the State of refuge may have been perceived as being highly political in the claimant's State of origin, considering the different political situation there."[139] In *Gomez v. Secretary of State for the Home Department*, the UK IAT asserted that "[the] parameters of time and historical place are even more present in relation to the political opinion ground. That the definition of the adjective 'political' must always be to some extent malleable flows from the fact that the nature of the power relationships and transactions that compose what is political vary from society to society."[140] In a similar vein, Justice Kirby, writing at the time as a member of the High Court of Australia and in the context of interpreting the scope of political crimes within article 1F(b), observed:

> The Convention, including Art 1F(b), should not be read with an eye focussed solely on the experience of the political processes of Australia or like countries. The Convention was intended to operate in a wider world. It was adopted to address the realities of "political crimes" in societies quite different from our own. What is a "political crime" must be judged, not in the context of the institutions of the typical "country of refuge" but, on the contrary, in the circumstances of the typical country from which applicants for refugee status derive.[141]

For the purposes of interpreting the meaning of the word "political", a consistent theory of refugee protection should be based on the human rights-centric purposes underlying the *Refugee Convention* (as mentioned earlier). Through such interpretations, one should ultimately focus on the "political" as being concentrated on the exercise of power and those who use it to regulate the conduct of individuals and of civil society more broadly; such an interpretation would, in turn, have an impact on those individuals' and civil society groups' social, economic, cultural, legal, and/or political rights and interests. Certainly, governments continue to

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[138] As will be demonstrated below, others have expanded the definition of the "political" while interpreting the concept of the political opinion. Furthermore, as noted above, there does not appear to be much evidence in the *Refugee Convention* itself that mandates a narrow definition of "political".

[139] Zimmermann & Mahler, *supra* note 57 at 399.

[140] *Gomez*, *supra* note 56 at para 40.

[141] *Singh*, *supra* note 2 at para 106.

be substantial bastions of power that regulate society and should still be recognized as such. However, they do not hold a monopoly over the ways in which power is experienced and used to oppress. Indeed, domestic human rights regimes recognize the power of private actors to discriminate on the basis of various grounds which have an impact on the dignity of individuals. As such, these human rights regimes prohibit private and public abuses of power through discrimination, particularly in the areas of employment, accommodation, and access to services and facilities.[142]

Just as private actors are capable of discriminating, some are also capable of going further and committing persecution. In connection with refugee law, it is rightly understood that mere discrimination on the basis of a *Convention* ground is not enough to constitute persecution.[143] Yet when discrimination by private actors escalates to the level of persecution, the response of refugee law jurists should not be to apply a limited state-centric notion of what constitutes the "political". To do so renders many vulnerable to persecution for challenging such power.

Numerous non-state actors exercise considerable power and in ways that are oppressive to civil society in general and vulnerable groups in particular. Such oppression can be exacted through traditional political processes and in a manner that is substantially mediated through the public sphere. For example, citizens can engage in the legitimate political activity of voting, but with the specific goal of depriving discrete minorities of their human rights.[144] It may also involve corporate actors who influence politicians through substantial campaign contributions to pass laws or to act in a manner that is beneficial to their own interests, but detrimental to others. However, there may also be little direct involvement of the state where individuals or communities engage in practices that undermine the rights and interests of other individuals.[145] In other circumstances, an otherwise legitimate corporate entity may engage in ac-

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142 See e.g. *Human Rights Code*, RSO 1990, c H.19.

143 However, a number of discriminatory actions viewed in their aggregate may give rise to a well-founded fear of persecution (see e.g. *Tetik v Canada (Citizenship and Immigration)*, 2009 FC 1240 at para 2, 86 Imm LR (3d) 154; *Mohammed v Canada (Citizenship and Immigration)*, 2009 FC 768 at para 67, 348 FTR 69).

144 In 2008, voters in California voted to create an amendment to the state constitution denying same-sex couples the right to marry under California law despite a previous ruling by the California Supreme Court indicating that such a legislative prohibition violated the state constitution (see *Hollingsworth v Perry*, 133 S Ct 2652 at 2659, 186 L Ed (2d) 768 (2013)). Such state constitutional amendments to prohibit same-sex marriage now violate the Fourteenth Amendment (see *Obergefell v Hodges*, 135 S Ct 2584, 192 L Ed (2d) 609 (2015)).

145 Such non-involvement by the state may be because it is unable or unwilling to provide assistance.

tions in foreign states that work to the detriment of local populations.[146] Lastly, there are instances in which non-state actors in the form of criminal organizations exercise substantial power in a given territory, imposing their own form of oppressive political power that rivals the state.

In recent years, leading scholars have increasingly recognized that non-state actors may engage in persecution for reasons connected to the asylum seeker's political opinion where that opinion does not concern the government or state more broadly, but relates to other dominant and powerful sections of society. For instance, there have been moves toward defining political opinion as constituting those opinions concerning control exercised by a non-state entity. The University of Michigan's annual Colloquium on Challenges in International Refugee Law recently produced its "Guidelines on Risk for Reasons of Political Opinion."[147] The Colloquium has defined a "political opinion" as

> an opinion about the nature, policies, or practices of a state or of an entity that has the capacity, legitimately or otherwise, to exercise societal power or authority. A relevant non-state entity is one that is institutionalized, formalized, or informally systematized and which is shown by evidence of pattern or practice to exercise *de facto* societal power or authority.[148]

This definition clearly acknowledges the societal power and authority exercised by non-state entities. A critical question that arises is how the Colloquium defines "entity". No definition is provided. The Merriam-Webster Dictionary defines it as a being or existence; "something that has separate and distinct existence and objective or conceptual reality"; or "an organi-

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[146] See *Nyamu v Holder*, 2012 WL 3013932, 490 Fed Appx 39 (9th Cir 2012); *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414 at paras 4–7, 13, 116 OR (3d) 674. See also Dawn Paley, "Drug War as Neoliberal Trojan Horse" (2015) 42:5 Latin American Perspectives 109; Madelaine Drohan, *Making a Killing: How and Why Corporations Use Armed Force to Do Business* (Toronto: Random House Canada, 2003); Daniel Kovalik, "War and Human Rights Abuses: Colombia and the Corporate Support for Anti-Union Suppression" (2004) 2:2 Seattle J Social Justice 393; Lesley Gill, "Labor and Human Rights: 'The Real Thing' in Colombia" (2005) 13:2 Transforming Anthropology 110; Todd Gordon & Jeffery R Webber, "Imperialism and Resistance: Canadian Mining Companies in Latin America" (2008) 29:1 Third World Q 63; Glen David Kuecker, "Fighting for the Forests: Grassroots Resistance to Mining in Northern Ecuador" (2007) 34:2 Latin American Perspectives 94.

