

# *Fordham International Law Journal*

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*Volume 33, Issue 2*

2009

*Article 2*

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## The Terrorism Bar to Asylum in Australia, Canada, the United Kingdom, and the United States: Transporting Best Practices

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## **Abstract**

This Article assesses the wisdom of the substantive laws enacted in the wake of 9/11 and the procedures set up to combat this enemy. This Article is divided into four parts. Part I evaluates the doctrinal debate relating to the definition of terror, terrorism and terrorists. More particularly, it attempts to demonstrate the difficulty in identify the “terrorist” that needs to be excluded, and how that definition affects the immigration laws. Part II sets the stage for a comparative analysis by briefly surveying the terrorism-related immigration laws and procedures of each jurisdiction to this study. Part III provides a detailed comparative analysis of the most important substantive and procedural laws of the four jurisdictions. Part IV identifies a model approach that combines the best practices of all four jurisdictions.

# THE TERRORISM BAR TO ASYLUM IN AUSTRALIA, CANADA, THE UNITED KINGDOM, AND THE UNITED STATES: TRANSPORTING BEST PRACTICES

*Won Kidane\**

## INTRODUCTION

The contemporary threat of terrorism<sup>1</sup> that the Western world<sup>2</sup> faces is primarily from so-called “aliens.”<sup>3</sup> As such, the laws that are meant to combat terrorism necessarily involve the regulation of the admission and exclusion of aliens. This type of

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1. The concept of terrorism has eluded social scientists and the international legal community for centuries. It has been understood either in the context of the state’s control and arbitrary use of coercive power, or as violence perpetrated by nonstate actors. “Contemporary” is used to show that this Article’s inquiry is limited to the latter phenomenon: terrorism as perpetrated by nonstate actors. For a recent discussion of the concepts of terrorism as state-sponsored action or freelance nonstate actors, see BEN SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW* 1–7 (2006).

2. “Western world,” which may have many different meanings and usages, is used here in its most common sense to signify the cultures, territories, and peoples of Australia, Europe, and North America.

3. The term “alien” is obviously controversial. The main concern, as Professors Legomsky and Rodriguez suggest, is the possibility of needless reinforcement of an outsider and inferior status that repeated use might perpetuate. See STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, *IMMIGRATION LAW AND REFUGEE POLICY* 1 (5th ed. 2009) (citing Kevin R. Johnson, *Aliens and the U.S. Immigration Laws: Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1997)). However, this Article uses the term not only because it still has a specific statutory meaning in the United States, 8 U.S.C. § 1101(a)(3) (2006) (defining “alien” as “any person not a citizen or national of the United States”), but also because the term itself captures the underlying assumption behind the regulation of immigration—how “we” stop “them” from coming (technical term “exclusion”), or how “we” send “them” to their countries of origin (technical term “deportation” or “removal”). See David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 989 (2002) (dating the inferior treatment of foreigners in the United States to the Alien and Sedition Acts in 1789 (citing JAMES MORTON SMITH, *FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 12–49 (1956))). Notably, the United States is the only one of the four jurisdictions included in this study that uses the term alien. Hopefully, the United States will some time replace this pejorative term with a more agreeable one.

regulation is traditionally the purview of immigration law.<sup>4</sup> Although the link between national security and immigration is by no means contemporary, the existing level of intersection between antiterrorism laws and immigration is essentially a post-9/11 phenomenon.<sup>5</sup> The reason for this phenomenon is that the 9/11 attacks were planned and executed by aliens.<sup>6</sup> Although there has not been a terrorist attack on U.S. soil since 9/11, Europe and other parts of the world have since suffered several prominent attacks by persons viewed as aliens,<sup>7</sup> which has fueled the characterization of alienage as the most essential ingredient of terrorism.

