Michigan Journal of International Law

Volume 37 | Issue 2

2016

Toward a New Framework for Understanding Political Opinion

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Catherine Dauvergne, *Toward a New Framework for Understanding Political Opinion*, 37 MICH. J. INT'L L. 243 (2016).
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TOWARD A NEW FRAMEWORK FOR UNDERSTANDING POLITICAL OPINION

*Catherine Dauvergne**

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Preface

This paper was written to frame the work of the Seventh Colloquium on Challenges in International Refugee Law, held at the University of Michigan Faculty of Law, on March 27–29, 2015. To some extent, therefore, it has already served its purpose. It is somewhat tempting in the wake of the Colloquium to completely reconstruct the paper in light of the conversations and conclusions of that event. Such reconstruction, however, would be misleading. Instead, I have chosen to publish the paper in a form that is very similar to its earlier iteration, with a few corrections, clarifications, and explanatory notes about some key pieces that formed part of the Colloquium conversation.

Given this decision, the paper now serves three purposes. First, it presents the dilemmas of 'political opinion' jurisprudence that Colloquium participants considered. The central questions are presented here as the participants saw them. This presentation

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serves, therefore, to deepen one's reading of the Michigan Guidelines on Risk for Reasons of Political Opinion. The paper addresses many questions that many a first-time reader of the Guidelines may raise in their own mind on reading the Guideline text. Second, the paper details, as well as detailing the case for these Guidelines. The analysis here makes plain that these guidelines fill an increasingly important gap in refugee decision making. Finally, because of the case-driven methodology of the paper, it presents a thorough overview of contemporary political opinion jurisprudence.

The paper has had an unusual gestation that has been exceptionally rewarding for me as a scholar and author. The traditional 'first footnote of thanks' is therefore completely inadequate. It was a daunting honor to be asked by Professor Hathaway to serve as Research Director for the Seventh Colloquium on Challenges in International Refugee Law. In this role, I had the benefit of working with three successive groups of Michigan Law students in developing the paper. The first group, in the autumn of 2013, began from a very vague sketch of an idea and spent a term completing a series of research tasks that were invaluable in developing my thinking about political opinion. The second group, a year later, spent a term working through an earlier draft of the paper, providing detailed critique and assessment, as well as further research. This term included a seminar session in Michigan where the students and I debated each section of the draft paper. The final group worked with the near-final version of the paper to transform it into questions to frame the Colloquium conversation. As a result of all of this work, the current version of this paper has had a more thorough and attentive review than anything I have written since my own graduate work.

After all of this had been completed, the Colloquium itself was an astonishing experience, where seven experts from around the world devoted their complete attention to the ideas presented by this paper over the two day period. Some of my ideas were taken up by this group, some were challenged, some were transformed. All of this took place in a highly collegial setting, with the goal of improving the law and its real world outcomes.

All of this adds up to a unique and precious experience in scholarly life. For this I am most grateful to James C. Hathaway.

Finally, I want to thank two students at Allard Law who worked with me in Vancouver over the past two years. The first is Dylan Mazur, law student and Executive Director of the Vancouver Association for Survivors of Torture, a vital refugee support organization, who read many of the political opinion cases with me.

The second is Catherine Repel, my highly efficient and always good-humoured research assistant, who worked with me through each successive draft.

All of this said, I turn now to the traditional starting point.

Introduction

The Refugee Convention extends protection to those at risk of being persecuted because of their political opinions. Political opinion is the final factor in the Convention's list of "grounds" of protection, where a refugee is defined as a person who

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. . .[1]

This list is the starting point for approaching the puzzle that political opinion has become: it is evident in this formula that political opinion is not quite the same as the other identity or status-linked grounds for refugee protection. It is, however, important not to overstate this distinction; each of the five grounds is well recognized in anti-discrimination law.

For obvious reasons, this ground for protection comes closest to the Cold War roots of refugee jurisprudence and most directly reflects the trope of the political refugee. It is not surprising that this ground has been interpreted broadly, given that it fits most closely with the popular imagination of who is a refugee. The Convention's working papers (*travaux préparatoires)* show that the drafters conceptualized political opinion expansively from the outset, indicating that the ground should include "diplomats thrown out of office,"[2] people "whose political party had been outlawed,"[3] and "individuals who fled from revolutions."[4]

It is settled law that protection based on political opinion is not limited to people who are members of a political party, or who are engaged in electoral politics, or who embrace in some way a particular political ideology. It is similarly well established that the basis of protection is "opinion" rather than activity, so there is no requirement that an individual has formally expressed their views. Indeed, the individual need not even hold the opinion that creates the risk of being persecuted, as there is general agree-

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1. Convention Relating to the Status of Refugees art. I(a)(2), *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954). The second clause, omitted here, includes stateless persons on the same bases.

2. U.N. ESCOR, Soc. Comm., 11th Sess., 172d mtg. at 18, U.N. Doc. E/AC.7/SR.172 (Aug. 12, 1950).

3. *Id.*

4. *Id.*

ment that "imputed" political opinion satisfies the Convention's requirement.[5]

To get some sense of how divergently political opinion has been understood, here are the examples that Hathaway and Foster have included in their second edition of the *Law of Refugee Status*:

> Among those acts that have been construed as expressions of political opinion are public statements regarding the unfair distribution of food in Iraq, a public accusation of judicial ineptness where such conduct was considered "anti-Islamic," attempts by a Guatemalan literacy teacher to educate the population, the preparedness of a Sinhalese travel agent to engage in business with Tamil clients, the supply of business services to governmental and military institutions, employment by political figures including the government, actual, imputed, or implied advocacy of human rights, including labor rights, undertaking humanitarian work, defection from the KGB, illegal departure or stay abroad, the lodgment of a (failed) claim for refugee status abroad, and violation of a politically motivated criminal law. Even the refusal to declare a political opinion – in other words a position of neutrality – might lead to an imputation of a political opinion.[6]

These examples demonstrate that many refugee decision-makers have been attentive to the political and social contexts in which opinions are formed, and aware of the vital role that context plays in determining the limits of the political realm.

This breadth leads to a central question about political opinion as a ground of protection: is there any kind of strongly held belief that is *not* a political opinion? The notion of infinite breadth is out of step with most judicial decision making and is inherently unappealing to states party to the Refugee Convention. Further, it does not fit the refugee definition's central requirement that not every risk of being persecuted will make a person a refugee: the risk must be "for reasons of" a stated ground.

Decision-makers have almost unanimously sought to define political opinion so that "[n]ot just any dissent to any organization will unlock the gates to . . . asylum. . ."[7] What the courts have disagreed about, however, is how to implement this distinction. The starkest points of this disagreement are seen in the contrast between the Supreme Court of Canada's view in *Ward v. Canada*[8] and the former New Zealand Refugee Status Appeal

5. *See* James C. Hathaway & Michelle Foster, The Law of Refugee Status 409-23 (Cambridge Univ. Press 2d ed. 2014) (1991); Guy S. Goodwin-Gill & Jane McAdam, The Refugee in International Law 87, 89, 104 (Oxford Univ. Press 3d ed. 2007) (1983).

6. Hathaway & Foster, *supra* note 5, at 413-15 (citations omitted).

7. Ward v. Canada (Attorney General), [1993] 2 S.C.R. 689, 750 (Can.).

8. *Id.*

Authority's more recent view.[9] The Canadian Court had specifically accepted Guy Goodwin-Gill's statement that political opinion ought to include "any opinion on any matter in which the machinery of state, government, and policy may be engaged."[10] The New Zealand tribunal, by contrast, found nearly twenty years later that this definition was "too broad to be of any meaningful assistance."[11] The tension over interpreting political opinion falls between these poles, and has increased in recent years as the number of claims at the limit of existing jurisprudence has increased, especially in two categories: flight from violent criminal groups and requests for protection made by whistleblowers.

The tension between the Supreme Court of Canada and the New Zealand Refugee Status Appeals Authority raises the overarching question of whether political opinion should be defined at all. It is evident that existing definitions have not provided sufficient guidance, and that there is no definition in the adjacent area of human rights law that can be logically imported. A starting premise of this paper is that a broadly agreed-upon definition of political opinion would advance the jurisprudence by providing a consistent standard. This is especially important as the overwhelming majority of refugee status determinations are made by decision-makers facing extremely high caseloads, who may not have legal training. Despite this, it is vital to keep in mind what lies behind the debate about the value of a definition. A definitional approach encourages abstraction, and cases that abstract a political opinion from its context are those that open themselves up to appearing frivolous or nonsensical. Context is vital to understanding the substance of "political." A new, definition-centered approach must include guidance on *how* to take context into account, simply repeating its importance is insufficient.

In pursuit of a new definition of political opinion, and, with it, a new analytical framework for decision-makers, the methodology in this paper is case-based and oriented around the central questions that must be answered in order for a new definition to be successful. The paper follows a case-based approach for two reasons. The first is that contemporary case law is the most effective way of observing the problems presented with the existing approaches to political opinion. The second is that case law is the best source of material for testing possible new direction and for assessing what will or will not work, from the point of view of the decision-makers who are ultimately charged with bringing refugee law to life. Case law is, thus, a rich source of both problems and solutions. This paper focuses on constructing a tool that is practical, rather than theoretical in focus; the analysis is developed out of the dilemmas facing decision-makers, not theoretically sophisticated scholars of jurisprudence. Developing my analysis directly out of the dilemmas that decision-makers are grappling with,

9. *Refugee Appeal No. 76339* [2010] NZAR 386 (R.S.A.A.). The Refugee Status Appeals Authority was superseded in 2010 by the Immigration and Protection Tribunal.

10. *Ward*, 2 S.C.R. at 746.

11. *Refugee Appeal No. 76339*, [2010] NZAR ¶ 88.

reveals a bias in my approach: I am more interested in constructing a tool that will work for first instance decision-makers than in theoretically sophisticated jurisprudence.

The questions at the heart of this paper are those that must be answered in order to generate a new definition of political opinion in the refugee law context:

1. What is an "opinion"?
2. Which opinions are "political"?
3. Are there any "political opinions" that ought not to be the basis for refugee protection?

In keeping with a commitment to a case-focused approach, the paper is organized around case law clusters, and the questions are used in a secondary manner to develop the analysis within these clusters.

This paper has the twinned aims of setting the stage for developing a new approach to analyzing political opinion in refugee law and of tentatively proposing a new framework for analysis. Emphasizing the dilemmas presented by the case law, this paper proposes an approach where the importance of understanding how and why imputed opinions must be protected is the basis for understanding "opinion" more generally, and where "political" is understood as relating to power structures that can exercise coercion in a given society. I suggest that some political opinions ought to be excluded from the refugee definition on the basis of the egregious human rights infringements they reflect.[12]

With these aims in mind, the paper opens by setting out some starting points to frame the discussion, including existing definitions. It then surveys the major cases that have fully grappled with what political opinion means. The following sections explore how political-opinion jurisprudence operates in a series of case clusters, including cases concerning flight from the People's Republic of China's ("PRC") one child policy, military conscientious-objection, whistleblowing, flight from armed groups, and political opinions on gender. The final section of the paper outlines essential features of any new approach by answering the three questions outlined above and, based on this analysis, proposes a tentative new framework.

I. Starting Points

Prior to launching into the case methodology, which grounds the new framework, this section canvasses key background sources: the Refugee Convention itself, international human rights law, and existing definitions of political opinion.

12. This suggestion was strongly rejected at the Colloquium, and I was ultimately persuaded that the "exclusions" provisions of the Convention's Article 1(F) would accomplish the purpose I envisioned here. The principle that some political opinions are so repugnant as to be undeserving of refugee protection remains sound.

As a matter of first principles, the meaning of political opinion is a question of treaty interpretation. As such, the primary interpretive tools are the ordinary rules set out in the Vienna Convention on the Law of Treaties, which consist of good-faith interpretation that takes into account the provision's context, object, and purpose.[13] The Refugee Convention has been widely accepted as establishing a framework for surrogate human rights protection by the international community when an individual's state of origin is unable or unwilling, for discriminatory reasons, to provide such support.[14] Good-faith interpretation, therefore, must reflect the human rights aims of the Convention.

Attuning to the "context" of political opinion within the Refugee Convention requires attention to the term's place within the definition itself. This is important in two ways. First, it is important because the *noscitur a sociis* principle tells us that items on a list ought to be interpreted by reference to one another—in other words, in the context of the protection against discriminatory persecution afforded by the refugee convention, "political opinion," must have something in common with race, religion, nationality, and membership in a particular social group. Even though political opinion sticks out as different on this list, an interpretive strategy must seek out similarities between political opinion and the other grounds. These similarities lie primarily in the ideals of anti-discrimination

---

13. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT]. The basic interpretation rules are set out in Article 31:

> 1. 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.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) Any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

14. *See, e.g.*, Hathaway & Foster, *supra* note 5, at 193-97.

and civil and political freedom that have been central to human rights law since its origins.[15]

Second, situating political opinion within the refugee definition serves as a reminder that our narrow focus here is on one ground of potential persecution. In developing a new approach, it is vital to recall that much of the work of determining whether one fits within the definition is done by other elements of the definition, in this case particularly by the nexus clause ("for reasons of") and the "being persecuted" element (including both serious harm and state protection). A number of the persistent problems that arise in interpreting political opinion are better understood as questions of nexus and of whether the harm in question is sufficiently serious to reach the persecution threshold. Defining political opinion well should alleviate these issues, but it is also vital to note that the focus here is narrow, and some of these adjacent issues will not be solved by a clearer framework for political opinion analysis.

Political opinion is not defined in the Refugee Convention or elsewhere in international human rights law. Freedom from discrimination on the ground of political opinion is enumerated in the Universal Declaration of Human Rights,[16] and is specifically protected by the International Covenant on Civil and Political Rights (ICCPR). In the ICCPR, the anti-discrimination provision of the Universal Declaration is mirrored by Article 2.[17] "Opinion" is specifically protected by Article 19:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may

15. *See id.* at 427; GOODWIN-GILL & MCADAM, *supra* note 5, at 70, 92-93.

16. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 2 (Dec. 10, 1948) ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.").

17. International Covenant on Civil and Political Rights art. 2(1), *opened for signature* Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.[18]

Article 19 links freedom to hold opinions to freedom of expression. The Article 18 protection for freedom of "thought, conscience, and religion"[19] is also relevant to considering the place of political opinion in international human rights law. Yet none of these textual references directly addresses the notion of political opinion as used in the Refugee Convention.

Looking beyond the ICCPR text does not provide much assistance. The Human Rights Committee has not been preoccupied with defining either "opinion" or "political opinion." In 2011, when the Committee undertook the considerable task of issuing a new General Comment on Article 19, the meaning of "opinion" received scant attention, undoubtedly because the Committee, in looking to distill its jurisprudence of several decades, found that defining opinion had not been problematic.[20] The General Comment states that "[n]o person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions. All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature."[21] The Rapporteur's leading work on the General Comment summarized the Committee's broad approach to freedom of expression by stating that "freedom of expression embraces every form of idea and opinion capable of transmission to others, including views that may be deeply offensive."[22]

Consideration of the *travaux préparatoires* to the ICCPR is also not particularly helpful in suggesting a definition. The *travaux* do note that "[a]s the debate on this clause progressed, it became clear that freedom of opinion and freedom of expression were not of the same character: the former was purely a private matter, belonging as it did to the realm of the mind, while the latter was a public matter, or a matter of human relationship . . ."[23] This comment echoes the question that has arisen in some refugee cases, of whether an opinion must have a public aspect in order to

18. *Id.* at 178.

19. *Id.*

20. *See* Human Rights Committee, General Comment No. 34, Article 19: Freedoms of Opinion and Expression, U.N. Doc. CCPR/C/GC/34/CRP.2 (2010).

21. *Id*. ¶ 9.

22. Michael O'Flaherty, *Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No. 34*, 12:4 Hum. Rts. L. Rev. 647, 647 (2012).

23. Marc J. Bossuyt, Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights 378 (1987).

be political; but it stops short of shedding light on the appropriate answer. The *travaux* also show, in regard to the Article 18 protection for thought, conscience, and religion, that it was agreed "[n]o restrictions of a legal character. . .could be imposed upon man's inner thought or moral consciousness, or his attitude towards the universe of its creator: only external manifestations of . . . belief might be subject to legitimate limitations."[24]

All of this leads to the conclusion that political opinion is not a term of art in refugee or international human rights law. It has been consistently treated, over a sixty-year span, as a straightforward expression used in its ordinary sense. The interpretive dilemmas it has posed within refugee law are not mirrored elsewhere in international human rights law.