[147] "The Michigan Guidelines on Risk for Reasons of Political Opinion" (Guidelines agreed to at the Seventh Colloquium on Challenges in International Refugee Law, University of Michigan, 27–29 March 2015) [unpublished], online: <www.law.umich.edu/centersandprograms/refugeeandasylumlaw/Documents/2015_Michigan_Guidelines_Risk_For_Reasons_Political_Opinion.pdf> ["Michigan Guidelines"]. The Colloquium is comprised of numerous leading scholars in the area of refugee law including Professors James C. Hathaway and Catherine Dauvergne.

[148] *Ibid* at para 8.

zation (as a business or governmental unit) that has an identity separate from those of its members."[149] Or, to employ a more legal definition, an entity is "[l]egally, equal to a person who might owe taxes. A generic term inclusive of person, partnership, organization, or business. An entity can be legally bound. An entity is uniquely identifiable from any other entity."[150] Although an entity can include a person (which might include individuals), within the context of the Colloquium's definition, it is largely suggestive of a particular set of collectives, including businesses and organizations.

A broader definition appears to have been incorporated into European Union law as well. Evidence of further recognition of the opposition to non-state actors as constituting expressions of a political opinion may be found in the 2004 and 2011 European Union Qualification Directives on interpreting the *Refugee Convention* and *Protocol*.[151] The Directives provide that the concept of political opinion shall include the holding of opinions, thoughts, or beliefs on matters related to "potential actors of persecution mentioned in Article 6 and to their policies or methods."[152] Article 6 in turn identifies that "actors of persecution or serious harm" include "the state", as well as "parties or organisations controlling the State or a substantial part of the territory of a state."[153] Importantly, the Directives include non-state actors as a separate and third category if it can be demonstrated that the state, or parties or organizations controlling the state including international organizations, "are unable or unwilling to provide protection against persecution or serious harm."[154]

The Directives are significant, as the political opinion must concern matters related to both the "agents of persecution", including non-state actors, as well as to those agents' policies and methods. This attention to non-state actors does not, then, inherently, as in the jurisprudence dis-

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149 *The Merriam-Webster Dictionary*, online ed, *sub verbo* "entity", online: <www.merriam-webster.com/dictionary/entity>.

150 *Black's Law Dictionary*, 2nd ed, *sub verbo* "entity", online: <thelawdictionary.org/entity/>.

151 EC, *Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted*, [2011] OJ, L 337/9 [*EC Council Directive 2011*]; EC, *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, [2004] OJ, L 304/12.

152 *EC Council Directive 2011*, *supra* note 151 at 16.

153 *Ibid* at 15.

154 *Ibid*.

cussed earlier in this article, require that the opinion be related solely to a matter on which the machinery of state, government, and policy may be engaged. In addition, it does not appear that the non-state actor about whom or which the opinion is expressed must be either vying for control or in opposition to the state.

The only apparent limitation placed on the definition of a political opinion about non-state actors is that it must be demonstrable that a state or those controlling it must be unable or unwilling to protect the asylum seeker. This limitation does not alter the meaning of what is a political opinion, but merely restates a recognized minimum requirement of international refugee protection. As the Supreme Court of Canada has posited, international refugee law is intended to protect only where there is a failure of state protection by the individual's country of nationality.[155] It is well recognized that non-state actors may be agents of persecution in connection with one of the four other grounds—race, religion, nationality, or member of a particular social group. In those cases, what is required is to show the inability or unwillingness of the state to protect. The EU Directive ensures that the political opinion ground not require that there be an added state-related component when asserting persecution for reasons of a political opinion.

The UNHCR has similarly recognized that non-state actors may engage in persecution for reasons of the asylum seeker's political opinion that are not related to the government but to other sections of society more broadly. In its guidelines on gender-related persecution, the UNHCR articulates a broader definition than the EU Directive, in that "[p]olitical opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, *society*, or policy may be engaged."[156] This definition largely replicates the Supreme Court of Canada and Goodwin-Gill definition discussed above.[157] Yet the UNHCR injects an additional and crucial component—the role of society in shaping and imposing policies and norms, even if the state is

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[155] See *Ward*, *supra* note 28 at 709.

[156] UNHCR, *Guidelines*, *supra* note 1 at para 32 [emphasis added]. There are good reasons for assessing whether there is a well-founded fear of persecution through a gender-specific approach as the refugee definition has been interpreted through the framework of male experiences (see *ibid* at para 5). This male-centric approach probably accounts for why gender was not specifically included in the definition of the *Refugee Convention*. It is worth noting that the UNHCR has retained this broadened interpretation of "political opinion" (see e.g. UNHCR, Division of International Protection, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* (Geneva: UNHCR, 2010) at para 45, online: Refworld <www.refworld.org/docid/4bb21fa02.html> [UNHCR, *Guidance Note*]).

[157] See *Ward*, *supra* note 28 at 746.

formally opposed to such conduct but otherwise condones or validates such behaviour.[158] Furthermore, the UNHCR *Guidelines* articulate that a claim of persecution based on one's political opinion presupposes that

> the claimant holds or is assumed to hold opinions not tolerated by the authorities *or* society, which are critical of their policies, traditions or methods. It also presupposes that such opinions have come or could come to the notice of the authorities *or relevant parts of the society*, or are attributed by them to the claimant.[159]

The use of the disjunctive term "or" indicates that society itself operates as a source of policy making and certainly as the generator of norms that arise from such policies. For instance, women may be subjected to threats of "honour killings" for failing to abide by or resisting the dictates of those with power within their families, kinships, or clan groups. The role of societal actors in this expanded definition of political opinion also explicitly recognizes that non-state actors may be agents of persecution should they take action to punish perceived violations of society's unofficial policies or norms.[160] Such understandings of political opinion are consistent with the UNHCR interpretation of this ground as requiring a context-specific analysis reflecting the realities of the "geographical, historical, political, legal, judicial, and *socio-cultural* context of the country of origin."[161]

The notion that certain acts perpetrated in opposition to non-state actors could serve as the basis for a political opinion was recognized in a binding precedential 2008 decision by the New Zealand Refugee Status Appeals Authority. In that decision, the applicant successfully claimed that she had a well-founded fear of persecution on the basis of her unilateral decision to terminate her abusive marriage, a decision which had stirred the wrath of her husband, his family, and her own family as well. She was subjected to death threats should she return to Turkey. Regarding the claimant's decision to terminate her marriage, the Authority concluded the following:

> [T]he appellant's assertion of her right to life and of her right to control her life was a challenge to the collective morality, values, behav-

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[158] UNHCR, *Guidelines*, *supra* note 1 at para 11. An example of the role of society in shaping and imposing policies and norms could include situations involving the infliction of female genital mutilation (see *ibid*).