After the 9/11 attacks, lawmakers from Australia, Canada, the United Kingdom, and the United States faced three possible alternatives for regulating the admission and exclusion of aliens: two extreme positions and a moderate middle option. The

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4. Immigration law refers to the legal rules that govern the admission and expulsion of foreign nationals. *E.g.*, Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990) (defining immigration law as the body of law concerning the admission and expulsion of aliens, as opposed to the more general rights and obligations held by aliens). The source of immigration law in the United States is the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101–1537 (2006 & Supp. 2008)). In the United Kingdom, the principal immigration law is the Immigration Act, 1971, c. 77, as amended by several subsequent acts over the years and most recently by the Immigration, Asylum and Nationality Act, 2006, c. 13. All of the United Kingdom's immigration laws are compiled in MARGARET PHELAN & JAMES GILLESPIE, *IMMIGRATION LAW HANDBOOK* (5th ed. 2007). The principal Canadian immigration law of most current importance is the Immigration and Refugee Protection Act, 2001 S.C., ch. 27. It amends and consolidates all preexisting laws. The main Australian immigration law is the Migration Act, 1958, No. 62, as amended several times over the years.

5. See Andrew I. Schoenholtz, *Anti-Terrorism Laws and the Legal Framework for International Migration*, in *INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES* 3–5 (Ryszard Cholewinski et al. eds., 2007).

6. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES* 215–53 (2004) [hereinafter 9/11 COMM'N REPORT] (detailing the identity of the terrorists who carried out the 9/11 attacks).

7. The most notable include the October 12, 2002, Bali, Indonesia, bombing, which killed 202 people and wounded over 300, *e.g.*, John Crewdson, *2 Firms Linked to Al Qaeda, Saudi Intelligence Agency*, CHI. TRIB., Mar. 31, 2004, at A1, the March 11, 2004, Madrid bombing, which killed 191 people and wounded 1800, *e.g.*, Keith B. Richburg, *Spain Arrests Another in Train Bombings*, WASH. POST, Apr. 6, 2004, at A14, and the July 7, 2005, London bombing, which killed fifty-two people and injured hundreds, *e.g.*, Damien Francis, *London Bombing Victims Remembered*, GUARDIAN (London), July 8, 2008, at 11.

position at one extreme was a total ban on the admission of aliens. None of these jurisdictions opted for this choice because it would have resulted in a total cessation in world trade. The position at the other extreme was to continue the usual practice of alien admission as though the 9/11 attacks never occurred. Again, none of the jurisdictions in this study exercised that option, mainly because it would almost certainly have jeopardized their security. Instead, they all opted for some compromise of the two extremes: admitting noncitizen foreign nationals as needed by attempting to exclude aliens with terrorist ties. To confront the new and real threat posed by terrorism, each of these four jurisdictions amended their immigration laws and set up new procedures.<sup>8</sup> In the process, however, their substantive laws and procedures largely neglected, to varying degrees, fundamental notions of proportionality and justice. This Article attempts to measure the degree of deviation from the notions of proportionality and substantial fairness by critically examining the approaches taken by the four jurisdictions, and then advances a model approach that strikes the appropriate balance between fairness, increasing the administrability of immigration laws, maximizing the benefits of cross-border mobility, and minimizing the exposure to risks of future terrorist attacks.

In its comprehensive report, the bipartisan 9/11 Commission characterized the enemy as “sophisticated, patient, disciplined, and lethal.”<sup>9</sup> It also noted that the government institutions entrusted with the task of protecting the borders, including the national security agencies, failed to appreciate the gravity of the threat and adjust their policies to combat it.<sup>10</sup> The report further indicated that U.S. government institutions were built in a different era to deal with different kinds of threats, and urged modifying the current system in order to deal with the new type of enemy.<sup>11</sup> The commission hoped that the United States would be “safer, stronger and wiser” as a result of the attacks.<sup>12</sup> The inclusion of “wiser” is obviously deliberate and seems to be

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8. *See infra* Part II.

9. 9/11 COMM’N REPORT, *supra* note 6, at xvi.