International human rights law is useful, however, in emphasizing two ideas. First, political opinion is a subset of opinion more generally. Second, political opinion is distinct from political expression, because political opinion includes private and unexpressed thought. If it is not already evident, these points reinforce that interpreting political opinion, requires attention to both words. Refugee decision-makers have primarily focused on the limits of political. This makes sense based on international human rights law, where opinion is clearly very broad and can cover anything. But in seeking a new approach, there is something to be garnered from attention to opinion itself, as will become clearer in the discussions of case law that follow.

Another starting point in any discussion of political opinion is Goodwin-Gill's definition, adopted by the Supreme Court of Canada in *Ward*.[25] Goodwin-Gill defined political opinion as "any opinion on any matter in which the machinery of State, government and policy may be engaged."[26] This formulation has been central to the analysis of political opinion for nearly twenty years, and has made important contributions: first to ensuring broad interpretations and second to forming the parameters of debate. Numerous courts have discussed this definition, but the Supreme Court of Canada remains the only court to have explicitly adopted it. Within recent Canadian jurisprudence, it is evident that even decision-makers bound by this definition struggle to apply it consistently.

Two decades prior to Goodwin-Gill's definition, Atle Grahl-Madsen wrote that "the scope of the term 'political opinion'. . . is not easily ascertainable."[27] Grahl-Madsen did not reduce his discussion of the outer limits of political opinion to a definitional form, but did launch his discussion with the statement "it is apparent that it covers persecution of persons on the simple ground that they are alleged or known to hold opinions contrary to or critical of the policies of the government or ruling party."[28]

24. *Id.* at 355.

25. Ward v. Canada (Attorney General), [1993] 2 S.C.R. 689, 746 (Can.).

26. Goodwin-Gill & McAdam, *supra* note 5, at 87.

27. Atle Grahl-Madsen, The Status of Refugees in International Law 220 (1966).

28. *Id.*

Grahl-Madsen's analysis following this statement focused on how political opinion was generally a "liberal" doctrine, and explored the ways in which it might be limited. In doing so, he drew on international human rights law, concluding that "a person may justly fear persecution 'for reason of political opinion' in the sense of the Refugee Convention if he is threatened with measures of a persecutory nature because of his exercise of or his insistence on certain of the 'rights' laid down in the Universal Declaration."[29]

While the UNHCR Handbook published in 1992 did not define political opinion,[30] by 2010, when its Guidance Note on Refugee Claims Related to Victims of Organized Gangs was released, the UNHCR defined political opinion, at least for that context, by drawing on Goodwin-Gill's work.[31] As a result, the present UNHCR definition appears strongly influenced by Goodwin-Gill and the jurisprudence that has engaged with his work: "In UNHCR's view the notion of political opinion needs to be understood in a broad sense to encompass 'any opinion on any matter in which the machinery of State, government, society, or policy may be engaged.' "[32]

A final contribution to defining political opinion has been made by the European Union's Qualification Directive ("QD"). Article 10(1)(e) states

> [T]he concept of political opinion shall, in particular, include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.[33]

Article 10(1)(e) must be read in conjunction with Article 6, which states

> Actors of persecution or serious harm include:
>
> (a) the State;
>
> (b) parties or organisations controlling the State or a substantial part of the territory of the State;
>
> (c) non-State actors, if it can be demonstrated that the actors mentioned in points (a) and (b), including international organisations,

29. *Id.* at 227.

30. *See* U.N. High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶¶ 80-86, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1992) [hereinafter UNHCR Handbook].

31. U.N. High Comm'r for Refugees, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, ¶ 45 (Mar. 31, 2010), http://www.unhcr.org/refworld/docid/4bb21fa02.html [hereinafter *Guidance Note*].

32. *Id.*

33. Council Directive 2011/95/EU, art. 10(1)(e), 2011 O.J. (L 337) 9, 16 [hereinafter Qualification Directive].

> are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.[34]

This two-part definition of political opinion aims for breadth, but quite possibly overreaches. At the very least, this definition offers a sharp answer to the question of whether a political opinion must be about state or government in some way. Article 6 paragraph (c), in combination with the political opinion definition in Article 10, implies that a political opinion will include any opinion "on a matter related to" a non-state actor from whom the state cannot or will not offer protection. Paragraph (c) is accordingly almost infinitely broad. It is not clear whether this limit would exclude any *actual* instances of risk or whether its limiting function is strictly hypothetical. For example, forming the idea that "this group is going to harm me and no one can protect me" would appear to be a political opinion under the QD. Paragraph (c) provides an illustration of how easy it is for political opinion analysis to become so open-ended as to be unwieldy.

This clumsy formulation does not offer much by way of definitional limit, and is vastly broader than the Goodwin-Gill definition. Its contours probably result from the relationship between Article 6 and the definition of "actors of protection" set out in Article 7, which has been soundly critiqued on the basis that it pulls the QD away from the Refugee Convention itself and erroneously suggests that non-state entities can assume responsibility for basic human rights protections. It might be useful to draw from the QD the idea that opinion can be expanded, or possibly even defined, by equating it with "thought" or "belief." This definition has not yet been interpreted in detail by the leading courts that are now required to use it.

The contributions of international human rights law, Goodwin-Gill's definition, the UNHCR, and the new definition mandated by the Qualification Directive all form part of the backdrop to the establishment of a new approach to political opinion. None of these sources, however, provides a compelling answer to the tensions recurring in the jurisprudence. The next step, therefore, is to look to the case law in order to understand the setting in which these questions arise.

II. Major Cases

There are a handful of decisions in which courts have expounded definitions of or approaches to interpreting political opinion. The three most detailed of these decisions are *Ward*,[35] *Gutierrez Gomez*,[36] and the combined contribution of two successive rulings of the New Zealand Refugee Status Appeals Authority in 2008 and 2010.[37] In addition, the ruling of the

34. *Id.* at 15.

35. Ward v. Canada (Attorney General), [1993] 2 S.C.R. 689 (Can.).

36. Gutierrez Gomez v. Sec'y of State for the Home Dep't [2000] UKIAT 00007, [2001] 1 WLR 549.

37. *Refugee Appeal No. 76044* [2008] NZAR 719 (N.Z.); *Refugee Appeal No. 76339* [2010] NZAR 386 (R.S.A.A.).

Supreme Court of the United States in *Elias Zacarias*[38] is worth examining because it has had a profound influence on American political opinion jurisprudence and it illustrates the dilemmas that arise in adjudicating in the absence of a definition.[39] Each of these cases provides landmarks for mapping the terrain of political opinion, and together they form a basis for understanding how decision-making operates in the cases where no detailed analysis of the political opinion ground takes place. This section, therefore, presents these four cases in some detail. It concludes by considering what answers these cases offer to the central questions of what constitutes an opinion, whether an opinion is political, and whether some political opinions ought not be the basis for refugee protection.

Ward marks the first time that a senior court attempted to wrestle with the parameters of political opinion.[40] Mr. Ward was a member of an Irish paramilitary group, the Irish National Liberation Party ("INLA"), which, in the words of the Court, was "more violent than the Irish Republican Army."[41] He had been assigned to guard hostages and was subsequently ordered to kill them. Because he felt the hostages were "innocent," and as a matter of conscience he felt he could not kill them, Ward instead released them. Once the INLA discovered this, Ward was confined and tortured, and the group "sentenced" him to death. Ward sought police assistance and as a result served a three-year prison sentence for his role in the hostage-taking. Prior to his release, Ward expressed concern about his safety after release. The Irish authorities responded by helping him travel to Canada, where he claimed protection as a refugee.

The decision affirmed much of what is now accepted as the agreed terrain of political opinion analysis: including, that a political opinion need not have been expressed outright but can be perceived from actions,[42] that the opinion in question need not conform to the applicant's true beliefs,[43] and that this ground of persecution is relevant in cases where the persecutor is not the state.[44] All of these points have become part of the bedrock of political opinion jurisprudence and are generally considered to be uncontroversial. The *Ward* court also took the view that political opinion must be broadly understood; in doing so, the Court embraced Goodwin-Gill's definition of political opinion and explicitly rejected Grahl-Madsen's narrow 1966 formulation.[45]

Ward's influential position warrants closer attention in order to understand how it contributes to a jurisprudence that now requires clarification.

38. INS v. Elias-Zacarias, 502 U.S. 478 (1992).

39. Courts referring to *Elias Zacarias*, which does not offer a specific definition of "political opinion," have generated a contradictory and overlapping jurisprudence that is difficult to reconcile. *See infra* notes 174-79 and accompanying text.

40. *Ward*, 2 S.C.R. 689.

41. *Id.* at 699.

42. *Id.* at 746.

43. *Id.* at 747.

44. *See id.* at 717.

45. *Id.* at 746.

Even within Canada, where the Immigration and Refugee Board and the Federal Court are bound to follow *Ward*, political opinion decisions have lacked consistency.[46] Beyond Canadian borders, aspects of the *Ward* approach have been actively disputed.[47]

Even though *Ward* clarifies and settles many questions about political opinion, it generates uncertainty and controversy for two reasons: the facts of the case and the Goodwin-Gill definition itself. Ward's protection claim was presented to the courts as a "particular social group" case. The Canadian courts were, understandably, unwilling to define "particular social group" in a way that would include terrorist organizations. The UNHCR introduced the alternative political opinion claim at the final appellate level. After reviewing the transcript of the original hearing, the Court stated: "To Ward, who believes that the killing of innocent people to achieve political change is unacceptable, setting the hostages free was the only option that accorded with his conscience."[48] Ward never made this statement. It was "imputed" to him, possibly by the agent of persecution, and certainly by the Court. The INLA may simply have presumed Ward to be disobedient, or subversive, or cowardly. It is important to the uncertainty that follows from *Ward* that it did not matter what the INLA believed.

Given the court's formulation of Ward's views, the Grahl-Madsen definition of political opinion would not fit, as it requires that the opinion in question be opposed to the state or ruling party. The idea that innocent people should not be killed to achieve political change, however, is undoubtedly shared by many states and, indeed, by a great many individuals. Abstracted in this way, the core of this "opinion" hardly seems political at all. Insight is a valuable caution that abstraction generally reduces one's capacity to discern which opinions are political.

Knowing the definition that the Court adopted, the opinion it analyzed becomes clearer. By considering that the opinion was one "in which the machinery of state or government and policy could be engaged,"[49] the Court signaled that what mattered about the view that innocent people should not be killed as part of a political struggle was that it arose in the context of a struggle. The machinery of state is very unlikely to be engaged by such an opinion, aside from making law to reflect it and possibly to prosecute those who disobey it, but it is likely to be engaged by the struggle that provided context for the opinion.

The next case to fully canvass political opinion was *Gutierrez Gomez*, decided by the United Kingdom Immigration Appeal Tribunal in 2000. Ms. Gutierrez Gomez was a Colombian citizen and law student whose uni-

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46. See, for example, the disparate approaches of the Federal Court and Federal Court of Appeal in Klinko v. Canada (Minister of Citizenship & Immigration), [2000] 3 F.C. 327 (Can.) and Femenia v. Canada (Minister of Citizenship & Immigration), [1995] F.C. No. 1455 (Can.), each purporting to follow *Ward*.

47. *See supra* notes 8-11 and accompanying text.

48. *Ward,* 2 S.C.R. at 748.

49. *Id.* at 746.

versity required her to provide free legal advice in a clinic setting. As part of this work, she investigated the cases of a number of farmers who were being extorted by armed men Gutierrez Gomez believed were members of the Fuerzas Armadas Revolucionarias de Colombia ("FARC"). After assisting the farmers, she was threatened and her university tutor was kidnapped. Two of her student colleagues disappeared. The Tribunal held that the FARC did not impute a political motive to Gutierrez Gomez because "it seems clear they knew that she was a law student and knew the ad hoc basis on which she had become involved in the investigations into their extortion racket."[50] Because of this, the tribunal concluded that Gutierrez Gomez was being threatened for reasons that were criminal and retaliatory, and her circumstances could be distinguished from those of a human rights crusader working against guerilla extortion.[51]

The ruling in *Gutierrez Gomez* agreed with the now largely settled views on political opinion, including that the doctrine must be interpreted broadly, that it applies in the case of non-state actor persecution, that it need not involve political action or activity, and that imputed opinions can be the basis of protection. The tribunal also drew a connection between the refugee context and protection for political views and freedom of conscience in international human rights law. The analysis then focused on non-state actors and on the outer limits of "political" types of opinions.

One of the most important aspects of this ruling was the tribunal's assessment that the Goodwin-Gill definition, "which places focus on the machinery of state or government," may not be "broad enough to encompass every type of situation relating to non-state actors of persecution."[52] This view opens the way for an analysis of how far beyond government and the state the realm of the political ought to extend. The tribunal settled on an interpretation of "political opinion" that drew a line between, on the one hand, "views which have a bearing on the major power transactions relating to government taking place in a particular society" and, on the other hand, "power-relationships at all levels of society."[53] This is a crucial and finely graded distinction.

The tribunal built on this distinction with some illustrative examples: "sexual politics" or the "politics of the family" would not be appropriate subjects of protected political opinion unless they "in some way link up to major power transactions that take place in government or government-related sectors such as industry and the media."[54] By way of further illustration, the tribunal drew on the House of Lords' finding in *Shah and Islam*, that the victims of domestic violence in that case were not being

50. Gutierrez Gomez v. Sec'y of State for the Home Dep't [2000] UKIAT 00007 ¶ 69, [2001] 1 WLR 549.

51. *Id.* ¶¶ 69-70.

52. *Id.* ¶ 33.

53. *Id.* ¶ 38.

54. *Id.*

persecuted on the ground of political opinion,[55] and further opined that only in "very unusual circumstances" could it envision political opinion being established at the purely domestic or interpersonal level.[56] These examples are particularly useful in understanding the tribunal's interpretation, especially given the challenge that gender-related cases often pose to political opinion analysis.

There is a shade of difference between this ruling and the Goodwin-Gill definition, but only a shade. In introducing its definition, the tribunal said that political opinions within the Convention concern "major power transactions *relating to government* taking place in a particular society." In summarizing its ruling, the tribunal said only that the opinion in question must relate to "the major power transactions relating to government taking place in that particular society."[57] One must assume that this summary has, in fact, *summarized*, and that the tribunal required that political opinions relate to major power transactions that in turn relate to government. This is somewhat different from Goodwin-Gill's focus on matters relating to the machinery of state, government or policy, but the difference appears to be more in analytic approach than underlying substance.

In reading the other aspects of the decision, the desire for a broader ambit becomes clearer. For example, the tribunal emphasized that even political opinions that are not protected by human rights norms may be protected by the Refugee Convention,[58] and that the non-state persecutor's motives need not be "purely political."[59] The idea that protection may be required for opinions beyond human rights norms is provocative. It reminds us that there is no restriction in international human rights on the content of opinion, only on the extent to which expressions of opinion are to be protected.

The *Gutierrez Gomez* tribunal also made several observations that may or may not broaden the scope of its definition, but that provide helpful clarity regardless. The first of these is that "the political opinion ground. . . is often a group-based phenomenon."[60] The second is that political opinion must be given a broad interpretation, "but not one that is entirely undifferentiated."[61] Third, the tribunal cautioned that not every opinion imputed to someone by a non-state actor will necessarily be a po-

55. *Id.* (citing Islam (A.P.) v. Sec'y of State for the Home Dep't, R v. Immigration Appeal Tribunal & Another ex parte Shah (A.P.) (Conjoined Appeals) [1999] 2 AC 629 (HL) (appeal taken from Eng.)). This presentation of the case ignores the two-part understanding of persecution that ultimately results in protection for the claimants in that case: it fails to ask whether Shah and Islam were (1) unable to receive state protection (2) on the basis of their political opinions.

56. *Id.*

57. *Id.*

58. *Id.* ¶ 25.

59. *Id.* ¶ 22.

60. *Id.* ¶ 23.

61. *Id.* ¶ 27.

litical opinion.[62] Finally, the tribunal noted that the definition of political is "malleable" and differs in different historical places and times.[63] For this reason, as the tribunal emphasized, "In consequence of the shifting boundaries of the political in different societies and at different periods *neither is it possible to identify any fixed categories of persons or bodies* that will qualify as political entities."[64] This statement probably goes too far, as it is difficult to imagine a context in which politicians or government leaders would not be considered political entities. The extent to which the political sphere is understood to be malleable is certainly central to our inquiry, and points to the insight that what counts as "political" will always be determined by context.

Following this careful elaboration, the tribunal turned to the facts before it, and concluded that Gutierrez Gomez was being threatened for reasons that were criminal and retaliatory, and that her circumstances could be distinguished from those of a human rights crusader working against guerilla extortion.[65] In other words, her personal convictions were not strong. This conclusion again heightens focus on what ought to count as opinion.