[159] *Ibid* at para 32 [emphasis added]. As a more recent UNHCR study articulates, "non-State actors may impose religious norms in the area that they control, perceiving deviation from such norms as manifesting religious (non-) belief and/or a political opinion" (Vanessa Holzer, *The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence* (Geneva: UNHCR, 2012) at 30, online: Refworld <www.refworld.org/docid/50474f062.html>).

[160] See UNHCR, *Guidelines*, *supra* note 1 at para 19.

[161] UNHCR, *Guidance Note*, *supra* note 156 at para 46 [emphasis added].

> iours and codes of the two families and beyond them, of the greater "community" of which they are a part. This challenge to inequality and the structures of power which support it is plainly "political" as that term is used in the Refugee Convention.[162]

The Authority also held that based on country information, the government of Turkey either refuses or is unable to protect women from this type of violence.

Although there are certainly differences between these conceptualizations of what constitutes a political opinion (with the UNHCR definition and the New Zealand case illustrating conceptualizations of political opinion at its broadest reach), they all strongly suggest a series of moves toward realizing a more generous and purposive interpretation of a political opinion. They also suggest that opposition toward non-state entities such as criminal organizations may be viewed as legitimately political and that a well-founded fear of persecution may be connected to political retribution by such entities within a given society.

As noted above, within the *Convention*, the term "political" is associated not only with "opinions" but with "crimes" too. How should these broader understandings of "political" within the context of "political opinion" relate to "political crimes" as referenced in article 1F(b)? There is nothing in the text of article 1F(b) that indicates that the term "political" should be given a more restrictive meaning. In addition, although the UNHCR formulated a generous interpretation concerning political opinion in the particular context of gender-related persecution (though this definition can have broader applicability), and the EU Directive and the Michigan Colloquium did so more generally, there is no reason not to extend such broader understandings of the "political" to political crimes under article 1F(b). Indeed, non-state actors may persecute individuals with the tolerance or indifference of the state.[163] As such, if individuals engage in conduct that would qualify as a manifestation of a political opinion against oppressive and powerful non-state actors or entities, that same conduct should similarly be considered a political crime for the purposes of article 1F(b).

That the concept of political crimes should also be subject to a broader reading was supported by Justice Gaudron of the High Court of Australia. In writing a concurring opinion in the context of a political crimes decision

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[162] *Refugee Appeal No 76044* (11 September 2008), [2008] NZAR 719 at para 90 (NZ RSAA), online: <forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref_20080911_76044.pdf>.

[163] As I discuss further below, the UNCHR, in a recent guidance note on refugee claims relating to victims of organized gangs, applies this broader definition of political opinion to gang-related persecution (UNHCR, *Guidance Note*, *supra* note 156 at para 45).

under the *Refugee Convention*, Justice Gaudron argued that one ought to "consider a crime to be political if a significant purpose of the act or acts involved is to alter the practices or policies of those *who exercise power or political influence* in the country in which the crime is committed."[164] More importantly, Justice Gaudron does not limit those who exercise political power or influence to those within government. She explains that in

> some, perhaps many countries, *power and political influence are exercised by bodies and organisations that are not organs of government*. They may exercise power and influence with the tacit consent of the government concerned. On the other hand, they may do so because the government is unable to assert its own authority. And with increasing globalisation, the organisations or bodies in question are not necessarily confined to those that operate solely within national boundaries.[165]

Drawing from these statements and from the broader points respecting political opinion discussed earlier, the concept of a political crime should be understood and reframed as any act, the primary objective of which is to resist or otherwise challenge those working within the government, state, and/or society who (1) hold and exercise substantial power or (2) influence those who hold and exercise such power. Several objectives may govern the conduct of those challenging such power. They include: (1) depriving those who hold and exercise power from continuing to do so; (2) forcing or pressuring those with power to change policies, legal norms, practices, and/or personnel; or (3) refusing to be subject to the control of those who exercise power.[166] Under this articulation, political crimes are not defined solely by the means and methods employed but also by the primary objectives of those invoking the exception. Furthermore, this articulation recognizes that power is not lodged exclusively within the government but is exercised by non-state actors in substantial ways as well, and, as such, certain non-state actors should be considered legitimate targets of political crimes.

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[164] *Singh*, *supra* note 2 at para 45 [emphasis added].

[165] *Ibid* [emphasis added]. However, despite the tenor of Justice Gaudron's concurring judgment as well as those of Chief Justice Gleason and Justice Kirby who wrote separate concurrences, the Australian government has since passed legislation that significantly limited the definition of political crimes under national law (see Khoday, *supra* note 18 at 182–83; Rikhof, *supra* note 54 at 313). The passage of this legislation, however, does not, in my view, limit the persuasive value of Justice Gaudron's statements when considering the notion of expanding the meaning of the term "political" within the context of article 1F(b).

[166] See *R v Governor of Brixton Prison Ex Parte Kolczynski* (1954), [1955] 1 QB 540, [1955] 2 WLR 116; Federal Tribunal, 30 April 1952, *Re Kavic, Bjelanovic and Arsenijevic*, (1952) ILR 371 (Switzerland).

Invoking non-state actors or entities as recognized power holders against whom political crimes may be waged remains a controversial notion. This controversy is perhaps based on two interrelated ideas. First, one often associates political crimes with violent conduct, and the manner in which it has developed in extradition and refugee law indicates that the association is not without some foundation. Second, there is the dichotomy that resisters or freedom fighters are believed to primarily target government actors, while "terrorists" target civilians, that is, non-state targets.[167] This simple dichotomy fails to recognize the serious harm that certain "civilians" or otherwise non-government actors can inflict through their power, which has a substantial impact on the rights and interests of other civilians. Resistance to such power, even though it may seem to target "civilians" in a superficial sense (in the sense of their being notionally non-military or non-state actors), should not be seen as simply apolitical when it is demonstrably and profoundly otherwise. Examples of such non-state power include organized criminal organizations, cartels, and gangs that engage in brutal exercises of non-state oppressive power.[168]

The foregoing discussion indicates that there are competing interpretations of the term "political" in relation to political opinion and political crimes. While the traditional and narrow approach outlined in Part II more closely ties the concept of the "political" to the state, the broader vision enumerated in this Part recognizes other entities or social actors as holding power that one might legitimately characterize as political. The UNHCR, European legislators, and prominent refugee law scholars have supported this broader vision to varying degrees. These moves are not insignificant and register an important shift in shaping a purposive approach to interpreting the *Refugee Convention*, though the shift is by no means universal.