10. *See id.*

11. *See id.*

12. *See id.*

an essential aspect of overcoming the challenges. Accordingly, this Article assesses the wisdom of the substantive laws enacted in the wake of 9/11 and the procedures set up to combat this enemy. Although the commission's report did not fully cover particular threats to other nations, the basic message seems to be equally valid as it applies to all of the four jurisdictions included in this study. Predicated on the outcome of such evaluations, this Article suggests a means of striking the proper balance between national security and the maintenance of open, tolerant, and progressive societies.

This Article is divided into four parts. Part I evaluates the doctrinal debate relating to the definition of terror, terrorism and terrorists. More particularly, it attempts to demonstrate the difficulty in identifying the "terrorist" that needs to be excluded, and how that definition affects the immigration laws. Part II sets the stage for a comparative analysis by briefly surveying the terrorism-related immigration laws and procedures of each jurisdiction in this study. Part III provides a detailed comparative analysis of the most important substantive and procedural laws of the four jurisdictions. Part IV identifies a model approach that combines the best practices of all of four jurisdictions.

### I. WHO IS A TERRORIST?

Nearly ten thousand books have been published around the world containing "terrorism," "terror," or "terrorist" in their titles between September 11, 2001, and the middle of 2008.<sup>13</sup> Professor Dipak Gupta analogizes the intense study of the subject to the man in the Tolstoy short story who looked at the sun for so long that he lost his sight and concluded that, after all, the sun never existed because he could see it no longer.<sup>14</sup> Professor Gupta's observation is quite interesting because, as of yet, it has proven impossible to agree on the meaning of the terms "terrorism" or "terrorist" at the international level.<sup>15</sup> At the center of this confusion is a fundamental doctrinal dilemma.<sup>16</sup>

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13. DIPAK K. GUPTA, UNDERSTANDING TERRORISM AND POLITICAL VIOLENCE 3 (2008).

14. *See id.* at 6–7.

15. *See id.* at 7–8.

16. The *Encyclopedia of World Terrorism* begins with this introduction:

This Part examines this dilemma, surveys the various international definitions, highlights the major problems in settling on one definition, and identifies the appropriate international standards for defining the term. Consequently, this Part provides a background for a discussion of the definitions used by the four jurisdictions.

#### A. *Doctrinal Dilemma*

The ordinary meaning of the term “terrorism” could be extremely broad. Any kind of violence or the threat of violence no matter how insignificant may have the potential of terrorizing human beings depending on the circumstances.<sup>17</sup> However, in this era, this term carries with it significant legal and political consequences. The meaning depends on who defines it. There is no real disagreement in the Western World on whether Mohammed Atta was a terrorist.<sup>18</sup> But the concept is far more elusive than an analogy.

An excellent example displaying the doctrinal dilemma in defining terrorism is the situation of former South African President and Nobel Peace Prize winner Nelson Mandela. Although, for a great majority of South Africans and other groups, he was both a freedom fighter and great leader, others considered him to be a terrorist. In fact, as recent as June 2008 he was deemed inadmissible into the United States for his role as a member and leader of the African National Congress

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Terrorism is a phenomenon that affects many people in the modern world. Terrorists' targeting of innocent victims in order to influence some other group such as a government means that nobody can be totally assured that the shadow of terrorist violence will never darken their lives. However, given that one person's terrorist is another person's freedom fighter, what precisely is terrorism? Are covert state-sponsored death squads eliminating political enemies any less terrorists than a revolutionary group assassinating police chiefs? The complexity of what precisely is terrorism must be addressed before the campaigns of modern terrorist can be explored.

1 ENCYCLOPEDIA OF WORLD TERRORISM 9 (Martha Crenshaw & John Pimlott eds., 1997).

17. See M. Cherif Bassiouni, *A Policy Oriented Inquiry into the Different Forms and Manifestations of "International Terrorism,"* in *LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS* xv, xv (M. Cherif Bassiouni ed., 1988) (positing that “every form of violence is potentially terror-inspiring to its victim”).

18. For detailed description of Mohammed Atta and his ties to the 9/11 attacks, see Richard Bernstein, *On Plotters' Path to U.S., A Stop at bin Laden Camp*, N.Y. TIMES, Sept. 10, 2002, at A1.