Gutierrez Gomez contributed a new definition of political opinion to the jurisprudence and spent considerable time detailing its application. Potential questions that remain following this case include whether this definition can be functionally distinguished from Goodwin-Gill's, especially if the facts and outcomes of each case are added into the mix. Regarding the central questions, the *Gutierrez Gomez* ruling may possibly move political opinion a bit further from the state than *Ward* did. It comes close to requiring a public aspect to the opinion in question. In the *Gutierrez Gomez* analysis, altruism, self-interest, and group or individualist assessments of the opinion are irrelevant, but individual commitment to one's ideas seems to play a role. Finally, the case presents the question of whether acting in a particular role, such as legal advocate, can ever be the basis for an imputed political opinion.

The United Kingdom Supreme Court affirmed the *Gutierrez Gomez* approach in its more recent ruling in *RT (Zimbabwe)*.[66] *RT (Zimbabwe)*

62. *Id.* ¶ 38.

63. *Id.* ¶ 40.

64. *Id.* ¶ 45.

65. *Id.* ¶¶ 69-70.

66. RT (Zim.) v. Sec'y of State for the Home Dep't [2012] UKSC 38, [2013] 1 AC 152. *RT* was not a full canvass of political opinion because its facts were much closer to a traditional political opinion case. All four individuals in question were in fear because they lacked any political opinion and thus they would not be able to demonstrate the requisite loyalty to the Mugabe regime. The *RT* ruling contributes a strong and clear line of reasoning regarding individuals with no political opinion. But given this starting point, it does not address the vexing issue of the limits of the political opinion category, nor does it attempt to apply the *Gutierrez Gomez* definition. At most, *RT* is helpful in clarifying that it is possible to have *no* political opinion, even in highly polarized and politicized contexts. It might be possible to extend this reasoning to the proposition that "having no political opinion" is distinct from "neutrality," but the judgment does not explicitly go this far.

does not grapple with the meaning of political opinion to the same extent as the other major cases in this section, but it does do two important things. First, it elevates the *Gutierrez Gomez* reasoning to a final appellate-court level. Second, it demonstrates how political neutrality can be analyzed as a political opinion.

The facts in *RT* come much closer to a classic political opinion case, because the agent of potential persecution is the state. This case joined four appeals by Zimbabwean nationals, who had each argued that they risked persecution on the basis that they had no political opinions and thus would not be able to demonstrate the requisite loyalty to the Mugabe regime. This "no political opinion" question reaches a number of aspects of the political opinion jurisprudence, and the court approached it from two directions: whether it is persecutory to be required to feign support for a political regime, and whether someone with no political opinion risks that the regime will impute to them support for the opposition.[67]

The first issue drew heavily on the reasoning in the same Court's *HJ* ruling about gay men at risk of being persecuted.[68] In that case, the question of "discretion" loomed large, and the court drew on this parallel strongly in analyzing political opinion.[69] In approaching this question, the court considered how political expression rights are framed internationally, as well as how freedom of thought, conscience and religion are protected. The Court drew particularly on freedom of religion analysis, stating

> It is true that much of the case-law and commentary is on freedom of belief in the context of religion, rather than other kinds of belief (whether political, philosophical or otherwise). But I see no basis for distinguishing between the freedom to hold and express different kinds of belief here.[70]

Building on this reasoning, the court concluded that "the right *not* to hold the protected beliefs is a fundamental right which is recognized in international and human rights law and . . . the Convention too."[71] The court rejected the idea that a distinction could be drawn on the basis that some individuals are more committed to their neutrality than others; rather,

67. *Id.* ¶¶ 22-23.

68. HJ (Iran) v. Sec'y of State for the Home Dep't (*HJ and HT*), [2010] UKSC 31, [2011] 1 AC 596 (appeal taken from Eng. & Wales C.A.).

69. In claims by gay men and lesbians, the issue of whether an individual is at risk of being persecuted if they are able to "hide" (closet) their sexuality has had a long and ignominious history. It has now been settled in the United Kingdom and in Australia that a requirement to live a closeted life is a human rights infringement. *See id.*; *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* (S395) (2003) 216 CLR 473 (Austl.). For a history of the "discretion" jurisprudence, see Jenni Millbank, *From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom*, 13 Int'l J. Hum. Rts. 391 (2009).

70. RT (Zim.) v. Sec'y of State for the Home Dep't [2012] UKSC 38, ¶ 39, [2013] 1 AC 152.

71. *Id.* ¶ 42.

there ought to be no difference between indifferent non-believers and those whom the court names conscientious non-believers.[72]

In sum, the *RT* ruling contributes a strong and clear line of reasoning regarding individuals with no political opinion. But given this starting point, it does not address the vexing issue of the limits of the political opinion category, nor does it attempt to apply the *Gutierrez Gomez* definition. At most *RT* is helpful in clarifying that it is possible to have *no* political opinion, even in highly polarized and politicized contexts. It might be possible to extend this reasoning to the proposition that "having no political opinion" is distinct from "neutrality," but the judgment does not explicitly go this far. The *RT* court's use of human rights law, particularly of human rights law beyond the political rights context, is also instructive.[73]

The New Zealand Refugee Status Appeals Authority has also produced a highly detailed analysis of political opinion, articulated over the length of two decisions, which both merit attention because of their breadth and depth. The first ruling was handed down in 2008, in the case of an Alevi Kurdish woman from Turkey who feared being murdered by family members in the name of honor.[74] The authority held that she was at risk of being persecuted because of her political opinion. The authority opened its reasoning by stating that "gender is a primary way of signifying relationships of power,"[75] a starting point that puts the case on a collision course with the ruling in *Gutierrez Gomez*.

The first step in the analysis was the examination of evidence about the practice of honor killing, concluding that "[t]he observance of honour [in Turkish society] is a societal concern and reflects the gendered inequality of power in that society."[76] The authority then proceeded to a gender-sensitive interpretation of political opinion, drawing on a series of its own earlier decisions. The most important contribution here is the statement that "political opinion is not a matter of definition but depends on the context of the case."[77] This approach is in sharp contrast to all of the other leading cases. The word "government" is not mentioned at any point in the analysis, and the focus is instead on how power is exercised in particular social contexts. For example:

> In the particular context, a woman's actual or implied assertion of her right to autonomy and the right to control her own life may be seen as a challenge to the unequal distribution of power in her society and the structures which underpin that inequality. In our view such situation is properly characterized as "political."[78]

72. *Id.* ¶ 45.
73. *See supra* notes 66-69 and accompanying text.
74. *Refugee Appeal No. 76044* [2008] NZAR 719 at ¶ 1, ¶ 28 (N.Z.).
75. *Id.* ¶ 71.
76. *Id.* ¶ 80.
77. *Id.* ¶ 83.
78. *Id.* ¶ 84.

The authority emphasized that gender identity is constructed in specific "geographic, historical, political and socio-cultural contexts," and that such contexts provide an answer as to whether or not a person is at risk of being persecuted for reasons of political opinion.[79] The authority also highlighted that a decision-maker must not inadvertently privilege a claimant who can articulate her claim as political over one who does not identify the constructed and political nature of her situation.[80]

Given this analysis, the authority turned to the facts before it and found that the claimant's actions taken to end her relationship with her husband demonstrated a political opinion within the Convention meaning. In the authority's words, her actions were a "challenge to inequality and the structures of power which support it."[81]

In a decision handed down almost two years later, the authority built on this approach to political opinion and provided some crucial additional guidance.[82] In this second case, a Romanian citizen argued that he was facing politically-motivated prosecution as a result of reporting on corrupt activities by city officials. Here, the Authority affirmed its commitment to a contextual approach without a core definition, arguing that "all-encompassing definitions are an unhelpful distraction. . . ."[83] In regard to the Goodwin-Gill definition in particular, the Authority assessed it as "too broad to be of any meaningful assistance."[84] The authority then canvassed international approaches to political opinion arguments in cases of corruption and criminal non-state actors, and persuasively argued that, in each instance, contextual analysis prevailed over a definition-focused approach.[85] In conclusion, the Authority ruled that, despite extensive evidence of corruption in Romania, the applicant's fears in this case were the result of a "very personal fight which has nothing to do with the appellant's . . . actual or perceived political opinion."[86]

Together these two cases are instructive about how an analysis that does not begin with a definition can operate. Within the "context" box, however, very few signposts are given. In each case there is extensive evidence that certain problems, gender inequality and corruption respectively, are deeply embedded in the societies being examined. In each case the claimant had not expressed a political opinion overtly and had acted in a way that primarily served personal interests. It was the case of alleged state-actor persecution that failed. In considering the cases side-by-side, it is useful to discern what distinguishes the first and leads to a successful

79. *Id.* ¶ 87.

80. *Id.* ¶ 86.

81. *Id.* ¶ 90.

82. *Refugee Appeal No. 76339* [2010] NZAR 386 (R.S.A.A.).

83. *Id.* ¶ 87.

84. *Id.* ¶ 88.

85. *Id.* ¶¶ 91-103 (surveying the jurisprudence of Canada, the United Kingdom, and Australia to examine the role of context in the Courts' determinations).

86. *Refugee Appeal No. 76339*, [2010] NZAR ¶ 107.

claim. The critical factor appears to be that the imputed political opinion that women are equal and autonomous individuals aligns with well-established human rights norms in opposition to broad society-wide patterns of unequal treatment. It might be possible to use the factors of opposition to authority and human rights norms as context markers, despite the authority's explicit rejection of any defining features.

The New Zealand Authority's approach is important because it introduces the possibility of jettisoning the quest for a definition. Its analysis of political opinion hinges on power rather than on the state or government, and in this way it shares something with the *Gutierrez Gomez* approach, despite the cases' substantive disagreement about gender claims. Because of the focus on context, this approach attunes to macro-level societal factors, rather that abstracting the substance of an opinion and analyzing it. It also complicates the question of how to understand opinion, as the authority imputes opinions to the claimants based on patterns of behavior over time, rather than a particular action as in *Ward*.

All five of these cases, with their disparate approaches, differ significantly from *Elias Zacarias*,[87] which was decided by the Supreme Court of the United States in 1991 and thus predates all of them. For the majority of the *Elias Zacarias* Court, the question was whether Elias Zacarias was at risk "for reasons of political opinion."[88] As the Court neither defined "political opinion" nor grappled with interpreting "for reasons of," it is impossible to say whether Elias Zacarias' claim failed because of a lack of political opinion or a lack of nexus. For the dissenters, however, understanding "political opinion" was the central issue.[89]

Regardless of the majority's intent, *Elias Zacarias* has become a landmark case for United States political opinion jurisprudence. The majority's stance, that political opinion is self-evident and need not be defined, is provocative and contributes significantly to the quandary of American political opinion cases.[90]

Subsequent political opinion rulings in the United States have looked to the Court's disposition of the case for guidance, and the absence of any definition of political opinion has the effect of ensuring that the facts of the case remain vital and are frequently discussed. Elias Zacarias was a young man from Guatemala who had refused to join the insurgent forces in the on-going conflict in that country, and had fled to the United States because of the threat that the guerillas would persist in requesting his cooperation. Elias Zacarias gave evidence that he did not want to join "be-

87. INS v. Elias-Zacarias, 502 U.S. 478 (1992).

88. *Id.* at 479. Although the U.S. statutory rendition of "for reasons of" is "on account of" political opinion, subsequent caselaw has not indicated any interpretive divergence from the original text of the Convention. For purposes of the current analysis, the present Section employs "for reasons of" when discussing U.S. caselaw.

89. *Id.* at 488 (Stevens, J., dissenting) ("In my opinion, the record in this case is more than adequate to support the conclusion that this respondent's refusal was a form of expressive conduct that constitute the statement of a political opinion.").

90. *See supra* notes 38-39 and accompanying text.

cause the guerillas are against the government and he was afraid that the government would retaliate against him and his family if he did join the guerillas."[91] The risk facing Elias Zacarias if returned to Guatemala was not in dispute, but the proper analysis of the reasons for that risk divided the Court.

The majority ruling emphasized that even a supporter of a guerilla cause might have multiple reasons for resisting recruitment, and that Elias Zacarias' stated fear of government retaliation evinced the "opposite" of a political motive on his part.[92] The Court stated that there was no indication "that the guerillas erroneously *believed* that Elias-Zacarias' refusal was politically based."[93] Other important aspects of the reasoning were that the analysis must focus on the victim's political opinion, not the persecutor's; that "the mere existence of a generalized 'political' motive" for forced recruitment to a guerilla force was insufficient to render resistance to such recruitment a political matter;[94] and that not taking sides in a political dispute is not "ordinarily" the expression of a political opinion.[95] Finally, the majority concluded that the guerillas would harm Elias Zacarias because of his refusal to fight alongside them, rather than because of any political opinion he may hold.[96]

Not surprisingly, given the approach focusing on engagement with the facts rather than a definition-based assessment, the majority and dissenters disagreed pointedly over the presentation of factual nuance in the case. The dissenters asserted that "a simple desire to continue living an ordinary life with one's family . . . is the kind of political expression that the asylum provisions of the statute were intended to protect."[97] This phrasing is beautifully evocative and serves to express the nub of the problem that still remains with political opinion jurisprudence almost a quarter century later.

Overall, the *Elias Zacarias* ruling contributes to the consensus on political opinion through its acceptance that threats by non-state actors are relevant, that political opinion may be gleaned from an individual's conduct, and that while it is the victim's political opinion that must be assessed, it is what the persecutor *believes*, rather than the truth of the opinion, that matters. *Elias Zacarias* contributes to uncertainty in the jurisprudence through its fact-driven approach, its skepticism about diverse motivations for an individual's resistance, and its seeming rejection of neutrality as expressing a political opinion. The conclusion that risk would come from Elias Zacarias' refusal to fight with the guerillas, rather than from the reason for that refusal, adds another layer of confusion to the

91. *INS v. Elias-Zacarias*, 502 U.S. at 480.
92. *Id.* at 482.
93. *Id.*
94. *Id.*
95. *Id.* at 483.
96. *Id.*
97. *Id.* at 486.

analysis. It demonstrates how easily analysis can slip from the essence of political opinion to the other elements of the refugee definition, most often the "for reasons of" nexus clause.

Considering this group of cases as a whole demonstrates why political opinion appears nebulous. Among these leading cases, there is no agreement about what political opinion means or about how to approach it. Aside from *RT (Zimbabwe*), all of these cases arose in factual circumstances that have become the typical trouble spots of political opinion analysis: claimants resisting criminal gangs, claimants acting as whistleblowers, and instances of gender-based persecution. As these cases illustrate, there has been much disagreement among national jurisdictions. Thus, rather than providing guidance, these high profile cases illustrate the need for clarification.

This need can be given specific form by considering what these major cases contribute to the three central questions. On the matter of what constitutes an opinion, these cases do a great deal to flesh out the importance of "imputed" opinions and the challenge of an accurate analysis of imputation. In the *Ward* ruling, the court itself gives content to the opinion it analyzes, with little attention to whether the agent of persecution would have considered this content. In the *Gutierrez Gomez* ruling, the issue presents as whether one's opinion can be "read into" or "imputed" from a particular role that one occupies.[98] This case also raises the important question of how strongly an opinion must be held: Ms. Gutierrez Gomez fails in her claim for lack of strong conviction, and thus, reasons the tribunal, for the implausibility of imputation.[99] The issue is echoed in *RT (Zimbabwe)*, where the Supreme Court (UK) finds that strength of conviction ought not matter; indifferent neutrality is to be treated identically to highly-committed neutrality.[100] The New Zealand cases base imputation on patterns of behavior rather than on individual acts.[101] And, most problematically, the majority and dissent in *Elias Zacarias* disagree about *what* to impute from an individual's actions.[102]

On the question of whether an opinion is political, these cases disagree about whether or not political opinion requires an engagement with government or the state: the *Elias Zacarias* majority and *RT (Zimbabwe)* do *seem* to require such a linkage, while *Ward* and *Gutierrez Gomez* suggest such a linkage is unnecessary but deploy definitions that link back in some way to government, *policy*, or the state.[103] The New Zealand Authority clearly rejects the need for such a linkage. In each of the cases, context is vitally important in determining what is political, and for the

98. *See* Gutierrez Gomez v. Sec'y of State for the Home Dep't [2000] UKIAT 00007 ¶ 4, [2001] 1 WLR 549.

99. *Id.* ¶¶ 68-70.

100. *See* RT (Zim.) v. Sec'y of State for the Home Dep't [2012] UKSC 38, ¶ 46, [2013] 1 AC 152.

101. *See* discussion *supra* Section II.

102. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

103. *See* discussion *supra* Section II.

New Zealand Authority context is everything.[104] None of the cases, however, give guidance on how to assess context, and thus the analysis here does not advance. The cases also introduce several *sub-questions* that decision-makers seem to use to analyze the content of "political." For example, the *Ward* court pays some attention to Ward's altruism, the New Zealand Authority pays attention to self-interest, and the *Elias Zacarias* Court, the *RT (Zimbabwe)* Court, the New Zealand Authority, and the *Ward* Court take into account the oppositional posture of the views in question.

On the final question of whether some political opinions ought not be protected because of their content, these cases make little direct contribution. But *RT (Zimbabwe)* and *Gutierrez Gomez* do introduce the idea of using human rights standards to limit the analysis of political opinion.[105]

The paper now turns to consider how these dilemmas have played out in areas of case law where significant clusters of political opinion decisions have arisen. In these subsequent sections, the jurisprudence has not generally been as detailed as in the major cases, but the volume is higher, as the rulings are closer to the first instance setting where any new framework of analysis will meet its true test.

III. Case clusters raising important themes & questions

The five case clusters in this section each present a particular type of challenge or issue for the analysis of political opinion. The five clusters involve: military conscientious objectors, people fleeing China's one-child policy, people in flight from criminal violence, people at risk because of their whistleblowing activities, and circumstances where gender and political opinion are linked. Each of these areas contribute one or more specific points that must be weighed in answering the paper's central questions.

A. *Objections to Military Service*

In 1966, when Atle Grahl-Madsen published his influential commentary on the Refugee Convention, what he termed "evasion of military duties" had already become a paradigmatic case concerning the political opinion ground.[106] The cases in this section squarely involve the state, and also involve individuals who have articulated their views plainly: they have objected to military service for reasons of conscience or principle.[107] Accordingly, the questions of what counts as an "opinion" and whether the opinion is "political" are easily answered. As Goodwin-Gill writes, "[r]efusal to bear arms, however motivated, reflects an essentially political opinion regarding the permissible limits of state authority; it is a political

104. *See supra* notes 77-86 and accompanying text.

105. *See* discussion *supra* Section II.

106. Grahl-Madsen, *supra* note 27, at 220-21.

107. Objections for reason of religion require a somewhat different analysis, as "religion" is itself a listed ground in the refugee definition.

act."[108] The challenge lies beyond these points, and is squarely captured by the Canadian Federal Court in *Hinzman*, where the Court notes that, while freedom of thought, conscience, and religion are well-recognized in international law, there is as yet no internationally recognized right to conscientious objection.[109] Conscientious objection is, rather, "viewed as more of a relative right."[110]

This awkward expression gets at something important. Formulated as an international human right, freedom of opinion is almost unrestrained, and in matters of military service evasion or desertion, an opinion is clearly political. These cases serve as a reminder that there is a potentially wide range of political opinions that are morally repugnant (for example, Holocaust deniers) or embrace illegal acts (for example, support for a political assassination). Faced with the adjudicative challenge presented by conscientious objectors, courts in many jurisdictions have turned to international human rights standards to determine the ambit of this "relative right," in other words, to determine which subset of political opinions merit protection.[111]

Setting aside conscientious objection on religious grounds, which has somewhat different contours, the consensus view on conscientious objection is that being compelled to serve, or being punished for desertion or evasion, is generally not persecution within the meaning of the Refugee Convention. In many of these cases, the crux of the analysis addresses whether the consequence of not serving is sufficiently serious harm to meet the persecution standard.[112] However, in cases where the individual objects to performing specific acts or participating in specific conflicts, the analysis often centers on whether the political opinion ground is actually met. Much recent case law has therefore concerned defining the scope of conscientious objections that *will* attract refugee protection. Examples include: *Zolfagharkhani*, where an Iranian citizen objected to being required to participate in chemical warfare;[113] *Hinzman*, where an American volunteer soldier objected to participating the war in Iraq;[114] *Krotov*, where a Russian conscript objected to fighting in the Chechen war;[115] and *Ramos-Vasquez*, where an Honduran national deserted after being ordered to execute a friend who had also deserted.[116] In these cases, the issue is not

108. Goodwin-Gill & McAdam, *supra* note 5, at 111.

109. Hinzman v. Canada (Minister of Citizenship & Immigration), [2006] F.C. 420, ¶¶ 206-07 (Can. Ont.).

110. *Id.* ¶ 211.

111. *See id.*

112. *See* Hathaway & Foster, *supra* note 5, at 269-70.

113. Zolfagharkhani v. Canada (Minister of Emp't & Immigration), [1993] 3 F.C. 540 (Can. C.A.) (judicial review successful).

114. Hinzman v. Canada (Minister of Citizenship & Immigration), [2010] FCA 177 (Can. Ont. C.A.). Hinzman was ultimately found not to be a refugee.

115. Krotov v. Sec'y of State for the Home Dep't [2004] EWCA (Civ) 69 (Eng.) (judicial review successful).

116. Ramos-Vasquez v. INS, 57 F.3d 857 (9th Cir. 1995) (judicial review successful).

whether the risk the individual faces is persecutory, but, rather, whether an objection to military service in highly specific circumstances expresses the type of political opinion that merits attention.

The dividing line between successful and unsuccessful conscientious objector claims in these circumstances has turned on the likely required conduct of the individual, the characteristics of the conflict in question, and the consequences for evasion or desertion. This approach risks intertwining analysis of "opinion" with analysis of "persecution," but remains instructive. The English Court of Appeal in *Krotov* demonstrates how these aspects are intertwined:

> [W]hile it must be acknowledged that the Convention itself is silent as to conscientious objection and the norms of international law, I consider that the terms of the Handbook and court decisions have recognised a point at which punishment for objection to participation in a particular conflict on grounds of its legality may properly be regarded as establishing persecution for the purposes of the Convention.
>
> The basis upon which they have done so is not by recognition of an internationally accepted right of (general or partial) conscientious objection (see *Sepet & Bulbul supra*) or by categorisation of such a stance as *ipso facto* protected under the express terms of the Convention, but *by treating a genuine conscientious refusal to participate in a conflict in order to avoid participating in inhumane acts required as a matter of state policy or systemic practice, as amounting to an (implied or imputed) political opinion as to the limits of governmental authority, which thereby attracts the protection of the Convention*. . . .[117]

The UNHCR Handbook similarly states that "not every conviction, genuine though it may be, will constitute sufficient reasons for claiming refugee status,"[118] which clearly implies that *some* convictions, themselves political opinions, will constitute sufficient reasons. The United States Court of Appeals for the Ninth Circuit similarly opined:

> Where a nation espouses democracy and the rule of law, desertion may be the most practical way of politically dissenting from military practices which do not conform to the stated national policy. If a soldier deserts in order to avoid participating in acts condemned by the international community as contrary to the basic rules of human conduct, and is reasonably likely to face persecution should he return to his native country, *his desertion may be said to constitute grounds for asylum based on political opinion.*[119]

117. Krotov, [2004] EWCA (Civ) ¶¶ 45-46 (emphasis added).

118. UNHCR Handbook, *supra* note 30, ¶ 171.

119. *Ramos-Vasquez*, 57 F.3d at 864 (emphasis added).

Here again, it is clear that the desertion is conceptualized as expressing a particular political view, which, because of its content, may attract protection under the Refugee Convention. The decision-maker, therefore, must parse the reasons for desertion to separate protected from unprotected political opinion.

Given the need to examine the particular content of these political opinions, in order to determine whether they merit protection, courts have turned to internationally articulated standards in both human rights law and humanitarian law. In *Krotov,* the English Court of Appeal grappled with determining which body of international law would provide the most appropriate guidance, and found that international humanitarian law was preferable to international human rights law for evaluating conduct in conflict situations.[120] Two points raised by these cases are instructive to this paper's analysis. The first is whether it is appropriate to say that some political opinions ought not be the basis for refugee protection. The second is the idea that *other* international legal standards beyond the definition of "opinion" itself can contribute to delimiting the relevant opinion within refugee law.

B. *Flight from Extreme Applications of China's One-Child Policy*

The one-child policy cases demonstrate that the question of what counts as a political opinion has been settled in completely opposite ways in different jurisdictions. This is a serious problem that any new approach must be able to address. People in flight from extreme applications of the People's Republic of China ("PRC's") one-child policy have in some cases been found to be expressing a political opinion through their disagreement with the policy, and in other cases have not. There is little disagreement with the idea that the extreme or rogue localized applications of the policy that include forced sterilization and forced abortion fit within the ambit of persecution.[121]

The breadth of decision-making can be summarized as follows. In Australia and New Zealand, well-regarded decision-makers decided early on that flight from the one-child policy did not constitute political opinion.[122] People were opposed to the policy, but opposition within the confines of the family, or evidenced only by having additional children, did

120. Krotov, [2004] EWCA (Civ) ¶ 38 ("It is in my view preferable to refer in this context to 'basic rules of human conduct' or 'humanitarian norms' rather than to 'abuse of human rights', at least unless accompanied by the epithet 'gross': cf. the observations of Lord Bingham quoted above. That is because human rights really concern rights enjoyed by all at all times, whereas humanitarian rules concern rights which protect individuals in armed conflicts. Most Conventions and other documents which provide for the protection of human rights (a) include a far wider variety of rights than the rights to protection from murder, torture and degradation internationally recognised as set out above; (b) in any event, contain safeguards which exclude or modify the application of such rights in time of war and armed conflict: see generally the approach set out in Detter.").

121. *Id.*

122. Regarding Australia, see *A v Minister for Immigration & Ethnic Affairs* [1997] HCA 4 (Austl.), where political opinion received scant attention, the central issue was

not amount to political opinion.[123] Despite this, a number of more recent lower-level decisions in Australia have found that such claimants were at risk of being persecuted because of their political opinions; however, none of these decisions comment on the meaning of political opinion.[124] Canadian jurisprudence occupies a middle ground divided on gender lines. In Canada, women in flight from extreme application of the one-child policy were found in 1993 to be members of a particular social group, and this line of reasoning has generally been followed in lieu of engaging in political opinion analysis.[125] In 1995, the Supreme Court of Canada skirted the issue in *Chan*, with Justice LaForest stating in a vociferous dissent that: "I leave it for another case to resolve whether the action itself of having a child can constitute, in the words of Goodwin-Gill '. . .an opinion on any matter in which the machinery of state, government, and policy may be engaged.'"[126] While recent Canadian cases involving female claimants have generally followed the particular social group route, cases with male claimants or heterosexual couple co-claimants have proceeded on the ground of political opinion.[127]

The United States occupies the other end of the spectrum. The American *Immigration and Nationality Act* was amended in 1996, expressly overruling the Board of Immigration Appeals' ruling in *Matter of Chang* that flight from application of this policy could not be political opinion.[128] As a consequence, political opinion claims are now the norm in the United States for individuals in flight from rogue applications of the one-child policy.

The law is reasonably settled in each of these jurisdictions, but, from an international point of view, confusion reigns. On a case-by-case basis, clever lawyers can of course distinguish any one case from the next, but the point remains that any new approach to political opinion should be

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whether such claimants were members of a particular social group. Regarding New Zealand see *Refugee Appeal No. 3/91 Re ZWD* [1992] NZRSAA (20 Oct. 1992) (N.Z.).

123. Cases of individuals who organize public protest activities against the policy, or who write to politicians, do not present the same issues.

124. *See, e.g.*, *RRT Case No. 1102903* [2011] RRTA 685 (9 Aug. 2011) (Austl.); *RRT Case No. 0902142* [2009] RRTA 447 (12 May 2009) (Austl.); *RRT Case No. 0806444* [2009] RRTA 146 (16 Feb. 2009) (Austl.); *RRT Case No. 071910232* [2008] RRTA 24 (22 Feb. 2008) (Austl.).

125. *See* Cheung v. Canada (Minister of Emp't & Immigration), [1993] 2 F.C. 314 (Can.).

126. Chan v. Canada (Minister of Emp't & Immigration), [1995] 3 S.C.R. 593, ¶ 93 (Can.). This example makes it particularly clear how removing the political backdrop (that is, the PRC's one-child policy) robs the question of meaning.

127. Particular social group cases with female claimants include Chi v. Canada (Minister of Citizenship & Immigration), [2002] F.C.T. 126 (Can.) and Tan v. Canada (Minister of Citizenship & Immigration), [2004] F.C. 1280 (Can.); political opinion cases involving couples include Canada (Minister of Citizenship & Immigration) v. Ye, [2013] F.C. 634 (Can. Ont.) and RPD File No. VB1-03180/VB1-03183, 2012 CanLII 100143 (Can. I.R.B.).

128. 8 U.S.C. § 1101(a)(42) (1996). This was introduced by the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*.

able to give a clearer answer to the question of whether fleeing the application of extreme versions of China's one child policy evinces a political opinion. The cases diverge on how to "impute" an opinion and on the definition of political. Moreover, because the case law is settled in these jurisdictions, contemporary cases rarely analyze or define political opinion, so it is challenging to unearth the crux of the problem.

C. *Whistleblowers*

In English-speaking jurisdictions, there is now a considerable body of case law assessing claims brought by individuals who are at risk for reporting on corrupt practices, and who either failed to find redress or to compel the state to enforce the law. These cases are grouped together in a "whistleblower" category, but this is not a term of art; the term is used to refer to cases where individuals reported on corrupt practices or sought to have the law enforced. The Council of Europe definition of whistleblowers as "concerned individuals who sound an alarm in order to stop wrongdoings that place fellow human beings at risk"[129] is broader than the factual scenarios present in refugee case law. In particular, the refugee cases in this group do not include any instances of whistleblowing against private-sector actors.[130]

The whistleblowing cases present a particular dilemma for decision-makers. The question of whether a whistleblower is expressing a political opinion can be vexing: on one hand, the people involved are each seeking to engage the state in some way; but, on the other, the demand made of the state (that is, that the law be enforced) would be considered mundane in a Western liberal democracy (that is, in the places where these claims are typically being adjudicated). While the label "whistleblower" evokes the Edward Snowdens and Julian Assanges of the world, the comparison is misleading, as the protections benefitting those two at present are not the results of refugee-status determination processes. Their circumstances share little with the facts that typify these cases. Rather, these cases require decision-makers to re-conceptualize the quotidian request that the law be enforced.

Overall, the whistleblower cases yield several insights. There is general agreement that in some, but not all, circumstances, protesting against governmental corruption will evince a political opinion. As in the military-objector and one-child policy cases, this conclusion is reasonably easy to reach because the state is always present.[131] Courts also generally agree that pervasive corruption is a necessary, but not sufficient, condition for a

129. Resolution on Protection of "Whistle-Blowers," Eur. Parl. Res. 1729 (2010).

130. Private sector actors are clearly a relevant whistle-blower target. *See, e.g.*, Heinisch v. Germany, App. No. 28274/08, Eur. Ct. H.R. (2011); Guja v. Moldova, App. No. 14277/04, Eur. Ct. H.R. (2008).

131. The possible complexity that would be introduced if private actors were involved was alluded to by the Court in Grava v. INS, 205 F.3d 1177, 1181 (9th Cir. 2000) ("Whistleblowing against one's supervisors at work is not, as a matter of law, always an exercise of political opinion. However, where the whistle blows against corrupt government offi-

finding that whistleblowing is a political opinion. Finally, in grappling with the meaning of political, decision-makers in these cases found that actions that are self-interested, private, or individual were less likely to be considered to show a political opinion than those that were altruistic, group-based, or public. In this group of cases, the question of what constitutes an opinion does not arise because the whistleblowing action fits this criterion. In an indirect way, these cases do potentially address the question of whether some political opinions ought not to attract refugee protection.

Courts generally agree that in some circumstances whistleblowing may constitute an actual or imputed political opinion. In the United States, the Ninth Circuit has stated "where the whistle blows against corrupt government officials, it may constitute political activity sufficient to form the basis of persecution on account of political opinion."[132] Similarly, the Australian Federal Court summarized its canvass of the jurisprudence by concluding that "exposure of corruption can, in a wide range of circumstances, lead to political persecution."[133] The English Court of Appeal asserted that an imputed political opinion may exist "where an individual is perceived to be on the side of law and order in a country where that has broken down."[134] Given this consensus, discrepancies arise in articulating the limits of the admittedly "wide range of circumstances," because there is also broad support for the idea that simply reporting a crime or acting as a witness is not a political opinion necessitating Convention protection.[135]

The starting point for decision-makers is often to examine the extent to which the corruption in question permeates the state. It is more likely that whistleblowing will evince a political opinion when corruption pervades the state, or when the state is unable or unwilling to take the action the whistleblower requests. This was a decisive factor in the *Rodas Castro* ruling of the United States Court of Appeals for the Second Circuit, where a police officer was at risk of retribution because of his persistent efforts to report the drug-trafficking activities of his superiors to both national and international authorities in Guatemala.[136] The court noted that "the record is replete with evidence documenting substantial and pervasive cor-

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cials, it may constitute political activity. "). I have not encountered a case in my research that has not involved the state.