Building on this discussion, I shall next examine how criminal organizations such as drug cartels and youth gangs may qualify as political actors. The hoped-for consequence is that persons who have a well-founded fear of persecution for resisting such organizations will be able to claim refugee status on the basis of a political opinion. In addition, crimes committed against such actors may also be considered "political", and as a result, may not be excluded under article 1F(b).

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[167] See e.g. *Gil*, *supra* note 109 at 515.

[168] Even if crimes committed against such actors or organizations were to be considered "political", states such as Australia, Canada, the United Kingdom, and the United States have enacted various limitations (see Gilbert, *supra* note 18 at 92–97; Khoday, *supra* note 18).

IV. Resisting Criminal Organizations

Drawing from the previous discussion, in this Part, I shall demonstrate that criminal organizations, particularly drug cartels and criminal gangs in Central America, exercise significant power and control in particular countries or portions of them. Such criminal organizations have grown to be exceedingly powerful and pose serious threats to those countries' civil societies and to their political, legal, economic, and social systems.[169] Because of the expanding power of these organizations, residents in these "semi-autonomous zones controlled by criminal insurgents increasingly recognize the insurgents rather than the hollowed out state as the real source of local power and authority."[170] I shall argue that resistance to such organizations should be interpreted as "political". In support of this argument, I draw in part upon the growing body of scholarly literature on drug cartels in Mexico and on youth gangs in other Central American states. With respect to the growing problem of youth gangs in Central America, I also draw on the UNHCR's work on those fleeing the harms threatened by such groups.

A. Drug Cartels in Mexico

Over the past decade or more,[171] substantial areas of Mexico[172] have been transformed into fiercely contested spaces[173] between wealthy and

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169 See John P Sullivan & Robert J Bunker, "Drug Cartels, Street Gangs, and Warlords" (2002) 13:2 Small Wars & Insurgencies 40 at 41.

170 Nils Gilman, "The Twin Insurgency" (2014) 9:6 The American Interest 3 at 9, online: <www.the-american-interest.com/2014/06/15/the-twin-insurgency/>. See also Ed Vulliamy, "The Zetas: Gangster Kings of Their Own Brutal Narco-State", *The Guardian* (15 November 2009), online: <www.theguardian.com/world/2009/nov/15/zetas-drugs-mexico-us-gangs>.

171 The broader history of the drug trade in and throughout Mexico and the diminution of the Colombian drug cartels leading to their Mexican counterparts filling the void is a fascinating one but beyond the scope of this article. For more of this history, see Francisco E Gonzáles, "Mexico's Drug Wars Get Brutal" (2009) 108:715 Current History 72; Tomas Kellner & Francesco Pipitone, "Inside Mexico's Drug War" (2010) 27:1 World Policy J 29.

172 I hasten to add that the problem of drug cartels is not and has not been isolated to Mexico. Prior to Mexico becoming a focal point for drug cartel activity and violence, Colombia drew significant attention. It is also worth noting that drug cartels are also active in other Central American states.

173 Indeed, the excessive violence that has been developing has led at least one scholar to argue that the current violence might legitimately be designated as a non-international armed conflict under international law (see Carina Bergal, "The Mexican Drug War: The Case for a Non-International Armed Conflict Classification" (2011) 34:4 Fordham Intl LJ 1042).

well-armed drug cartels on one hand[174] and between these cartels and the Mexican government on the other.[175] Although formal power in Mexico is shared between thirty-one subnational jurisdictions (states) and one federal district, numerous large drug-trafficking organizations informally exert de facto control over large parts of the country.[176] Although there were earlier governmental efforts to challenge the cartels, the violence substantially escalated due to then-President Felipe Calderón's large-scale attempted takedown of the drug cartels beginning in late 2006.[177] This government offensive led to massive violent resistance by these criminal organizations.[178] The repercussions arising from this sanguinary violence have led to thousands of deaths, forced disappearances,[179] and displacement, with many having fled the country to seek asylum elsewhere.[180] In addition, the killing of civilians has not just been perpetrated by the cartels, but also by state military and police actors.[181] Despite attempts by the Mexican federal government to suppress drug-related violence and overall activity, the death toll has nevertheless continued to rise.[182] In some locations, drug cartels have established parallel tax systems where

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174 From a military standpoint, the cartels' access to weaponry has helped to solidify their capacity to outgun government forces—including the use of grenade launchers and antitank rockets (see Howard Campbell, "Narco-Propaganda in the Mexican 'Drug War': An Anthropological Perspective" (2014) 41:2 Latin American Perspectives 60 ("[m]embers of organized crime groups use grenades, 50-caliber machine guns, rocket launchers, and other high-impact weapons" at 65); Ken Ellingwood & Tracy Wilkinson, "Drug Cartels' New Weaponry Means War", *Los Angeles Times* (15 March 2009), online: <www.latimes.com/world/la-fg-mexico-arms-race15-2009mar15-story.html>).

175 See Campbell, *supra* note 174; Kellner & Pipitone, *supra* note 171 at 34–37; Gonzáles, *supra* note 171 at 73–76; Flanigan, *supra* note 19 at 288; Longmire & Longmire, *supra* note 19 at 36, 42; Estévez, *supra* note 26 at 1162. There is also violence and competition between cartels; in other contexts, however, there have been instances of different groupings of violent non-state actors engaging in forms of complementary governance (see Idler & Forest, *supra* note 17).

176 See Campbell, *supra* note 174 at 62; "Drugs in Mexico: Kicking the Hornets' Nest", *The Economist* (12 January 2011), online: <www.economist.com/blogs/dailychart/2011/01/drugs_mexico>.

177 See Gonzáles, *supra* note 171 at 74–76.

178 See *ibid*.

179 See Estévez, *supra* note 26 at 1161; Gonzáles, *supra* note 171 at 75; Longmire & Longmire, *supra* 19 at 36; Campbell, *supra* note 174 at 61.