(“ANC”).<sup>19</sup> He was formally removed from the U.S. immigration watch list for his ninetieth birthday.<sup>20</sup>

Two examples from the New York Times and USA Today blogospheres at the time of Mandela’s ninetieth birthday offer an insightful cross-section of the debate as among ordinary people. One man painted Mandela as having “the blood of thousands of innocent lives [sic] on his hands.”<sup>21</sup> This poster depicted Mandela’s role as the leader of the ANC, and many of the horrendous acts of violence carried out by that organization.<sup>22</sup> He commented that contrary views on Mandela display “the ignorance of the human race” and come from persons “that pass comment on people, organisations and countries that they know little to nothing about.”<sup>23</sup> An excellent representation of the opposing view is stated by Nicholas Kristof of the New York Times. He opines that “of all the ridiculous things [the United States] did in the name of protecting American security, putting Nelson Mandela on a terrorism watch list may be the most absurd.” Kristof went on to describe Mandela as “the symbol of peaceful conciliation,” and a “90-year-old hero.”<sup>24</sup>

It is easy to dismiss the opinion of the USA Today blogger as arrogant, insensitive, or even ill-conceived. However, it is an excellent representation of one side of the debate. The fundamental question boils down to this: should involvement in violent resistance of any kind be considered a *prima facie* evidence of terrorism? There is no easy answer to this question.

Nelson Mandela was in fact the one who proposed that the ANC abandon its course of nonviolence—which he said failed to

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19. See Mimi Hall, *Mandela Is On U.S. Terrorist Watch List*, USA TODAY, May 1, 2008, at A2.

20. See *Law Removes Mandela from U.S. Watch List*, July 2, 2008, WALL ST. J., at A2 (quoting then–U.S. Secretary of Homeland Security Michael Chertoff on the Mandela case, “[i]t raises a troubling and difficult debate about what groups are considered terrorists and which are not”).

21. Comment of Tim Jeanes to Mimi Hall, *supra* note 19.

22. See Comment of Tim Jeanes to Mimi Hall, *supra* note 19 (citing the use of training camps, Limpet Mines, and car bombs, and rhetorically closing “shall I go on?”).

23. *Id.*

24. On the Ground, <http://kristof.blogs.nytimes.com/> (July 1, 2008, 17:08 EST). Individual states’ terrorist lists may contain such persons as climate campaigners. See, e.g., Posting of Andrew C. Revkin to DOT EARTH, <http://dotearth.blogs.nytimes.com/2008/10/23/climate-campaigners-on-terrorist-list/> (Oct. 23, 2008, 10:37 EST) (reporting that some members of an environmental group were listed on Maryland’s terrorist list).



work for fifty years—and formed the first ever military wing of the ANC.<sup>25</sup> His very own description of the debate with the other leaders on whether to use violence best illustrates the dilemma. Mandela recalls a June 1961 ANC leadership meeting during which the leadership discussed nonviolence.<sup>26</sup> Mandela recounted,

At the meeting I argued that the state had given us no alternative to violence. I said it was wrong and immoral to subject our people to armed attacks by the state without offering them some kind of alternative. I mentioned again that people on their own had taken up arms. Violence would begin whether we initiated it or not . . . .<sup>27</sup>

Mandela was then assigned to form and lead the armed branch of the ANC, best known by its acronym MK.<sup>28</sup> This group had to consider the way in which it would use force. In his own words:

[W]e considered four types of violent activities: sabotage, guerrilla warfare, terrorism, and open revolution. For a small and fledgling army, open revolution was inconceivable. Terrorism inevitably reflected poorly on those who used it, undermining any public support it might otherwise garner. Guerrilla warfare was a possibility, but since the ANC had been reluctant to embrace violence at all, it made sense to start with the form of violence that inflicted least harm against individuals: sabotage.<sup>29</sup>

In the early morning hours of a December morning, the MK detonated homemade bombs at electric power stations and government offices in Johannesburg, Port Elizabeth, and Durban.<sup>30</sup> Mandela describes the group's choice to initiate attack that morning, "Afrikaners celebrate December 16 as the triumph of the Afrikaner over the African and the demonstration that God was on their side," but goes on to conclude, "We chose December 16 to show that the African had only begun to fight, and that we had righteousness—and dynamite—on our side."<sup>31</sup> For Mandela, deploying dynamite in aid of righteousness was

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25. NELSON MANDELA, *LONG WALK TO FREEDOM* 238–39 (1994).