132. *Grava*, 205 F.3d at 1181.

133. Zheng v Minister for Immigration & Multicultural Affairs [2000] FCA 670, ¶ 32 (23 Aug. 2000) (Austl.).

134. A v. Sec'y of State for the Home Dep't [2003] EWCA (Civ) 175 ¶ 23 (appeal taken from Immigr. Appeal Trib.) (U.K.).

135. *See, e.g.*, *Zheng,* [2000] FCA 670, ¶ 21 ("The general position is that opposition to criminal activity *per se* is not political expression."); Yoli v. Canada (Minister of Citizenship & Immigration), [2002] F.C.J. No. 1823, ¶ 27 (Can. Ont.) ("Refusing 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. . ."); *see also* Suarez v. Sec'y of State for the Home Dep't [2002] EWCA (Civ) 722 (appeal taken from Immigr. Appeal Trib.) (U.K.).

136. Rodas Castro v. Holder, 597 F.3d 93, 104 (2nd Cir. 2010).

ruption in the [police] and the Guatemalan government more broadly."[137] The Ninth Circuit has held that there is a key distinction to be drawn between whistleblowing activity that is "directed toward a governing institution" and that which is directed "only against individuals whose corruption was aberrational. . ."[138] Similarly, the Second Circuit has stated that decision-makers must distinguish "whether the persecutor was attempting to suppress a challenge to the governing institution, as opposed to a challenge to isolated, aberrational acts of greed or malfeasance."[139]

This analytic starting point is also important in decisions outside the United States. For example, in *Y*, the Australian Federal Court noted that a key factor to consider was "that there was corruption throughout the whole of the Government services including Brazil's police force";[140] the Canadian court focused on this factor in *Klinko*,[141] as did the English Court of Appeal in *Storozhenko*.[142]

Even in circumstances where extensive corruption exists, however, whistleblowing has not been found in every case to constitute a manifestation of political opinion. The distinction has been clearly stated by the English Court of Appeal in *Suarez:* "it is wrong to assume that all actions aimed at preventing the exposure of criminal activities in such a [corrupt] society can be characterised as imputing a political opinion to the witness."[143] The New Zealand Refugee Status Appeal Authority held that despite a high level of pervasive corruption in Romania, "a blanket determination cannot be made that every transaction . . . between an individual and a public official is tainted by corruption."[144] In *Storozhenko*, the English Court of Appeal carefully weighed evidence about the Ukraine, and determined that the state was making some progress against corruption that was relevant to the case at hand.[145]

It is certainly correct, given the individual focus of refugee determination, to reject a uniform approach to whistleblowers in corrupt states. Further, the United States Second Circuit has also cautioned against the opposite approach of making systemic corruption a strict requirement for considering whistleblowing as a political opinion:

> The fact that the protests organized by Yu challenged corruption at a single workplace does not render the corruption categorically

137. *Id.* at 101.

138. *Grava v. INS*, 205 F.3d 1177, 1181 (9th Cir. 2000).

139. *Zhang v. Gonzales*, 426 F.3d 540, 548 (2nd Cir. 2005).

140. *Minister for Immigration & Multicultural Affairs v Y* [1998] FCA 515 at 7 (Austl.).

141. *See* Klinko v. Canada (Minister of Citizenship & Immigration), [2000] 3 F.C. 327, ¶¶ 4-5, ¶¶ 34-35 (Can.).

142. Storozhenko v. Sec'y of State for the Home Dep't [2001] EWCA (Civ) 895 ¶¶ 28-29 (appeal taken from Immigr. Appeal Trib.) (U.K.).

143. Suarez v. Sec'y of State for the Home Dep't, [2002] EWCA (Civ) 722 ¶ 46 (appeal taken from Immigr. Appeal Trib.) (U.K.).

144. *Refugee Appeal No. 76339* [2010] NZAR 386 ¶ 7 (R.S.A.A.).

145. *Storozhenko*, [2001] EWCA (Civ) ¶¶ 28-29.

> aberrational without regard to the nature of Yu's conduct. In several ways, Yu's conduct is typical of political protest (and may have been perceived as such by the authorities).[146]

In tandem, these parallel cautions lead to the heart of this issue: what specific and individual indicators do decision-makers look for in assessing political opinion in whistleblowing circumstances, and are these indicators sufficient to provide predictable and consistent decisions?

While no one factor looms as large in the existing case law as the extent of corruption, a number of other ideas are present. One factor that has been decisive in several cases is whether an individual is acting solely in his or her own interests. Though this factor ultimately would not be a useful addition to a new definition of political opinion, it does seem to have a useful role for many decision-makers in the whistleblower cluster. Indeed, one could argue that the Council of Europe definition[147] of whistleblowing requires a degree of altruism. There are two aspects to consider. First, whether the opinion is altruistic, as in *Storozhenko*, where the claimant's initial confrontation with the police began from his anger that a police car had run down a child. The second aspect is whether the opinion in question relates to an individual or a group. Applicants who rallied a group to action have been more likely to be seen as having expressed a political opinion than those who are the sole beneficiaries of their actions. It was notable, for example, that Mr. Yu was acting on behalf of others in his work unit (which did not receive its wages), despite having been paid himself.[148] In *Zhang*, a decisive factor was that the claimant rallied other small business owners to work with him in opposing extortion by local officials.[149] This criterion has also worked against claimants, where personal interests are perceived to be the motivating factor. For example, the New Zealand Authority found that the Romanian claimant discussed above was acting solely in his own interests:

146. Yu v. Holder, 693 F.3d 294, 299 (2d Cir. 2012).

147. *See supra* notes 129-130 and accompanying text.

148. *See Yu*, 693 F.3d at 299 ("[T]he record indicates that Yu had no personal, financial motive to oppose the corruption, undertook to vindicate the rights of numerous other persons as against an institution of the state (a state-owned factory), and suffered retaliation by an organ of the state—the police.").

149. Zhang v. Gonzales, 426 F.3d 540, 547 (2nd Cir. 2005) ("He argues that the dispute became political when he decided to marshal support from similarly afflicted business owners and to attempt to publicize and criticize endemic corruption extending beyond his own case. Zhang argues that at this stage his efforts were transformed from a purely self-interested attempt to shield his business from greedy bureaucrats into a challenge to the legitimacy of the municipal government; this was the point at which the government closed his business, detained and beat him, and sent public security officials to his home to discuss "his opinion of them." On Zhang's theory, then, what began as an attempt by government officials to extort him became an attempt to repress his challenge to the government's legitimacy. It is clear under *Osorio* that if Zhang can show that the government acted with the latter motive, his claim is "covered under 'political opinion' " within the meaning of § 1101(a)(42).").

> The appellant acted in self-interest both when getting into the HY group and when leaving it. Nothing he has done can sensibly be described as a political act or expression of a political opinion.[150]

Some decision-makers have drawn a related distinction between public and private actions. The English Court of Appeal, in ruling against Mr. Storozhenko, concluded that the matter was one of "the private activities of a private citizen seeking to bring an individual police officer to justice."[151] The fact that public actions are more easily seen to evince a political opinion may account for why whistleblowing journalists have been readily perceived as expressing political views: they have done their whistleblowing in public.[152]

There is a higher level of convergence among the whistleblower cases than in the two groups that follow, and this convergence reveals some useful insights; however, it would be going too far to suggest that an international approach to cases like these has already emerged. *Klinko* and *Storozhenko* demonstrate divergent approaches, each in cases where the respective courts have set out explicitly to build a definitional framework for political opinion analysis.

Klinko was handed down by the Canadian Federal Court of Appeal in 2000.[153] It involved a businessman from the Ukraine who, along with five others, made a complaint against the widespread corruption of customs officers and police.[154] *Klinko* shows how the *Ward* approach to political opinion applies in a whistleblower situation. Grappling with the somewhat difficult idea of engaging the machinery of state, the court says: "I emphasize that such test does not require that the state or machinery of state be actually engaged in the subject-matter of the opinion. It is sufficient in order to meet the test that the state or machinery of state 'may be engaged.'"[155] Following this approach, the Court considered that the evidence demonstrating that the Ukrainian government was actively fighting corruption showed that ". . .the machinery of government in the Ukraine was actually 'engaged' in the subject matter of Mr. Klinko's complaint."[156]

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150. *Refugee Appeal No. 76339* [2010] NZAR 386 ¶ 107 (R.S.A.A.).

151. Storozhenko v. Sec'y of State for the Home Dep't [2001] EWCA (Civ) 895 ¶ 30 (appeal taken from Immigr. Appeal Trib.) (U.K.); *see also Zheng v Minister for Immigration & Multicultural Affairs* [2000] FCA 670, ¶ 42 (23 Aug. 2000) (Austl.).

152. *See* Hayrapetyan v. Mukasey, 534 F.3d 1330 (10th Cir. 2008); *see also Minister for Immigration & Multicultural Affairs v Y* [1998] FCA 515 (Austl.).

153. Klinko v. Canada (Minister of Citizenship & Immigration), [2000] 3 F.C. 327 (Can.).

154. The reasoning in the case is partially devoted to overruling an earlier Canadian decision and so the route it takes is a bit circuitous. The FCA overruled *Femenia,* which had held that a whistleblower was not expressing a political opinion because that state was not "engaged" in police corruption, and therefore a complaint about such corruption did not fit within the *Ward* definition.

155. *Klinko v. Canada* (Minister of Citizenship & Immigration), [2000] 3 F.C. 327, ¶ 33 (Can.).

156. *Id.* ¶ 35.

The Court also established that a political opinion need not be in opposition to the government, and concluded by saying: "Where, as in this case, the corrupt elements so permeate the government as to be part of its very fabric, a denunciation of the existing corruption is an expression of 'political opinion.'"[157] With this conclusion, the Canadian Court goes farther than most others by embracing the idea that in cases of pervasive corruption, *all* whistleblowing evinces political opinion.[158]

Storozhenko is an important contrast to *Klinko*, because Mr. Storozhenko also came from the Ukraine, and the ruling was handed down just one year later by the English Court of Appeal.[159] The cases were decided against the same contextual background. Mr. Storozhenko had been assaulted by a police officer and his persistent efforts to report this crime had led to harassment, physical attacks and threats. His engagement with the police began from an altruistic impulse. Mr. Klinko's circumstances were less personally emotive, however, as he sought out a group to join in his protest against corrupt officials.[160]

The evidence before the English court concerning the Ukraine was similar to that reviewed by the Canadian courts, showing extensive corruption, as well as serious governmental efforts to combat it. The English court also gave serious consideration to the *Ward* ruling and the Goodwin-Gill definition. However, Mr. Klinko was seen as expressing a political opinion,[161] while Mr. Storozhenko was not.[162] These outcomes are difficult to reconcile. The *Storozhenko* Court asserted a distinction from *Klinko* on the basis that Mr. Klinko had complained to a regional authority;[163] however, Mr. Storozhenko had also made a formal complaint, and had done so more than once. The *Storozhenko* Court also looked to the evidence of the Ukrainian government's fight against corruption and concluded that this meant corruption was not pervasive, and thus the situation differed from *Klinko*.[164]

Neither of these distinctions is particularly persuasive. It is easier to accept that the English Court of Appeal was seeking to disagree with the Canadian Court without saying so directly. This disagreement is important to the objective of moving whistleblower political opinion analysis forward.

Whistleblowing is an area that has received some attention in international human rights law, where it has been considered as a matter of freedom of expression. The jurisprudence of the European Court of Human

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157. *Id.* ¶ 36.

158. *Id.*

159. *See* Storozhenko v. Sec'y of State for the Home Dep't [2001] EWCA (Civ) 895 ¶ 30 (appeal taken from Immigr. Appeal Trib.) (U.K.).

160. *Klinko*, 3 F.C. ¶ 4.

161. *Id.* ¶ 35, ¶ 40.

162. *See* Storozhenko, [2001] EWCA (Civ) 895 ¶¶ 51-52.

163. *Id.* ¶¶ 30-31.

164. *Id.* ¶ 50.

Rights has outlined a series of factors to be weighed in assessing whether a whistleblowing action falls within a sphere of protected expression.[165] It is difficult to directly adapt these factors to the refugee law context for two reasons. First, the Refugee Convention's drafters explicitly chose the term "opinion" rather than "expression," despite freedom of expression being well-known at the time. The canvass of relevant human rights elements in the opening section of this paper demonstrated that the principal distinction between these two freedoms in the human rights realm is that "expression" is inherently limited, while "opinion" is not. Second, because the ECHR's limiting factors contemplate whistleblowing against private actors, and reach to areas that would logically come under other aspects of the refugee definition such as "persecution."[166]

What is analytically helpful about drawing on freedom of expression analysis in human rights law is the idea that a political opinion (for example, whistleblowing) may not have the same unlimited characteristic as an opinion full stop. Further, it is helpful to consider that whistleblowing is, by definition, always a question of both expression *and* opinion. In other words, in the whistleblowing cases, the political opinion in question is always expressed rather than imputed. Unfortunately, the ECHR's analytic factors do not allow us to avoid the conclusion that the decision-makers in *Klinko* and *Storohozenko* were at odds with one another; they do not provide a distinction between these two cases. This does not mean, however, that a new set of limiting factors may not be useful in the whistleblowing context. It may also simply be the case that any set of criteria will require us to conclude that at least one of these cases was wrongly decided.

In sum, the whistleblowing cases are important because their number is increasing, and they raise questions that a new approach must answer. Treating corruption as an important but not conclusive factor seems insightful in determining the limits of political. The questions of altruism, group orientation, and public orientation seem useful within this cluster, but their utility falls away when they are transported to the two case clusters that follow.

D. *Fleeing Criminal Violence*

The final two case clusters are areas where the state is not necessarily central to the analysis. These clusters, therefore, allow for a focus on the question of what ought to constitute a political opinion. The case cluster involving flight from violent criminal groups is the largest of all the clusters, and contains the most diverse array of cases. The groups in question include drug cartels, street gangs, insurgent guerilla groups, and even the Taliban, a group that both defies categorization and does not need it. The

165. The factors are: the public interest in the information disclosed; whether there were alternate channels for this disclosure; the authenticity of the disclosed information; whether the applicant acted in good faith; the detriment to the employer; and the severity of the sanction. *See* Heinisch v. Germany, App. No. 28274/08, Eur. Ct. H.R. (2011); Guja v. Moldova, App. No. 14277/04, Eur. Ct. H.R. (2008).

166. *See supra* note 1 and accompanying text.

preponderance of claims of this nature prompted the UNHCR to issue a guidance note on claims "relating to victims of organized gangs" in 2010, in which the organization remarks that there is an increasing number of these claims, "especially in the context of Central America."[167] From the point of view of legal analysis, there is little to distinguish a gang from any other organized group that operates outside the law, is frequently involved in criminal activity, has a code of membership or a group ethos, and exercises significant power within its social setting such that its threats are meaningful. It is clear, therefore, that the UNHCR intended its guidance to be relevant in these cases.

One indicator of the analytic difficulty of these cases is that three of the influential decisions discussed above fit within the group: *Elias Zacarias*, *Ward*, and *Gutierrez Gomez* each involve a claimant at risk from a violent group.[168] As these three cases offer divergent approaches in varying jurisdictions, it is not surprising that the global jurisprudence is somewhat incoherent. The set of rulings on claimants fleeing violent groups reflects all of the issues presented by the leading cases; it also illustrates that these rulings have left many questions unanswered, even within the jurisdictions where they are controlling.

The UNHCR Guidance Note begins from the problem of unchecked gang violence, and thus is not primarily directed towards clarifying political opinion analysis; nevertheless, it serves to introduce a number of the questions that need to be addressed.[169] Starting from Goodwin-Gill's definition of political opinion, the Guidance Note states that

> In 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 to constitute a "political opinion" within the meaning of the refugee definition.[170]

The analysis in the Guidance Note is focused on situations where the gang in question is in a position to exercise state-like power in at least some part of a country.[171] This focus facilitates a political opinion analysis, but only if

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167. Guidance Note, *supra* note 31. Interestingly the Guidance note does not report data in support of this assertion.

168. *See* discussion *supra* Section II.

169. The Guidance Note assesses membership in a particular social group as a first potential nexus for protection in gang violence situations.