180 See Estévez, *supra* note 26 at 1160.

181 See generally Human Rights Watch, *Neither Rights Nor Security: Killings, Torture, and Disappearances in Mexico's "War on Drugs"* (New York: Human Rights Watch, 2011), online: <www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf>.

182 See Estévez, *supra* note 26 at 1161; Stephanie Hanson, "Mexico's Spreading Drug Violence", *Council on Foreign Relations* (21 November 2008), online: <www.cfr.org/mexico/mexicos-spreading-drug-violence/p17817>.

citizens are subjected to perilous circumstances for failing to pay.[183] Thus, in addition to demanding and collecting "taxes", the cartels impose their own brutal law and enforce it.

With this information as background, in what ways might it be argued that the drug cartels are de facto political actors rather than purely criminal actors seeking economic gain through illicit means? Several scholars have approached the theorization of drug cartels as political actors, each from different angles. For instance, Nils Gilman emphasizes the fact that criminal organizations are non-state entities at the same time that they exercise de facto political power.[184] He contends that though these organizations operate like criminal insurgencies, they are distinct from social revolutionaries in that they do not seek to build or capture institutionalized state power.[185] Rather, the cartels merely desire to maintain their rents and income from the markets they control.[186] Instead of controlling the state directly, such organizations seek to selectively cripple the state so as to establish a private zone of economic autonomy, while continuing to rely on the state to supply vestigial social services. In Gilman's words, "[t]hese actors thrive in (and indeed try to foster) weak-state environments, and their activities reinforce the conditions of this weakness."[187]

Gilman posits that by engaging in such activities, these organizations create conflict with the state and become de facto political actors.[188] He asserts that the cartels' status as political actors is based on three factors. First, they increasingly control large swaths of the global economy and operate prominently in spaces "where the state is hollowed or hollowing out."[189] Second, such actors employ a significant amount of violence to enforce their will and to resolve their unlawful contractual disputes.[190] Gil-

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183 See David Luhnow & José de Cordoba, "The Perilous State of Mexico", *The Wall Street Journal* (21 February 2009) W1.

184 Gilman, *supra* note 170 at 3, 9.

185 See *ibid* at 8.

186 See *ibid*.

187 *Ibid*. See also Longmire & Longmire, *supra* note 19 ("Mexican [drug-trafficking organizations] do not wish to remove the Mexican Government and replace it with one of their own. They are not religious zealots wishing to convert the Mexican people or the rest of the world. They simply want to maximize their profits and keep government and law enforcement out of their business" at 47); Flanigan, *supra* note 19 (observing that while attacks on law enforcement and other government officials were "not explicitly political in nature, these attacks have the goal of influencing the state by intimidating Mexico's government into suspending its efforts to defeat the cartels" and allow them to "engag[e] in their economic activities unhampered by government intervention" at 288).

188 Gilman, *supra* note 170 at 8.

189 *Ibid*.

190 See *ibid*.

man observes that the use of violence brings such political actors into "primal conflict with one of the state's central sources of legitimacy, namely its monopoly (in principle) over the socially sanctioned use of force, transforming them from merely deviant businessmen into criminal insurgents."[191] Lastly, in some cases, these new de facto political actors "have begun to emerge as private providers of justice, health care, and infrastructure—that is, precisely the kind of goods that functional states are supposed to provide to their citizens."[192]

While the relationships between the cartels and various government and state actors in Mexico are violent and antagonistic, some scholars articulate that they nevertheless have closer relationships than one might imagine despite the open antagonism. This position is based on the fact that the cartels purchase the loyalty of many government and law enforcement officials. Corruption is rampant. Those officials who refuse to comply are murdered or otherwise targeted.[193] So extensive is the relationship that, according to a Mexican government estimate in 2010, criminal organizations acting in collusion with corrupt officials control as much as seventy-one per cent of national territory.[194] However, the degree of collusion is not uniform; it varies and corresponds to certain geographic zones. In his study of drug cartels in Mexico and Colombia, Gustavo Duncan posits that there are three types of geographic spaces to examine. In one type, he observes, drug cartels exercise greatest control in rural areas, marginal(ized) neighbourhoods (including in large cities), and smaller cities.[195] In such places, the social influence of drug trafficking is at its peak, and the cartels create regular armies that establish monopolistic control over the local order.[196] Duncan observes that the state in such places (and peripheral to much larger urban centres) is effectively absent and the car-

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191 *Ibid* at 8–9.

192 *Ibid* at 9.

193 See Myles Estey, "Mexico's Messenger Angels amid the Drug War Violence", *The Toronto Star* (19 February 2012), online: <www.thestar.com/news/world/2012/02/19/mexicos_messenger_angels_amid_the_drug_war_violence.html> ("Juarez, a city of 1.3 million, saw 1,200 murders in the first nine months of 2011 and more than 3,000 in 2010. Competing cartels and corrupt security forces ensure that dissenters and critics stay silent in the culture of fear"); Daniel Hernandez, "In Monterrey, Mexico, a Culture of Fear is Evident", *Los Angeles Times* (3 April 2012), online: <articles.latimes.com/2012/apr/03/world/la-fg-mexico-monterey-fear-20120403>.

194 See Campbell, *supra* note 174 at 62.

195 Gustavo Duncan, "Drug Trafficking and Political Power: Oligopolies of Coercion in Colombia and Mexico" (2014) 41:2 Latin American Perspectives 18 at 28–33.

196 See *ibid* at 32.

tels maintain a monopoly on social coercion and violence.[197] As one Mexican elected official asserts, "I have no doubt that organized crime rules. ... There are whole neighborhoods controlled by criminals. Every day, there are more luxury homes built where we know they live without fear."[198] Not surprisingly, this power extends into the formal political arena. Duncan posits that the drug cartels "decide who can participate and win local elections, who can be appointed to public office, and which candidates the population has to vote for in presidential and congressional elections."[199] Given the power of the cartels, voters may end up being skeptical as to whether voting has any meaningful impact.[200]

This exercise of power can be contrasted with a second type of area—large cities. In those geographic spaces, Duncan argues, drug cartels maintain relatively less influence. He asserts that the interconnections between the cartels and politicians are limited to bribery, largely with the understanding that certain government authorities limit their efforts to suppress the activities of the drug cartels.[201] Duncan posits that bribery is not sufficient to decide elections, and that politicians must be wary of the press and non-governmental organizations pointing to a politician's criminal acts and acceptance of bribes.[202] However, he notes that even in larger cities, marginalized communities and neighbourhoods may be subject to much greater levels of control by drug cartels as discussed above.