26. *Id.* at 236.

27. *Id.* at 237.

28. *See id.* at 239.

29. *Id.* at 246.

30. *See id.* at 248.

31. *Id.* at 249.

justified. For the apartheid regime, it was obviously outright terrorism.

Professor Gupta adds an interesting perspective from the Indian anticolonial struggle. He begins his story by saying, "I come from a long line of terrorists and their adversaries."<sup>32</sup> The relatives that he calls terrorists include his uncle who fought against the colonial forces using whatever they could find, including bamboo sticks.<sup>33</sup> The relatives that he calls the adversaries of the terrorists include those who served the colonial forces in different capacities including as prosecutors, magistrates, police officers, and others.<sup>34</sup> Professor Gupta's paternal grandfather was a "terrorist" who fought the British but his maternal grandfather was a judge who "no doubt[] handed down sentences to the likes of [his] paternal grandfather."<sup>35</sup> Gupta's maternal grandfather no doubt considered Gupta's paternal grandfather a terrorist because he was engaged in the violent resistance of colonial rule. The paternal grandfather no doubt considered himself a freedom fighter, and the violence as a legitimate self-defense. Again, the essential question remains unanswered.

The general rule of international law relating to the use of force by states is enshrined in the United Nations ("U.N.") Charter. Article 2(4) of the charter prohibits the use of force by states.<sup>36</sup> The exception to this rule allows states to resort to force in the exercise of their inherent right of individual or collective self-defense.<sup>37</sup> The question of whether nonstate actors, particularly individuals or resistance movements, have the same right of self-defense is a difficult one.

One of the leading authorities on international criminal law, Professor Antonio Cassese, who served on the appellate chamber of the International Criminal Tribunal for Yugoslavia, remarks that the right to self-defense only applies to states under international law and is inoperative between groups and

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32. GUPTA, *supra* note 13, at xiv.

33. *See id.*

34. *See id.*

35. *Id.* at vix–vx.

36. U.N. Charter art. 2, para. 4.

37. *See id.* art. 51.

individuals.<sup>38</sup> He reasons that individuals and organized armed groups are without this protection because this policy judgment is left to the national legal system of each state.<sup>39</sup> As a result, it is entirely unsurprising that most countries do not legitimize resort to armed violence “given the threat this would pose to their own authority.”<sup>40</sup> Professor Cassese does observe, however, that organized armed groups are permitted to use force against a government in order to “resist the forcible denial of self-determination by (1) a colonial state, (2) an occupying power, or (3) a state refusing a racial group equal access to government” but not because these situations are considered ones of “self-defence” under international law.<sup>41</sup>

David Kopel, Paul Gallant, and Joanne Eisen of the Independence Institute provide an interesting commentary to this opinion. The commentary highlights the existing debate and in a way the doctrinal dilemma in defining terrorism. They argue that, under Cassese’s definition, a great many number of victims would be entirely helpless to guard against genocide by an oppressive regime.<sup>42</sup> In short, “to deny the individual, inherent, and universal right of self-defense is to eliminate the right to resist genocide, ethnic cleansing, rape, and every other atrocity.”<sup>43</sup> In support of their argument, they cite to numerous persuasive authorities, most notably Grotius, who relying on philosopher Thomas Aquinas noted, “defensive violence is based on the intention of self-preservation, not the purpose of killing another.”<sup>44</sup>

The International Criminal Tribunal for the Far East, in *In re Hirota*, observed: “Any law, international or municipal, which prohibits recourse to force, is necessarily limited by the right to

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38. See SMALL ARMS SURVEY 2004: RIGHTS AT RISK 181 (2005) (quoting Antonio Cassese, *The Various Aspects of Self-Defense Under International Law*, in SMALL ARMS SURVEY 2003: DEVELOPMENT DENIED (2004)).