170. Guidance Note, *supra* note 31, ¶ 46.

171. *Id.* ¶ 47 ("It is important to consider, especially in the context of Central America, that powerful gangs, such as the Maras, may directly control society and *de facto* exercise power in the areas where they operate. The activities of gangs and certain State agents may be so closely intertwined that gangs exercise direct or indirect influence over a segment of the State or individual government officials. Where criminal activity implicates agents of the State, opposition to criminal acts may be analogous with opposition to State authorities. Such cases, thus, may under certain circumstances be properly analysed within the political opinion Convention ground. Or, conversely, advocacy in favour of the rule of law may be considered a political opinion.").

the government or the state is necessary for an opinion to be considered political. Many cases of individuals fleeing criminal groups fall into a murky in-between position where the group is *not* state-like, but where state protection is not possible. For example, the cases of *Elias Zacarias*, *Ward*, and *Gutierrez Gomez* probably would not be considered to involve gangs exercising "*de facto* . . . power" or which "directly control society,"[172] because in all of these circumstances the government remained in control of the country and played its part in the story of the case. The potential for violent groups to assume state functions, and therefore facilitate a political opinion analysis, is also signaled in the unusual approach to political opinion taken in the European Union's Qualification Directive.[173] Equating the gang with the state facilitates political opinion analysis only if one begins from the principle that all political opinions relate to the state in some way. When this principle is de-centered, the troublesome question of whether a group is exercising state functions can be properly avoided. At this juncture it is vital to recall that an analysis of whether state protection is possible occurs in analyzing the persecution aspect of the definition. It is not useful for understanding whether risk arises for reason of political opinion.

A large number of protection claims in this criminal group category have been made in the United States, where the *Elias Zacarias* decision is the governing authority and remains the starting point for analysis.[174] Looking at the case law that has amassed in the interim sharpens an appreciation of how the *Elias Zacarias* ruling fails. In many cases, *Elias Zacarias* is reduced to a simple statement: "mere refusal to join a gang does not constitute political opinion."[175] Or alternatively,

> The respondents argue on appeal that the MS-13 attempted to forcibly recruit the male respondents into their gang, and that the gang persecuted the respondents on account of their anti-gang political opinion. Given the circumstances of this case, we find that the respondents' argument is foreclosed by *INS v. Elias Zacarias*.[176]

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172. *Id.*

173. Qualification Directive, *supra* note 33.

174. *See supra* note 38 and accompanying discussion.

175. Mejilla-Romero v. Holder, 600 F.3d 63, 72 (1st Cir. 2010) (holding that, in the case of an eleven-year-old Honduran national who fled following threats from a gang that controlled his neighborhood, and whose parents had supported a different political party than most of their neighbors, "[e]ven if Mejilla-Romero had shown the attacks were motivated by his resistance to gangs and gang recruitment, which he did not do, that would not help his case. Mere refusal to join a gang does not constitute political opinion.").

176. *Matter of S-E-G*, 24 I. & N. Dec. 579, 588 (B.I.A. 2008) (involving Salvadoran teenaged siblings who left because of threats from a Mara that controlled their neighborhood after they refused to join). In some cases, this position is developed in more detail. *See, e.g.*, *Sangha v. INS*, 103 F.3d 1482, 1490 (9th Cir. 1997) ("In *Elias Zacarias* the Supreme Court instructed us to change course. It held that an applicant's refusal to fight in the context of a forced recruitment is not enough by itself to show that the persecutor acted 'on account of' his political views.").

Following *Elias Zacarias* does not always lead to the conclusion that a person resisting a violent group is not a refugee. In *Mayorga Esguerra* the Ninth Circuit distinguished the case where a member of an elite special-forces team, refused to join a guerilla group on the basis of his "manifest pro-government allegiance," which was evidenced by his employment.[177] In *Martinez Buendia*, the Seventh Circuit held that "*Elias Zacarias* does not stand for the proposition that attempted recruitment by a guerilla group will never constitute persecution on account of the asylum seeker's political beliefs."[178]

There are three important points to take away from the *Elias Zacarias* legacy. The first is that the legacy is scarcely settled. In both *Mejilla Romero* and *Mayorga Esguerra* there were strongly worded dissents arguing for a different reading of the Supreme Court's ruling, but the dissentients argued in opposite directions, emphasizing the confusion the case has fostered.

The second is that the distinctions required are very finely split, indeed. The fact of a "pro-government allegiance" was decisive in *Mayorga Esguerra*, but a desire to align with the government was irrelevant in *Elias Zacarias* itself.[179]

The third important point builds on the first two: given that *Elias Zacarias* is a controlling decision that provides neither a definition nor an overall framework approach, what it leaves in its wake is a confusing and cross-cutting engagement with facts from which it is difficult to discern principles. Indeed, the factual engagement is often in the weeds, so to speak, as many of the cases pay close attention to the claimant's narrative, but make little comment on the background political situation in the country in question. This raises the matter of how to appropriately assess the context in political opinion cases. It would be close to impossible to predict what would happen in a given case on the basis of this jurisprudence, and, as many of the cases arise in the United States, this serves to emphasize that a new approach would be valuable, and must be workable in this setting especially.

The Canadian jurisprudence, following from the lead ruling in *Ward*, has encountered a domestically idiosyncratic issue that has sidelined developments in political opinion analysis involving criminal groups. In 2002, the domestic legislation was amended to allow protection when a nexus to one of the grounds of protection in the refugee definition could not be

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177. *Mayorga-Esguerra v. Holder*, 409 F. App'x 81, 83 (9th Cir. 2010).

178. *Martinez-Buendia v. Holder*, 616 F.3d 711, 716 (7th Cir. 2010) (granting protection to a woman who had organized humanitarian health care services in rural Colombia and who had been threatened because she refused to credit the FARC with the success of her work).

179. The facts could easily have been interpreted differently on the basis that Mayorga-Esguerra was a government employee and Elias-Zacarias was not, therefore supporting the government in Elias-Zacarias' case meant something more than keeping his job.

established in cases where the risk faced is one of torture or death.[180] This new provision has been used most extensively in cases that fit in this category, with the result that analysis of political opinion in the context of flight from criminality has diminished.[181]

The comparatively few Canadian cases that do analyze political opinion demonstrate that the *Ward* approach does not get at the heart of the issue for many factual situations involving violent groups. In *Labsari*, the court held that a young Algerian man who refused to turn over his truck to an armed terrorist group for use in its activities may have been perceived as expressing a political opinion and sent the matter back for reconsideration.[182] The court did not give a clear account of why this perception might exist. In *Gomez*, the court held that resisting extortion could possibly be the basis for an imputed political opinion, without further explanation.[183] These two pre-2002 cases contrast with *Yoli* and *Suarez* from the same time frame, in which informing against a violent group and resisting involvement with it were considered not to be bases for imputed political opinion.[184] Each case purports to apply the *Ward* analysis, but it is difficult to point to how the definition from *Ward* influences the outcome, as the court tends to reach its conclusion without spelling out the analytic steps taken in reaching it.

The more recent Canadian cases that apply political opinion as the potential ground of protection show some tendency to skirt the substance of the issue. In *Sanchez*, a state employee who also ran a business reporting lawbreakers to the government ran afoul of the FARC in Colombia because he was infringing upon their extortion racket. Originally rejected because there was no political opinion, the Federal Court of Appeal ruled without providing analysis of political opinion.[185] *Tobias Gomez* and *Navarro* were cases where shop owners resisted extortion by gangs, the

180. There are several other limiting criteria, as well as a higher standard of proof than in the case of refugee determination. *See* Immigration and Refugee Protection Act, S.C. 2001, c 27 § 97 (Can.).

181. As in the United States, claims from Central and South America where violent groups are the source of risk have received considerable attention in Canada. Of the four decisions ever designated by the Immigration and Refugee Board as "jurisprudential guides" or "persuasive decisions," two have involved flight from gang violence in Costa Rica and Mexico respectively: RPD File No. TA2-14980), [2003] RPDD 6 (Can. Ont.) (revoked as a jurisprudential guide in October 2011), and RPD File No. TA6-07453, [2007] RPDD 253 (Can.). The Board's selection of these cases demonstrates the importance of violent group persecution to its caseload.

182. Labsari v. Canada (Minister of Citizenship & Immigration), [1999] F.C. 666, ¶ 41 (Can. Ont.).

183. Gomez v. Canada (Minister of Citizenship & Immigration), 2001 F.C.T. 647, [2001] F.C.J. 965 (Can.).

184. *See* Yoli v. Canada (Minister of Citizenship & Immigration), [2002] F.C.J. No. 1823 (Can. Ont.); Suarez v. Canada (Minister of Citizenship & Immigration) [1996] F.C.J. 1036 (Can.).

185. *See* Sanchez v. Canada (Minister of Citizenship & Immigration), [2007] FCA 99 (Can.).

former in El Salvador and the latter in Mexico.[186] Each case was argued as a matter of political opinion, but this analysis was rejected by the courts on the basis of the judges' views of what the gangs were likely thinking.[187] The political opinion analysis here potentially departs from *Ward*, where the INLA was explicitly *not* analyzed as perceiving Mr. Ward's action as political.

Canadian jurisprudence also demonstrates that the dividing line between whistleblower cases and cases involving violent groups is sometimes blurred. In *Yoli*, the agent of persecution is a violent group that the applicant wished to dissociate from after he became aware of the extent of its criminal activities.[188] While the applicant had not reported these activities, he was at risk because of the possibility that he *could* do so. The Court considered the case one of "refusing to participate in criminal activity" or "witnessing and/or reporting crime," and held that his actions did not evince a political opinion.[189] *Yoli*, along with *Suarez* and *Sanchez*, are examples that might be considered "whistleblowing (informing) on violent groups," which are then analyzed as "political opinion or not" depending on how fully the group has become imbricated with the state.[190] A similar blurring of the lines is evident in a New Zealand ruling that an Applicant's actions manifest "a genuinely held belief in the essential human dignity of all and that nobody should be subjected to being trafficked and an opinion that corruption among public officials and politicians in Pakistan needs to be tackled."[191] In other words, it is important to bear in mind that these categories have been created to assist solving the political opinion puzzle and do not have any intrinsic role independent of that.

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186. *Gomez v. Canada*, [2011] F.C. ¶ 17; Navarro v. Canada (Minister for Citizenship & Immigration), [2011] F.C. 768, ¶ 4 (Can.).

187. *See Gomez*, [2011] F.C. ¶ 26:

> The applicants point to objective evidence that suggests that those who resist gangs in El Salvador may be subject to retribution. However, the documentary evidence does not suggest that this opposition, in the eyes of the Mara-18, is perceived to be a political stand against them. It appears that the applicants' refusal to comply with escalating extortion demands, and Luis' resistance to recruitment, were acts of economic and personal preservation, not a political stance.

See also Refugee Appeal No. 2507/95 Re JEAH [1996] NZRSAA (22 Apr. 1996) (N.Z.) *(reaching a similar conclusion* where the claimant resisted extortion by the Shining Path because he could no longer afford the payments).

188. *Yoli*, [2002] F.C.J. No. 1823.

189. *Id.* ¶ 27, ¶ 33; *see also* Suarez v. Canada (Minister of Citizenship & Immigration) [1996] F.C.J. 1036 (Can.).

190. The IRB's "persuasive decision" on Mexico, *supra* note 181, is also a good example of this line blurring.

191. *Refugee Appeal Nos. 76478, 76479, 76480 & 76481*, [2010] NZRSAA ¶ 42 (11 June 2010) (N.Z.) (considering an applicant whose anti-trafficking activities marked him a target of a "mafia gang engaged in human trafficking" and whom the police were unable to protect).

In France, applicants at risk of being persecuted by the Taliban have been rejected for lack of political opinion on the basis that simply belonging to the national police force or the army cannot be the basis of a political opinion.[192] In the *Akhondi* decision, the court reached this conclusion despite the evidence that the applicant had strong anti-Taliban political views. The political opinion analysis failed because Mr. Akhondi had argued he was at risk because of his employment as a police officer, not specifically because of his views.[193] These decisions are a sharp contrast with the American ruling in *Mayorga Esguerra*, and suggest that it may be useful to clarify whether and when joining a particular institution could be considered in and of itself to evince a political opinion.

It is difficult to summarize the lessons of this diverse group of cases. It is apparent in this array that persecution by violent groups is prevalent; this means that any new approach will be called upon to make sense of these types of facts more than any other. If a new method is going to be useful, it must work to make sense of these cases. It is also evident that many violent groups pose serious threats, even when they do not have "state-like" capacities as suggested by the UNHCR guidelines. This observation raises the possible importance of de-centering the state in political opinion analysis, if opposition to this type of criminality is to be viewed as political.

These cases also present the question of whether and when occupying a role or profession might be evidence of opinion. This is an important addition to the analysis of what constitutes opinion. These cases also contribute a perspective on ways of characterizing opinions that seems useful in the whistleblowing context because, in matters of opposition to criminal violence, the question of whether an action is altruistic, personal or group oriented falls away from the center of the inquiry. What remains in the criminal violence cases is a strong need to attune to context in some principled way in order to separate political opinion from a mundane request for law enforcement. This analysis can be supported by looking at the question of how oppositional the opinion is and, once again, by considering what is being offered up as an opinion. Finally, these cases demonstrate how the reasoning in both *Elias Zacarias* and *Ward* leaves gaps when faced with risks posed by violent groups.

E. *Gender-related harms*

The final case cluster examined here involves cases where the potential political opinion links to gender. This cluster is important because the possibility of gender as the basis of political opinion has been the subject of explicit disagreement in the major cases.

As the New Zealand Refugee Status Authority's 2008 decision demonstrates, there is a coherent argument to be made that gender-related

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192. *See* CE Akhondi, June 14, 2010, No. 323669 (Fr.); CE Habibi, 14 June 2010, No. 323671 (Fr.).

193. *CE Akhondi*, No. 323669.

harm can be conceptualized as occurring for reasons of political opinion.[194] The question of whether and how those fleeing gendered harms are at risk because of their political opinions is a thorny one, and it has several dimensions. The complexity of the question makes this cluster of cases more complicated to assess than any of the previous groups. It also means that the gender cases generate key insights into all three of the central questions that must be answered in order to generate a new framework.

Among theorists and scholars, it is widely accepted that opposition to discriminatory gendered practices ought to be viewed as a political opinion.[195] This is the core of the analysis in *NZRSAA 76044*, but is also stated plainly in guidelines on gender-related persecution in Canada,[196] the United States,[197] Australia,[198] and by the UNHCR.[199] For example, the most recent guidance of the UK border agency states:

> Non-conformist opinions or behaviour may in certain circumstances be the expression of a political opinion or may result in a woman having a political opinion attributed to her whether she holds one or not. For instance opposition to institutionalised discrimination against women in society or expressing views in opposition to the predominant social or cultural norms can be seen to constitute a political opinion. Non-conformist behaviour in certain cultures such as refusing to wear a veil, pursuing an education or choosing a partner could also lead to a woman having a political opinion attributed to her.[200]

This guidance reflects precisely the position of the New Zealand Authority: a woman who behaves in a non-conforming way may have a political opinion attributed to her by someone who wishes to harm her or to deny protection to her.

At one level, this statement of the issue is the most challenging for political opinion jurisprudence: non-conforming behavior—which might range from refusal to marry by a certain age to wearing nail polish—that contradicts tradition or a societal moral code, but which has no connection

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194. *Refugee Appeal No. 76044* [2008] NZAR 719 (N.Z.).

195. Examples of this consensus are below, at note 201.

196. Immigration & Refugee Bd. of Can., Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution, A.II (1996) (Can.).

197. U.S. Citizenship & Immigration Serv.'s, Refugee, Asylum, and International Operations Directorate: Officer Training 35-37 (2011) [hereinafter USCIS Training Guidelines].

198. Dept. of Immigration & Multicultural Affairs, Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers (1996) (Austl.).

199. U.N. High Comm'r H.R., 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, U.N. Doc HCR/GIP/02/01 (May 7, 2002).

200. U.K. Visas & Immigration, Gender Issue in the Asylum Claim: Process (2010) (U.K.).

to government or the public sector, and is engaged in by a woman who does not view herself as having a political opinion. To invert the classic second-wave feminist maxim: when is a personal choice political and how is the private realm politicized?