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197 *Ibid*. Gilman explains that part of the reason the cartels were able to gain a foothold is that the impact of globalization and structural adjustment policies diminished the capacities of many states to "deliver a decent life to its citizens" (*supra* note 170 at 7). With the diminishing power of various states, Gilman notes that there was a "parallel development of a 'deviant' globalization in industries like narcotics" (*ibid* at 8). See also Campbell, *supra* note 174 ("Mexican organized crime groups are a response to the failures and neglect of the neoliberal Mexican state" at 63).

198 Alexandra Olson & Martha Mendoza, "Mexico's 'El Chapo' Thrives 10 Years After Escape", *The World Post* (18 January 2011), online: <www.huffingtonpost.com/huffwires/20110118/lt-drug-war-el-chapo-s-rise/>.

199 Duncan, *supra* note 195 at 33. See also Olga R Rodriguez, "Drug Cartels Make Many Mexicans Afraid to Vote", *SFGate* (4 July 2010), online: <www.sfgate.com/crime/article/Drug-cartels-make-many-Mexicans-afraid-to-vote-3259988.php>.

200 See Rodriguez, *supra* note 199. Estévez makes the argument that the drug cartels are in part constitutive of the state, contending that "[t]his leads to the appearance of agents who sell their killing expertise to any entity—private or state—willing to pay for it. By working for either or both, state or criminal, these subjects dislocate state attribution at the ontological level" (Estévez, *supra* note 26 at 1163). Even if such organizations are constitutive of the state in many instances (which makes a stronger case for "political opinion"), there will still be instances where such organizations and their members have limited contacts with the state.

201 Duncan, *supra* note 195 at 30.

202 *Ibid*.

Lastly, the third type of area that Duncan identifies is that of middle-sized cities wherein state institutions, politicians and other sources of non-criminal social power still maintain an important status in the socio-political order. In these areas, the drug cartels exercise greater influence and power than they do in larger cities but less than what they exercise in rural villages and other sites identified above.[203] As Duncan argues, given the increasing power and influence of the drug cartels in certain areas, politicians will tend to rely increasingly on illegal money from drug cartels to win local elections.[204] In exchange, criminal organizations obtain some immunity to carry on with their operations.[205]

What this literature suggests is that drug cartels maintain significant power in Mexico. In much larger cities, their power may be limited with the exception of marginalized communities. By contrast, in rural areas and smaller cities they are the dominant power and have significant control over officials, politicians, and electoral politics. A challenge to their power should be viewed as "political", even if their interests are not to assume direct control of the state, but to limit the state's ability to affect their criminal enterprises.

B. Gang Activity in Central America

In addition to the political power and violence exercised by drug cartels, there are also several organized youth criminal gangs who similarly exercise substantial control over local populations in parts of Central America.[206] In recent years, scholars and journalists have paid greater attention to violence perpetrated by youth gangs in, among other countries, El Salvador, Honduras, and Guatemala.[207] These gangs include prominent

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[203] See *ibid* at 30–32.

[204] *Ibid* at 31.

[205] See *ibid*.

[206] For an interesting discussion of how such groups developed in El Salvador, see Sonja Wolf, "Forced Displacement in El Salvador: Street Gangs, Violence, and the Politics of Security: Part 1" (2 July 2015), *CDA Institute Blog: The Forum* (blog), online: <www.cdainstitute.ca/en/blog/entry/forced-displacement-in-el-salvador-street-gangsviolence-and-the-politics-of-security-part-1>.

[207] See e.g. Juan J Fogelbach, "Gangs, Violence, and Victims in El Salvador, Guatemala, and Honduras" (2011) 12:2 San Diego Intl LJ 417; Ana Arana, "How the Street Gangs Took Central America" (2005) 84:3 Foreign Affairs 98; Oliver Jütersonke, Robert Muggah & Dennis Rodgers, "Gangs, Urban Violence, and Security Interventions in Central America" (2009) 40:4–5 Security Dialogue 373; Douglas Farah, "The Transformation of El Salvador's Gangs into Political Actors", *Hemisphere Focus* (21 June 2012), online: <www.csis.org/files/publication/120621_Farah_Gangs_HemFocus.pdf>; Elana Zilberg, "Gangster in Guerilla Face: A Transnational Mirror of Production Between the USA and El Salvador" (2007) 7:1 Anthropological Theory 37; Andrew V Papachristos, "Gang

groups such as the Mara Salvatrucha (MS-13) and the 18th Street Gang (M-18), both of which were first formed in the United States among disaffected immigrant and refugee youth.[208] During the 1990s and 2000s, because of their criminal activities, tens of thousands of these youths were deported from the United States to their countries of nationality in Central America.[209] With limited employment prospects, many adapted to their new surroundings by continuing their gang lifestyles.[210] The detrimental impacts of their presence were soon felt. Furthermore, gang membership swelled to such a significant degree (comprised of both those deported from the United States and recruitment among native-born youth) that it is believed that they outnumber military or law enforcement personnel.[211] In a postconflict society such as El Salvador,[212] MS-13 and M-18 have been able to acquire weapons with relative ease.[213] As with the cartels in Mexico, the gangs both compete with one another and also engage in violence against the government. The El Salvadoran government has employed forceful means to subdue and control the gangs, to which the

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World", *Foreign Policy* (23 October 2009), online: <foreignpolicy.com/2009/10/23/gang-world/>.

208 See Fogelbach, *supra* note 207 at 420–21. On the appeal of gangs for disaffected youth in the United States more generally, see Luis Enrique Bazan, Liliana Harris & Lois Ann Lorentzen, "Migrant Gangs, Religion and Tattoo Removal" (2002) 14:4 Peace Rev 379 at 380.

209 See Fogelbach, *supra* note 207 at 421; Papachristos, *supra* note 207; Jütersonke, Muggah & Rodgers, *supra* note 207 at 380.

210 See Arana, *supra* note 207 ("[t]he deportees arrived in Central America with few prospects other than their gang connections" at 100–01). As one current M-18 gang leader observes, "I had few options. My family was poor. They made me feel like I belonged" (Matt Chandler, "As Murders Soar, El Salvador Gangs Want to Talk Truce", *Al Jazeera* (3 August 2015), online: <www.aljazeera.com/indepth/features/2015/08/murders-soar-el-salvador-gangs-talk-truce-150802075715682.html>). Stressing the failure of the government to deal with poverty and lack of opportunities, this gang leader articulates that "[t]here are no football teams, but there are gangs. No boy scouts, but gangs. Nothing, just gangs" (*ibid*).