39. *Id.*

40. *Id.*

41. *Id.*

42. See David B. Kopel et al., *The Human Rights of Self-Defense*, 22 BYU J. PUB. L. 43, 157–58 (2007) (citing to the genocides in Nazi Germany, Cambodia, Rwanda, and Darfur as examples that would not be covered under Cassese’s definition).

43. *Id.* at 159.

44. *Id.* at 77 (paraphrasing 2 HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 398 (Richard Tuck ed., Library Fund 2005) (1625)).

self-defense.”<sup>45</sup> According to Grotius self-defense against tyranny has the same justifications as self-defense against a lone criminal.<sup>46</sup> The domestic laws of some nations provide citizens with the right and duty to violently resist tyranny whether it is foreign or domestic.<sup>47</sup>

Although the use of violence between states is credibly proscribed by way of the U.N. Charter,<sup>48</sup> the status of the use of violence within a sovereign jurisdiction remains elusive, particularly in light of the principle of noninterference.<sup>49</sup> The significant expansion seen in the field of human rights and fundamental freedoms has complicated the inquiry even further as far as the use of violence within the domestic arena is concerned. Perhaps the most important human rights principle relevant to this inquiry is the right to self determination

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45. 15 Ann. Dig. & Rep. of Pub. Int'l L. Cases 356, 364 (Int'l Mil. Trib. for the Far East, 1948), see YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 181 (2d ed. 1994) (“This postulate [from *Hivota*] may have always been true in regard to domestic law, and it is currently accurate also in respect of international law . . . . [T]he right of self-defence will never be abolished in the relations between flesh-and-blood human beings . . . .”).

46. Kopel et al., *supra* note 41, at 142.

47. See *id.* (citing the constitutions of Andorra, Argentina, Congo, Greece, Guatemala, Honduras, Hungary, Lithuania, Mauritania, Peru, Portugal, Romania, and Slovakia). In particular, the constitution of Argentina provides:

This constitution shall rule when its observance is interrupted by acts of force against the institutional order and the democratic system. These acts shall be irreparably null . . . . “Those who . . . were to assume the powers foreseen for the authorities of this constitution . . . shall be punished . . . and shall be civil and criminally liable for their acts . . . . All citizens shall have the right to oppose resistance to those committing the acts of force stated in this section.

CONST ARG. § 36, Boletín Oficial, 10 de Enero de 1995, translated in 1 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 7 (Gisbert H. Flanz ed., 1999). An English translation of the Argentine constitution is also available at [http://www.argentina.gov.ar/argentina/portal/documentos/constitucion\\_ingles.pdf](http://www.argentina.gov.ar/argentina/portal/documentos/constitucion_ingles.pdf). The constitution of Greece provides: “Observance of the Constitution is entrusted to the patriotism of the Greeks who shall have the right and the duty to resist by all possible means against anyone who attempts the violent abolition of the Constitution.” 1975 Syntagma [Constitution], art. 120(4), Ephemēris tes Kyvernesos tes Hellenikes Demokratias 1986, A:23, translated in 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra*, at 15. An English translation of the Greek constitution is also available at <http://www.ministryofjustice.gr/eu2003/constitution.pdf>. For the constitutions of several U.S. states, see Kopel et al., *supra* note 41, at 102 n.314. For instance, the Colorado constitution provides: “All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties . . . .” COLO. CONST. art. 2, § 3.