Despite the high level of agreement in official guidelines and scholarly literature,[201] courts around the world have explicitly disagreed about whether non-conforming behavior by women constitutes political opinion, or can be the basis of the imputation of political opinion by potential persecutors. There is a significant gulf in the case law. The New Zealand Refugee Status Appeals Authority has issued a number of decisions that follow its 2008 ruling that an Alevi Kurdish woman from Turkey expressed a political opinion through declaring she would end her marriage.[202] In *Lazo-Majano*, the US Court of Appeals for the Ninth Circuit held that a woman fleeing sexual abuse was asserting a political opinion by virtue of her flight.[203] The Immigration and Refugee Board in Canada has ruled that an Iranian student who was threatened because she had spoken out in class against wearing the *chador* was manifesting a political opinion.[204] On the other side of the coin, the United Kingdom's House of Lords stated in its seminal ruling in *Shah and Islam* that a political opinion argument could not be made out on behalf of two women who had each sought refuge from marriages where they faced domestic abuse and threats of

201. This consensus is also reflected in secondary literature. *See, e.g.*, HEAVEN CRAWLEY, REFUGEES AND GENDER: LAW AND PROCESS (2001); SHAUNA LABMAN & CATHERINE DAUVERGNE, *Evaluating Canada's Approach to Gender-Related Persecution: Revisiting and Re-Embracing 'Refugee Women and the Imperative of Categories'*, *in* GENDER IN REFUGEE LAW: FROM THE MARGINS TO THE CENTRE 264 (2014); Deborah E. Anker, *Legal Change from the Bottom Up: the Development of Gender Asylum Jurisprudence in the United States*, *in* GENDER IN REFUGEE LAW: FROM THE MARGINS TO THE CENTRE 46 (Efrat Arbel, Catherine Dauvergne, & Jenni Millbank eds., 2014); Audrey Macklin, *Refugee Women and the Imperative of Categories*, 17 HUM. RTS. Q. 213 (1995).

202. *Refugee Appeal No. 76044* [2008] NZAR 719 (N.Z.); *see also Refugee Appeal Nos. 76250 & 76251*, [2008] NZRSAA (1 Dec. 2008) (N.Z.) (considering a Saudi Arabian woman who has acted against the wishes of her father, brother and husband by working outside the home); *Refugee Appeal No. 71427/99*, [2000] NZRSAA (16 Aug. 2000) (N.Z.) (considering an Iranian woman who was "punished" by her husband for infringing traditional rules of behavior for women).

203. Lazo Majano v. INS, 813 F.2d 1432, 1436 (9th Cir. 1987) ("Olimpia has suffered persecution because of one specific political opinion Zuniga attributed to her. She is, she has been told by Zuniga, a subversive. Her husband left the country, a policeman has been told, because she is a subversive. If she complained of Zuniga, she was informed, she would be killed as a subversive. One cannot have a more compelling example of a political opinion generating political persecution than the opinion that is held by a subversive in opposition to the government. Zuniga viewed Olimpia as having such an opinion. The opinion, it may be said, is not Olimpia's. It is only imputed to her by Zuniga. And it is imputed by Zuniga cynically. Zuniga knows that Olimpia is only a poor domestic and washerwoman. She does not participate in politics. Olimpia, however, does have a political opinion, camouflage it though she does. She believes that the Armed Force is responsible for lawlessness, rape, torture, and murder. Such views constitute a political opinion. And she has been persecuted for possessing it.").

204. Namitabar v. Canada (Minister of Emp't & Immigration), [1994] 2 F.C. 42 (Can.).

being named as adulterers.[205] The guidance decision in *Gutierrez Gomez* stated that "sexual politics" and "the politics of the family" would rarely engage political opinion in a Conventional sense.[206] The former United Kingdom Immigration Appeal Tribunal also ruled that a young woman who did not want to take on the inherited role as a leader in female genital cutting, including marrying an elderly local chief, did not have any discernable political opinion.[207]

There are three subgroups of cases in this cluster. A first subgroup involves the important challenge of imputed political opinion on the basis of women resisting or rejecting traditional norms, but not otherwise engaging in political activity, nor in any activity that is directed towards the state, and who have not articulated their actions in political terms. In the view of his paper, this group of cases is where the true challenge for political opinion analysis resides. These cases can be contrasted with two other types: cases where a woman seeks protection on the basis of opinions that she identifies as feminist, and cases where male claimants seek protection on the basis that they are at risk because of their opposition to traditional roles or practices assigned to women. In both of these latter instances, regarding the actions as evincing political opinion is straightforward. These cases are useful because they demonstrate political opinion in the absence of the state.

To illustrate this point, consider the cases about feminism. The United States Court of Appeals for the Third Circuit has stated in *Fatin* that "there is little doubt that feminism qualifies as a political opinion."[208] Leaving aside the enormous question of whether feminism can be bundled up in this or any manner, the facts in *Fatin* called up this analysis, since Ms. Fatin presented herself to the tribunal as a woman who supported the deposed Shah of Iran *and* embraced feminist views. Examples of cases where women articulate political views and views that could be labeled feminist are found in a range of jurisdictions: an Iranian woman who opposed the government on the basis of how it treated women and reformists;[209] a Chinese woman who advocated against the Communist regime after being denied access to her children because of her partner's political

205. Islam (A.P.) v. Sec'y of State for the Home Dep't, R v. Immigration Appeal Tribunal & Another ex parte Shah (A.P.) (Conjoined Appeals) [1999] 2 AC 629 (HL) (appeal taken from Eng.). The facts in the Islam case indicated that a precipitating factor for the violence was that Ms. Islam had intervened in a fight between rival political factions that took place at the school where she worked. Her husband was associated with one of the factions.

206. Gutierrez Gomez v. Sec'y of State for the Home Dep't [2000] UKIAT 00007, [2001] 1 WLR 549.

207. FB v. Sec'y of State for the Home Dep't [2008] UKIAT 00090, ¶¶ 72-74.

208. Fatin v. INS, 12 F.3d 1233, 1242 (3rd Cir. 1993)*; see also* USCIS TRAINING GUIDELINES, *supra* note 197.

209. *See RRT Case No. 0903537*, [2009] RRTA 851 (Austl.).

connections;[210] an Iranian woman who had been arrested for dress code infringements and for meeting a man in public, who expressed strong views about women's rights and also participated in demonstrations advocating for the release of election results;[211] and an Afghan woman who opposed the Mujahideens.[212]

This group of cases is straightforward because the women involved in them have deliberately identified themselves as political actors through some engagement with state. A potential confusion does arise, however, when decision-makers do not distinguish this state-directed political action from opposing traditional mores or seeking personal autonomy. This confusion, first introduced in *Fatin*, is written into the United States Training Guidelines on Gender:

> [O]pposition to institutionalized discrimination of women, expressions of independence from male social and cultural dominance in society, and refusal to comply with traditional expectations of behavior associated with gender (such as dress codes and the role of women in the family and society) may all be expressions of political opinion. Feminism is a political opinion and may be expressed by refusing to comply with societal norms that subject women to severely restrictive conditions.[213]

Teasing out the differences between feminist cases and the non-conforming behavior cases may be useful for a broader analysis of political opinion, and is essential to ensuring that redefining political opinion does not serve to make women's state-directed political activities invisible. It is important to open a space where women can be seen to assert autonomy and reject traditional roles without being feminists, even just for the sake of analysis, and where feminists can assert feminism as a political opinion without rejecting traditional roles or asserting individual autonomy in a Western stereotypical sense—for example, by doing so while wearing the burka or performing all of the domestic unpaid labor in their households. Overtly-articulated feminist politics ought always to be understood as a matter of political opinion.

The final subset of gender-related cases is a small number of cases coming from France and Belgium, where men have been recognized as refugees on the basis of their political opinions about gender; in particular, their opposition to FGM.[214] These cases demonstrate how gender politics

210. *See RRT Case No. 0805612*, [2008] RRTA 407 (Austl.) (observing that the custody dispute was "purely domestic" but that the individual's political activities demonstrated a political opinion).

211. *Refugee Appeal No. 76511* [2010] NZRSAA 118.

212. CRR SR 26 octobre 1994 Mme K. n° 93012524/253902 R.

213. USCIS Training Guidelines, *supra* note 197, at 36.

214. CNDA MD, Mar. 10, 2010, No. 06007197, C+, *excerpted in* Année 2010 Contentieux des réfugiés: Jurisprudence du Conseil d'État et de la Cour nationale de droit d'asile [2010 Refugee Litigation: Jurisprudence of the Council of State and the National Court of the Right of Asylum] 49 (2010) (Fr.):

can be separated from one's person. When the applicant for status is not a woman, it is easier to see the political positioning of gendered questions, even those that would not likely add up a broadly understood commitment to feminism *per se*.[215] That a man who opposes the required genital cutting of women in his society is saying something political seems evident because of the oppositional content of the view and the power structure it relates to, even in the absence of the state, or, in some case, even with the support of the state.

The lesson to be taken from these two subsets is that much political action bypasses the state and relates instead to other loci of societal power, such as the family or the clan, which may or may not be ultimately backed by the state. These cases are less complicated because they do not raise a question about the nature of opinion, the opinion in question is overtly stated.

In the most complex subset of these cases, an individual does not state an opinion at all; she simply, at the very least, lets her hair down or puts on mascara. Indeed, she may not even perceive this action as remotely political *or* feminist. Can she be at risk because of an imputed political opinion? This is one of the most challenging hypotheticals for political opinion analysis, and it engages questions of definition, of context, of opposition and, most pressingly, of what counts as an opinion.

The gender cases are important not only because of how the variations within them sharpen questions of complexity, but also because of the questions presented by the decline of political opinion claims brought by women.[216] The possibility that the political opinion analysis may be failing

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> "qu'en cas de retour dans son pays, il craint donc avec raison, au sens des stipulations précitées de la convention de Genève, d'être persécuté par des groupes traditionalistes sans pouvoir se prévaloir utilement de la protection des autorités locales, lesquels perçoivent son engagement contre la pratique des mutilations génitales féminines comme une opinion politique transgressive des normes sociales et religieuses toujours prégnantes au Mali."
>
> "If returned to his country, he has a reasonable fear, in the sense of the above-mentioned provisions of the Geneva Convention, of being persecuted by traditionalist groups without the power to avail himself of the protection of the local authorities, who perceive his engagement against FGM as a political opinion transgressing social and religious norms always prevalent in Mali."

See also Conseil du Contentiuex des Étrangers [The Counsel for Alien Disputes] June 30, 2010, BELGIUM: CONSEIL DU CONTENTIEUX DES ETRANGERS, No. 45.823, http://www.refworld.org/docid/4dad99b32.html (Belg.) (holding that, where a Guinean man had been active in an organization opposing FGM for a number of years and fled with his daughter so that she would not be subject such practices, "the petitioner manifests a form of treason in regard to customary practices largely widespread. Therefore, the alleged persecution is connected to one of the reasons of the Geneva Convention.").

215. These cases contrast sharply with the Supreme Court of Canada's *Chan* ruling in which a man fleeing compulsory sterilization was treated skeptically. *See supra* note 126 and accompanying text.

216. Most recently, cases involving gender-related persecution are most often considered on the basis of membership in a particular social group, the group being defined as "women" or some subset thereof. This was an important feature of the *Fatin* case, which

women at risk of persecution looms large behind this decline. In sum, these cases squarely raise the issues of how and whether to position government or even the state in defining the political. They also bring a focus on whether resistance or oppositional posture ought to be required for an opinion to be political. Thinking through gender-related political opinion compels the decision-maker to consider how, why, and when opinions about private concerns, micro-level concerns, or matters of self-interest link up with larger social themes and thereby take on characteristics that are, to recall the words of the Second Circuit, "typical of political protest."[217] Thus, feminist analysis brings to the question a well-developed framework for illuminating the political in the personal.

This cluster also presents important questions about the parameters for imputing political opinion: in circumstances where an individual does not perceive her own opinions *or actions* as political, how should a decision-maker proceed? These cases raise this question, but provide little by way of an answer. Finally, and indirectly, some of the cases that reject gendered opinions as a basis for protection suggest that these opinions should not warrant protection under the Refugee Convention. The question presented here is whether some political opinions are so personal that they ought to be defined out of political opinion analysis for refugee law purposes. This view is important for several decision-makers, but is strongly rejected by scholars, and thus it requires comment in developing a new analysis.[218]

IV. Mapping A Way Forward

This detailed examination of the case law highlights the contours of the areas of debate surrounding political opinion. Having evaluated these cases, this paper returns to its three central questions: what is opinion, which opinions are political, and should any political opinions be excluded.

The case law squarely, but implicitly, raises the question of what ought to be considered an opinion. Interestingly, the parameters of opinion are not something that decision-makers have grappled with overtly. To this extent, refugee law mirrors the scant guidance from international human

despite leading to a strong statement about feminism, was not argued as a political opinion case. *See* Fatin v. INS, 12 F.3d 1233, 1242 (3rd Cir. 1993) ("The petitioner also argues that she is entitled to withholding of deportation or asylum based on her 'political opinion,' but her brief treats this argument as essentially the same as her argument regarding membership in a particular social group. Indeed, her brief relegates discussion of this entire subject to a single short footnote that simply states that her "political claim is intertwined with her social group claim."). The 2012 GENSEN Report on women's asylum claims in nine EU member states concluded that recognition of political opinion claims by women was declining. *See Study on Gender Related Asylum Claims in Europe: A Comparative Analysis of Law, Policies and Practice Focusing on Women in Nine EU Member States* 71-73, Eur. Parl. Doc. PE 462.481 (2012). This conclusion accords with trends that I have identified in recent collaborative work. *See* Arbel, Dauvergne & Millbank, *supra* note 201, at 2-4.

217. Yu v. Holder, 693 F.3d 294, 299 (2d Cir. 2012).

218. *See supra* note 201 and accompanying discussion.

rights law suggesting that opinion is almost unlimited. This open-ended notion is underlined by linking opinion to thought or conscience. But in order for an opinion to be protected, it must be discernable in some way, even if the decision-maker can stop short of saying that it must be "expressed." In the Refugee Convention, "opinion" is modified by "political," and most of the disagreement in the jurisprudence goes to the question of what counts as "political." But the question of what counts as "opinion" runs subtly alongside this; it is just rarely identified.

There are two ways that the definition of opinion becomes visible in the case law. The first is in consideration of whether taking on a particular role can evince a political opinion. In the cases discussed here, contested roles include law student, police officer, and soldier. It is easy to envision others such as party member, lawyer, and humanitarian volunteer. In all cases, what makes the example work as a thought experiment is how the contextual factors are imagined. For example, some people joined the Nazi party in order to keep their jobs. Would their role as members evince a political opinion? And if so, what would the content of that opinion be? "This party is so dangerous I had better join?" "I am not willing to oppose this?" "I am Jewish and this will help hide me?"

Whether taking on a role constitutes opinion points directly to the second way in which the cases present the question of opinion, and that is in analyzing 'imputation'. It is settled law that an opinion need not be stated in order to be a successful basis for a refugee claim.[219] And furthermore, it need not be true; but it does have to be *something*. Analytically, the question is whether the agent of persecution views the claimant as having a political opinion.[220] In practical terms, that question is for the court. How far can or should the court go in imputing an opinion? The answer to this question depends on what an opinion *is*. Especially in the case clusters regarding flight from violent groups and regarding gender, decision-makers varied enormously in their methodologies for imputation and, seemingly, in their willingness to "impute" at all. For example, weakness of conviction was a central issue in *Gutierrez Gomez*,[221] whereas, in *RT (Zimbabwe)*, doing nothing at all was the essence of an expression of neutrality, and the court explicitly stated that it would not draw a distinction between strongly articulated neutrality and indifferent neutrality.[222]

If an opinion need not be overtly expressed, it is intuitively correct to say that it equally need not require a specific act. But, unlike the ICCPR's analysis,[223] for an opinion to be the object of a risk in the refugee law setting, it must have some discernable trace in the world. Specifying such

219. *See, e.g.*, Hathaway & Foster, *supra* note 5, at 407-23; Goodwin-Gill & McAdam, *supra* note 5, at 87, 89, 104.

220. *See* Hathaway & Foster, *supra* note 5, at 409-11.

221. *See* Gutierrez Gomez v. Sec'y of State for the Home Dep't [2000] UKIAT 00007 ¶ 68-70, [2001] 1 WLR 549.

222. *See* RT (Zim.) v. Sec'y of State for the Home Dep't [2012] UKSC 38, ¶ 46, [2013] 1 AC 152.

223. *See supra* notes 17-20 and accompanying text.

traces must therefore be accounted for in a new approach. Here, this paper's tentative conclusion is that "opinion" need not trouble the analysis when there is some overt statement of it; the problems arise instead in the doubly constructed realm of imputation, which is doubly constructed because the decision-maker must speculate about the speculation of the persecutor. While international human rights law conceives of opinion as including any thought or idea, no matter how private, personal or guarded, refugee law, by its operating logic, requires that an opinion have some observable trace in the world There must be *something* that a decision-maker can point to as evincing an opinion; otherwise, there is no basis on which a potential persecutor could possibly form a view.