211 See Jütersonke, Muggah & Rodgers, *supra* note 207 at 377; Fogelbach, *supra* note 207 at 455; Arana, *supra* note 207 at 101.

212 For a discussion of the problems that plagued the formal political system after the civil war came to an end, see Sonja Wolf, "Subverting Democracy: Elite Rule and the Limits to Political Participation in Post-War El Salvador" (2009) 41:3 J Latin American Studies 429. Wolf observes that El Salvador has essentially devolved into an electoral authoritarian state where "public institutions remained largely unresponsive and acute social exclusion persisted, intensifying violent crime and street gang activities" (*ibid* at 462).

213 See Arana, *supra* note 207 at 104.

latter have responded with brutal violence against other citizens and government actors.[214]

In spite of government efforts, the gangs exercise substantial de facto political power by virtue of their substantial membership, their access to weaponry, and the money they generate and retain through their criminal enterprises.[215] The UNHCR posits that in Central America, powerful gangs "may directly control society and *de facto* exercise power in the areas where they operate."[216] Sonja Wolf asserts that wherever these gangs maintain a presence, "cliques establish an authority structure and norms that allow them to protect illicit markets and defend their territory against potential infiltrators. Citizens hoping to avoid physical harm have no choice but to comply with these rules."[217] Although there is diversity among the different gangs, a common feature is their shared intolerance for opposition to, and "acts of disrespect" to, their power.[218] The UNHCR observes that any refusals to succumb to a gang's demands, as well as any actions that challenge those demands, are subject to harsh reprisals.[219] Such demands include efforts at recruitment as well as—like drug cartels—the imposition of local taxes called *renta*.[220] The criminal activities of the gangs are varied but typically include murder, extortion, drug trafficking, robbery, kidnapping, smuggling, and human trafficking.[221]

The gangs' exercise of political power is not solely related to their de facto control over local populations through violence and the collection of *renta*. Like the cartels in Mexico, some gang members actively seek to influence or control political agendas. Based on his interviews with El Salvadoran gang members, analyst Douglas Farah observes that such gangs are looking to influence political actors directly. He writes that gang "leaders are beginning to understand that territorial control and cohesion

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214 See *ibid* at 98; Jütersonke, Muggah & Rodgers, *supra* note 207 ("[c]rackdown operations against gangs tend to generate perverse effects—including a greater predisposition to excessive acts of brutality and new forms of adaptation to avoid capture" at 384).

215 See Arana, *supra* note 207 ("[f]ifteen municipalities in El Salvador are believed to be effectively ruled by the *maras*" at 101).

216 UNHCR, *Guidance Note*, *supra* note 156 at para 47.

217 Sonja Wolf, "Forced Displacement in El Salvador: Street Gangs, Violence, and the Politics of Security: Part 2" (3 July 2015), *CDA Institute Blog: The Forum* (blog), online: <www.cdainstitute.ca/en/blog/entry/forced-displacement-in-el-salvador-street-gangs-violence-and-the-politics-of-security-part-2>.

218 UNHCR, *Guidance Note*, *supra* note 156 at para 6.

219 *Ibid*. See also *In the Matter of Orozco-Polanco* (18 December 1997), A75-244-012 at 112–15 (US Executive Office for Immigration Review) [*Orozco-Polanco*].

220 See UNHCR, *Guidance Note*, *supra* note 156 at para 10.

221 See *ibid* at para 58.

make it possible for them to wring concessions from the state while preserving [the] essence of their criminal character."[222] This understanding has led to the gangs contemplating support for particular candidates "for local and national office in exchange for protection and the ability to dictate parts of the candidate's agenda."[223] This desire to actively influence political agendas and governance grew out of the El Salvadoran government's negotiations with gang leaders. In order to stem the open violence between gangs and the ensuing high rate of homicides, the government had agreed to provide better living conditions in prisons for incarcerated gang members.[224] This accord purportedly led to a significant decrease in the murder rate, though crimes and criminal activity still persist.[225]

Like their counterparts in the drug cartels, the youth gangs in various Central American states exercise significant power and control over local populations. They are well armed and financed, and they challenge the state's authority without seeking to overthrow the government directly and seize control over the reins of governance. The data suggest that they have also sought to influence politicians through support in order to shape government policies and their treatment of the gangs. As with many entities or groups that exercise power, there are those who do not comply or obey. I deal with such resistance next.

C. Resistance to Criminal Organizations

Due to the power of the drug cartels and the criminal gangs in Central America, many people have resisted such entities through various means. A rather significant form of resistance is the refusal to be conscripted into the criminal operations of these organizations or the subsequent departure from the gang without permission.[226] Another is the refusal to pay "extortion or other unlawful demands for money or services."[227] A third mode of resistance is the active reporting of criminal activity by these groups to authorities.[228] A fourth way involves direct and armed confrontation with such groups.[229] As indicated above, unless there is state in-

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[222] Farah, *supra* note 207 at 1.

[223] *Ibid*.

[224] See *ibid*.

[225] See Chandler, *supra* note 210.

[226] See UNHCR, *Guidance Note*, *supra* note 156 at paras 12–13.

[227] *Ibid*.

[228] See *ibid*.

[229] See e.g. Tracy Wilkinson, "In the Hot Land, Mexicans Just Say No to Drug Cartels", *Los Angeles Times* (11 June 2013), online: <articles.latimes.com/2013/jun/11/world/la-fg-

volvement, courts have been largely reluctant to recognize opposition to criminal organizations as manifesting a political opinion for the purposes of granting asylum, even where they recognize a well-founded fear of persecution.

Given the prevalence and increasing power of drug cartels and other criminal organizations, jurists should shift away from the simplistic understanding that what is "political" is solely about government power or opposition to it. Applying the UNHCR's definition of political opinion where resisters refuse to join criminal gangs, blow the whistle on their criminal activities, or even, however rarely, confront such power either through the use of force or threats of the use of force, such acts should be seen as manifesting a political opinion on a matter in which the machinery of society may be engaged. The UNHCR observes that "[i]n certain contexts, expressing objections to the activities of gangs or to the State's gang-related policies may be considered as amounting to an opinion that is critical of the methods and policies of those in power and, thus, constitute a 'political opinion' within the meaning of the refugee definition."[230] What is important to note here is the use of the word "or" indicating that objections to the activities of gangs, solely, may constitute a political opinion. Also, as with other political opinion analyses, the UNHCR posits that gang-related refugee claims may be analyzed on the basis of an actual or imputed political opinion with respect to gangs, other segments of society such as vigilante groups which target gangs, or the state's policies toward gangs.[231]

The UNHCR highlighted one case in support of the notion that opposition to criminal activity in itself (absent the involvement of state actors) may constitute a political opinion. The case involved a Guatemalan asylum seeker who had a well-founded fear of persecution due to his refusal to join a criminal gang.[232] The United States immigration judge hearing the case recognized that the asylum seeker's well-founded fear of persecution was linked to his political opinion. The political opinion was constituted through his support for the notion of the rule of law, namely, the earning of an honest living in combination with opposing and refusing to be a part of gang life and its accompanying illegal activities. The decision represents a more realistic, reflective, and generous understanding of the "political" as being connected to power, but not tethered to the state. Yet

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mexico-hotland-20130611>. See also Asfura-Heim & Espach, *supra* note 20; Shoichet, *supra* note 20; Grillo, *supra* note 20; Crowder, *supra* note 20.