In regard to the second question, whether a given opinion is political, decision-makers have provided a great deal of fodder for analysis. The most important analytic aspect to emerge is accounting for context. This is central because it almost overshadows the question of the political entirely: what counts as political is always contextual. The conclusion lies behind the New Zealand Authority's view that a textural analysis of context should replace any definition of political opinion. Having rejected this view, the remaining task is then to provide markers about how decisions should move forward; in other words, to give guidance about what aspects of context matter and what a decision-maker should take into account in defining government, state, or opposition.

The United States cases, for example, have generally looked less broadly than others at what might be called background factors. How far *should* one look? In a functioning democracy with robust rule of law institutions, it may be the case that whistleblowing against government actors would not be considered a political opinion. In all of the cases, the social and large-scale political background provides the setting in which the question is asked and answered. In the contestation between *Klinko* and *Storozhenko*, a key factor was how to evaluate the Ukrainian government's efforts against corruption.[224] Context matters because it helps determine where power lies and thus what is properly counted as political. This will be true regardless of where one draws the line on the centrality of government and the state. This paper would not go so far as to agree with the *Gutierrez Gomez* tribunal that the political is so infinitely malleable that no political actors can be specified out of context.[225] For example, members of political parties and elected officials will be political actors in every instance. But the point about malleability is well-taken, even short of this limit. Context also is a vital guard against the type of unrestrained abstraction that makes definitions of political opinion look absurd. For example, abstracting the question of whether to have a child from the context of coercive population control makes it hard to discern its character.

224. *See* discussion *supra* Section III.C.

225. *See* Gutierrez Gomez v. Sec'y of State for the Home Dep't [2000] UKIAT 00007 ¶ 40, [2001] 1 WLR 549.

A second potential limit to the political, which is well canvassed in the case law, is how important government or even possibly "the state" is to assessing what counts as political. The definitions set out in both *Ward* and *Gutierrez Gomez* use the state as a touchstone.[226] The whistleblower cases are united by their focus on whistleblowing about or against the state.[227] In analysis of the criminal group cases, the extent to which the group and the state are intertwined features prominently in the typical analysis. Requiring that a political opinion must in some way bear on government, governance, or the state—or, in the *Gutierrez Gomez* formulation, on power transactions or major actors that are themselves related to government—would be a clear line, but it would oftentimes limit the reach of political-opinion-based protection in matters of criminal groups and gender-related persecution. Drawing the line in this way would have the advantage of clarity, but it would certainly result in a smaller group of individuals acquiring protection on this basis than is presently the case. It would exclude a significant number of gender-related claims where agreement about the political nature of the opinions involved is already widespread, such as the cases of overt feminist argument. It would also run counter to current UNHCR and national government guidelines on gender.[228]

A third potential indicator of political that emerges from the case methodology concerns the role of an oppositional posture in making an opinion political. While it appears settled that an opinion need not be developed in opposition to the government in order to qualify as political, it is generally the case that opinions that have been recognized as a worthy basis for refugee protection are in some way oppositional. This is one of the things that the Second Circuit may have been intimating when it wrote of actions that are "typical of political protest."[229] The notion of opposition is something that could usefully be developed further. Claimants who benefit from protection on the basis of an imputed political opinion, or indeed any political opinion, are all individuals who could have kept quiet and done nothing, but who instead *chose to do something*, and that action was against some actor or force in their society that was able to exercise power, legitimate or otherwise, against them. Despite this, they acted, and one way to account for that action is their view about something. This is even true in the gender cases regarding failure to conform to societal norms: the case law has never presented the argument that the woman in question did not know of the existence of the norm, only that her opposition to it was personal or non-political.

Opposition brings the idea of power into focus. This was the commonality between *Gutierrez Gomez* and the New Zealand approach, and was also an idea that figures in locating politics in the gender cases. The notion

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226. *See* discussion *supra* Section II.

227. *See* discussion *supra* Section III.C.

228. *See supra* notes 196-200 and accompanying text.

229. Yu v. Holder, 693 F.3d 294, 299 (2d Cir. 2012).

of opposition also provides some clues to key features of context. For example, situating power within *Elias Zacarias* would foster a richer analysis.

Beyond the factors of context, government or state, and opposition, decision-makers employed a number of potential indicators of the boundaries of political. These characteristics are often paired in the analysis, and the pairings have some conceptual overlap. Accordingly, decision-makers have sometimes paid attention to whether an opinion is self-interested (*NZ* 2010) or altruistic (*Storozhenko*), sometimes to whether an opinion matters to just one individual or whether it motivates a group (*Yu)* sometimes to whether it has a public aspect or whether it is private or personal. This was the line of reasoning behind rejecting a number of claims on the basis that the actions in question were not political, but instead simply reflected that the claimant did not want to go to jail, to be put out of work, to continue to pay extortion money or to conform to traditional practice. The notion of self-interest is potentially fruitful because it introduces a number of associated ideas. For example, a 'self-interested' view that a woman will leave an abusive marriage could be analyzed as linking to a broader macro-politics in a society where such an action is not permitted. The group versus individual theme can also be expressed by saying that some opinions are particularistic rather than generalized. For example, a whistleblowing action was evaluated by a number of decision-makers through consideration of whether it served, or even developed, group interests, rather than solely develop the interests of the claimant. An alternative way to interrogate the public-private tension might be to assess whether an action that reflects or connects to powerful societal trends or actors can ever be fully considered to be private.

Overall, these questions show decision-makers grappling with a desire to articulate some way to analyze the substantive content of an opinion, and thus to find some proxy value to equate with "political." It may well be, however, that these proxies simply reveal that some claimants are more appealing than others. Altruistic team players who risk public action may well be more sympathetic, and this line of analysis fits particularly well with human-rights approaches to whistleblowing as expression. But few would dispute that politics in the ordinary sense of the word can be self-interested and individualistic, and feminist analysts have done forty years of work on jettisoning the idea that the personal would not be considered political.[230] Similarly, it is well-established that heroism is not required for refugee protection.[231]

Answering the question of what constitutes the political in a way that attunes to the needs of refugee decision-makers requires a number of steps. Political opinion should not be defined by reference to government or the state. While opinions regarding government or the state will be involved in many, or maybe even most, cases, the case law demonstrates a

230. *See* discussion *infra* Section II.E.

231. *See, e.g.*, Hathaway & Foster, *supra* note 5, at 407-09; Goodwin-Gill & McAdam, *supra* note 5, at 86-90.

number of compelling situations where political opinions have been found, sensibly, to exist without a link to formal political structures. This paper is of two minds about the requirement for opposition because it could operate in two ways. In the traditional political sphere, opposition does not seem to be a helpful criterion. A view such as "I support the government" or "I vote Republican" is evidently political even though it is not tinged with an oppositional note or a tone of protest. Beyond the traditional political sphere, however, opposition does seem helpful in identifying views to which an individual is strongly committed and for which she is willing to take risks, views that one could hide or disavow, but for a strong personal commitment. In questions of context, a danger arises where a decision-maker attempts to isolate the essence of an imputed opinion; it is easy for this process to render the opinion an isolated abstraction. Turning to context ought to involve considering the power dynamics that surround any expressed or imputed view, and considering how those dynamics link, or fail to link, to formal authority within the relevant state. Such an approach to context would allow for opinions to be political without touching upon state or government, but would still leave a space for considering how the formal political sector is constructed in a given society.

The final question to address is whether some clearly political opinions ought to be excluded from the ambit of refugee protection. The easiest hypotheticals to conjure here are examples like "The president ought to be assassinated" or "The holocaust did not occur." Such examples are repugnant and, in many domestic legal systems, would be excluded from freedom of expression protections. The examples that arose in the political opinion cases came from the conscientious objectors cases, whistleblower cases and gender cases. In analyzing military objectors, some objections were excluded not on the basis that they were not political opinions, but on the basis that human rights law did not extend parallel protection to military objectors. In the whistleblower cases, the potential limit would similarly come from drawing on adjacent analysis of freedom of expression, rather than opinion, in the European Court of Human Rights. In the gender cases, the exclusion arises somewhat differently, on the basis that some political opinions should not be protected because they are too personal.

What this final question brings to the fore is how political opinion fits into the refugee definition as a whole. If one takes the view that some political opinions are not to be protected, s/he must be vigilant to ensure that s/he is not encroaching on a question of nexus or persecution, including state protection. This caution, in this paper's view, leans toward not constraining, or even subtracting from, the definition of political. It is analytically clearer to locate, for example, the risk one may face because of uttering hate speech within the analysis of whether a sanction is persecutory or whether the state will protect one from an angry mob.

These questions, and tentative answers, direct a decision-maker towards a new framework for defining political opinion. To move forward, it is vital to remember the starting points. There are two: 1) existing defini-

tions have not provided sufficient guidance for decision-makers, and 2) political opinion is not defined in an adjacent area of law in a way that can be easily borrowed for Refugee Convention purposes. This means that the best guidance for developing a new definition comes from the Vienna Convention on the Law of Treaties: political opinion must be interpreted in its context, in light of its object and purpose.[232] Courts around the world have agreed that the purpose of the Refugee Convention is to provide surrogate human rights protection to individuals at risk of being persecuted.[233]

Considering the parameters of political opinion is straightforward when both "political" and "opinion" are identifiable in an uncontested way. In the case of 'political' this happens when the opinion is about the government of the day or about core elements of the state.[234] In the case of "opinion," it happens when the view in question has been overtly expressed in words or in some gesture that could not conceivably have another purpose. Many political opinion claims do fit within these parameters, but even the settled core of political opinion jurisprudence reaches beyond this understanding on both vectors.

In the case of "opinion," it is vital that imputed opinions be a basis for refugee protection, because otherwise those who are falsely accused or tainted by association would be excluded from protection. Understanding the limits of imputed political opinion requires one to be deliberate about what constitutes an opinion. In the refugee context, while there is no requirement that an individual have expressed the view in question, there must be something that a decision-maker can point to that evinces the opinion. In other words, the decision-maker must be able to give an account of the imputation process. As an example, consider again the *Ward* ruling. The court held that Ward was at risk because of his view that innocent people should not be killed in political struggle; it did not consider that the risk may have accrued because Ward was viewed as a coward or a snitch.[235] The analysis will always be difficult because there will rarely be direct evidence of the imputed opinion. In *Ward*, the imputation is made possible by the evidence of the *truth* of this opinion, and the way that the opinion plausibly accounts for the persecutor's actions. It makes sense to have a *plausibility* threshold for imputing an opinion.

In other cases, however, an inverse reasoning process will apply. This will be the case, for example, when no opinion is expressed either at the time when the risk arises or before the decision-maker. The gender cases involving non-conforming behavior provide an example here. To take deliberately trivial examples to press the analysis to its extremes, consider the case of a woman who is at risk because she wears short skirts and

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232. *See* VCLT, *supra* note 13, at 340.

233. *See, e.g.*, Hathaway & Foster, *supra* note 5, at 51; Goodwin-Gill & McAdam, *supra* note 5, at 9-12.

234. Accepting here that the boundary of 'the state' is sometimes difficult to discern at its edges.

235. *See* Ward v. Canada (Attorney General), [1993] 2 S.C.R. 689, 750 (Can.).

make-up. She may do this solely because she follows fashion trends; she may have no political motivation whatsoever, and she may not consider herself a feminist, nor embrace any aspect of feminism. Indeed, she could even oppose feminism. All she wants to do is choose her clothing and personal presentation, even though her society frowns upon this. Whether this action can be the basis for an imputed opinion will depend fully on the context in which a potential persecutor acts. If someone seeks to harm her on the basis that he is violently opposed to short skirts, this is not the imputation of an opinion to her. If someone seeks to harm her because of his view that women ought to dress in a particular way, then the persecutor *is* imputing an opinion.

How can the context, object and purpose of the Convention assist this analysis? The objective of providing surrogate human rights protection helps us attune to what is relevant about context in this question. A person clearly has a human right to dress however he or she chooses.[236] Whether dress can be the subject of imputed political opinion will depend on the extent to which dress norms are controlled by powerful forces in a society (this idea elides to defining the political, as will become clear below). That is, if this human right is not protected in a given society, this indicates that a potential persecutor may indeed be imputing a political opinion in regard to it. It does not determine the issue, but it is a useful signal.

Both the *Ward* case and the non-conforming behavior example demonstrate how individual *choice* is linked to our understanding of opinion. This fits with the notion that at international human rights law, freedom of opinion protects matters of conscience. This in turn can lead to some purchase on the question of when occupying a role can be the basis for imputing a political opinion. When role-based political opinion is at issue, it is useful to consider whether the individual had a choice in assuming the role in question; the degree of choice cannot answer the question fully, but it may provide an indicator. Considering choice, for example, provides an explanation of the outcome in *Gutierrez Gomez*: the tribunal did not consider the claimant to be a human rights activist, but rather someone required by her role as law student to do human rights work.[237] The decision-maker found that the putative persecutor did not impute an opinion to the claimant because it knew she was not exercising a choice. This assessment may not seem plausible, but that is a second question.

A focus on surrogate human rights protection can bolster the role-opinion analysis as well: more anxious scrutiny should be given to roles that are by their nature manifestations of an individual's human rights.

Not surprisingly, many of these points about how to understand "opinion" bump up against questions of how to understand "political." Specifically, in the non-conforming behavior cases, the human rights backdrop provides clues to whether dress is politicized, and, in analyzing the dy-

236. This is subject to some limits such as the human rights of others and specific rules of dress in the workplace or other settings.

237. Gutierrez Gomez v. Sec'y of State for the Home Dep't [2000] UKIAT 00007 ¶¶ 69-70, [2001] 1 WLR 549.

namic of choice, the range of possible choices will often be defined in political terms. Before getting to these specifics, it is useful to set out the broad contours of the political realm.

While opinion has been almost un-interrogated in both refugee and human rights case law, contestation about political opinion protection in refugee law has almost always been contestation about what counts as "political." This paper concludes that the political ought to extend beyond government; the state is a useful starting point, but it does make the question of where the limit is thornier. If politics is not limited by these formal parameters, but is also not everything, what are the parameters? Here, apposite guidance is provided by the New Zealand decisions and, indirectly, by *Gutierrez Gomez*. In both instances, the discussion was about power dynamics in a given society. The New Zealand approach was partly objectionable because it rejected any definition, but in other aspects much of the finely crafted analysis was very apt. The *Gutierrez Gomez* ruling required a linkage back to government, but this final linkage could be omitted. In sum, it would be workable to define "political" as relating to the power structures of a given society that ultimately have the capacity, legitimately or otherwise, to compel an individual or group to behave in a certain way through coercive means.

Defining political in this way explains why 'oppositional' opinions often look more like political opinions than do 'agreeable opinions. The human right to freedom of opinion exists to protect unpopular, disagreeable minority opinions; opinions that are majoritarian rarely need protection. For this reason, the oppositional quality of an opinion provides a signal that it may well be political: it is engaged with, or more specifically against, power that ultimately has the capacity to be coercive. This signal is more important in cases beyond the limits of the state because there are few other signposts in these circumstances. Majoritarian and supportive opinions will rarely arise in refugee determinations: it is dissenters who are at risk. Thus opposition is not a prerequisite for something to be political; but, in the refugee context, it is an acute indicator.

Thinking about how societal power limits choice, or whether norms about dress are coercively enforced assists in understanding when an opinion might be plausibly imputed *and* when such an opinion is political.

Conclusion

In the end, this suggestion of a new approach offers only a beginning. This paper has asserted that the greatest challenges arise when opinion is imputed and the political is beyond the state. Regarding imputed opinions, it has suggested that imputation must attach to some act, or some specifiable absence of an action; that it must be plausible; and that human rights analysis can help ascertain plausibility. In regard to political, this paper has asserted that opinions will concern politics when they are informed by power dynamics, which, (in a given society) are, or have the capacity to be, coercive.

Context is vital to understanding both what might fairly be considered to an imputed opinion and where the political ends. It might fairly be said that this paper's approach amounts to injecting a definitional structure into the New Zealand jurisprudence. In looking to context, decision-makers must look beyond the specific events recounted by any claimant to consider both the underlying human rights at stake in a given setting and the power structures embedded deeply within a given society. By doing this, refugee protection can attune to those in need of surrogate human rights protections because they lack power and hold unpopular views, people who could choose to simply 'knuckle under' but resist the imposition of power by an actor or institution that has more societal legitimacy or that possesses some means of coercion. These two markers—human rights and power structures—are the contextual markers that should guide analysis, ensuring that decision-makers look far enough beyond the immediate facts of a case to avoid unanchored abstractions.