230 UNHCR, *Guidance Note*, *supra* note 156 at para 46.

231 *Ibid* at para 45.

232 See *Orozco-Polanco*, *supra* note 219 at 120–21, 124.

amidst the much larger body of binding jurisprudence to the contrary, the decision is at the moment an outlier.

In addition to the UNHCR's broadened definition of "political opinion", the Michigan Colloquium's definition would likely also contemplate opinions with respect to such criminal organizations.[233] Both the cartels and youth gangs have the capacity to and indeed do exercise societal power or authority, even though they do so illegitimately. At the very least, they are informally systematized and exercise de facto societal power. These organizations exercise this power through imposition of *renta*, as well as through fear, their use of violence and access to weapons, their sheer numbers, and their involvement in corrupting the formal political system and building alliances with officials and politicians.

As a consequence of the narrower interpretations of the "political", as set out in Part II of this article, were violent crimes to be committed against such cartels, gangs, and their members, such conduct would not be considered "political crimes" (unless, perhaps, those targeted were somehow connected to the state as suggested in the cases discussed above[234]). It is understandable that jurists in the North would find armed resistance against a criminal organization to fall outside the legitimate scope of the political crimes doctrine. Much of the jurisprudence has clearly demonstrated that courts are favourable, when at all, to recognizing a crime to be political when the target is a state or its actors. This perception neglects the reality that cartels have sufficient power and resources to counter the power of states without seeking to govern qua the state. Cartels and youth gangs create and enforce their norms so as to facilitate the smooth running of their commercial operations. It is helpful too to remember Justice Kirby's perspective on interpreting the *Refugee Convention* in connection with article 1F(b). Specifically, he noted that the *Convention* was intended to function in a wider world and to address the realities of "political crimes" in societies quite different from the one that exists in refugee-receiving states like Australia.[235] He observed that "[w]hat is a 'political crime' must be judged, not in the context of the institutions of the typical 'country of refuge' but, on the contrary, in the circumstances

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[233] To recall, this definition includes, "an opinion about the nature, policies, or practices of a state or of an entity that has the capacity, legitimately or otherwise, to exercise societal power or authority. A relevant non-state entity is one that is institutionalized, formalized, or informally systematized and which is shown by evidence of pattern or practice to exercise *de facto* societal power or authority" ("Michigan Guidelines", *supra* note 147).

[234] See e.g. *Extradition of Singh*, *supra* note 130 at 61.

[235] See *Singh*, *supra* note 2 at para 106.

of the typical country from which applicants for refugee status derive."[236] The political realities and conflicts that exist, *inter alia*, in Mexico and El Salvador are not like those in other states in the North. A reflective and purposive approach to interpreting the *Refugee Convention* needs to countenance such realities.

What the drug cartels and other organized criminal outfits represent is that legal systems must adapt to the fact that individuals cannot always be easily compartmentalized into simplistic categories such as "innocent civilian" (non-political target) or government or military official or agent (political target). There are those who fall somewhere in between—those who are both non-state actors and legitimate targets for political opposition. Furthermore, where organized criminals qua civilians engage in oppression against others through the use of their superior financial and military power, they are no longer innocent bystanders or ordinary citizens, even though they are not government actors either. Were other citizens to challenge such oppressive non-state power with violence, such actions should not automatically be categorized as serious non-political crimes or acts of terrorism.[237] Nor should courts and tribunals be quick to dismiss non-violent opposition to criminal organizations, gangs, and drug cartels as falling outside the parameters of a political opinion.

Conclusion

In this article, I have argued that the notion of what constitutes the "political" within the context of the 1951 *Refugee Convention* should be interpreted in a generous and purposive manner that expands the meaning of the term to apply to opinions about and crimes against non-state actors. In contrast to the narrower approach adopted by numerous courts which associates the "political" with the state, the UNHCR, jurists, legislators, and prominent refugee law scholars have provided such generous and purposive interpretations. Among them, the UNHCR has arguably provided the widest interpretation. Rather than being exclusively limited to official institutions of the state or groups seeking to displace or change the policies of the state, the concept of the "political" should refer to the exercise of power within a society such that the "political" goes beyond the

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[236] *Ibid*.

[237] I would add that if a member of a rival but less powerful drug cartel or youth gang were to seek refugee status for their opposition to a more powerful counterpart, a broadened understanding of the "political" would not necessarily lead to their acquiring asylum under the *Refugee Convention*. By virtue of their regular and more general criminal behaviour as part of a weaker drug cartel or youth gang, they would more than likely be excluded for committing serious non-political crimes under article 1F(b).

state to include sections within society such as, but not limited to, criminal organizations.

Expanding the notion of the "political" would inevitably affect what constitutes a "political opinion" and a "political crime". It should be noted, however, that expanding what constitutes political crimes does not mean that it becomes legitimate to engage in unrestrained violent conduct against non-state actors who happen to exercise power but do so in non-lethal but nevertheless violent ways. Also, the state is not removed from the scenario altogether. It should be recalled that refugee protection arises only when the asylum seeker's country of nationality is unable or unwilling to provide protection. Once it is determined that the state is unable or unwilling to provide protection, there must be some nexus to the political opinion of the resister. It may very well be the case that a drug cartel or youth gang decides to persecute someone for reasons other than an individual's opposition to their activities. Given that the failure or unwillingness of the state to protect comes into play at an earlier stage of the analysis, there is no need to include in the analysis the role or presence of the state when interpreting the notion of the "political" with respect to "political opinion" or to "political crimes". As the foregoing has attempted to show, power does not reside solely within the state, a reality that international refugee law should reflect.