48. See U.N. Charter art. 2, para. 4.

49. See *id.* art. 2, para. 7.

protected in, among other instruments, the U.N. Charter,<sup>50</sup> the International Covenant on Civil and Political Rights,<sup>51</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>52</sup> There is no doubt that this right now exists under customary international law.<sup>53</sup> In the context of self-defense or the resort to violence for purposes of self-determination, the guiding international law is found in First Protocol to the Geneva Conventions.<sup>54</sup> The protocol recognizes the legitimacy of “peoples [who] are fighting against colonial domination and alien occupation, and against racist regimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations.”<sup>55</sup>

Whether this right extends to resistance movements opposing tyranny where there is no racially based oppression or alien domination continues to be a subject of great controversy. The United Nations has completely avoided answering the question.<sup>56</sup> That means the doctrinal dilemma remains

50. *See id.* art. 1, para 2 (“To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.”).

51. International Covenant on Civil and Political Rights, art. 1, Dec. 16, 1966, 999 U.N.T.S. 171 (“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”).

52. International Covenant on Economic, Social and Cultural Rights, art. 1, Dec. 16, 1966, 993 U.N.T.S. 3 (“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”).

53. *See, e.g.*, IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 513 (4th ed. 1991) (“Other rules which probably have this special status include the principle of permanent sovereignty over natural resources and the principle of self-determination.”); ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 163 (1986) (discussing the rise of the right of self-determination under international law); JAMES CRAWFORD, *THE RIGHTS OF PEOPLES* 160–63 (1988) (same).

54. Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflict (Protocol 1) art. 1(4), Dec. 7, 1979, 1125 U.N.T.S. 3.

55. *Id.*

56. *See* The Secretary-General, *Report of the Secretary-General on the Question of Self-Determination*, ¶ 15, delivered to the General Assembly, U.N. Doc. A/63/254 (Aug. 8, 2008) (“In its concluding observations on the Sudan adopted on 26 July 2007, the Human Rights Committee noted the efforts made by the State party on the issue of self-determination in Southern Sudan, in particular article 222 of the Interim National Constitution, which provides for a referendum on self-determination. The Committee regretted the lack of information from the State party concerning the human rights situation in Southern Sudan . . .”).

unresolved, which in turn makes a comprehensive and workable definition of terrorism almost impossible.

B. *International Legal Definition: Identifying the Standards*

Examination of the modern attempt to define terrorism properly begins with a look at the definition of terrorism contained in the Terrorism Convention of 1937,<sup>57</sup> which was prompted by the assassination of King Alexander I of Yugoslavia and the French Minister of Foreign Affairs in Marseilles, France, on October 9, 1934.<sup>58</sup> The convention did not directly define terrorism, but identified some acts that the contracting states considered terrorist acts, including “any willful act causing death or grievous bodily harm or loss of liberty to . . . Heads of States,”<sup>59</sup> along with any “willful destruction of, or damage to, public property,”<sup>60</sup> or “willful act calculated to endanger the lives of members of the public.”<sup>61</sup> It also criminalized all related inchoate offenses.<sup>62</sup> The convention attracted no attention at all. Only India ratified it, and, it therefore never entered into force.<sup>63</sup> However, as will be discussed, this first attempt identified some of the basic elements that underpin contemporary efforts to define terrorism.

One of the first and most notable international conferences on terrorism was held in 1973 at the International Institute of Higher Studies in Criminal Sciences at Siracusa.<sup>64</sup> In that conference, Professor Bassiouni used the phrase, “what is terrorism to some is heroism to others.”<sup>65</sup> It has since become a

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57. Convention for the Prevention and Punishment of Terrorism, Nov. 16, 1937, 19 L.N.O.J. 23.

58. ELIZABETH CHADWICK, SELF-DETERMINATION, TERRORISM AND THE INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT 97 (1996).

59. Convention for the Prevention and Punishment of Terrorism, *supra* note 57, art. 2(1)(a).

60. *Id.* art. 2(2).

61. *Id.* art. 2(3).

62. *Id.* arts 2(4)–(5).

63. See CHADWICK, *supra* note 58, at 97.

64. See BASSIOUNI, INTERNATIONAL TERRORISM AND POLITICAL CRIMES ix (1974).

65. Bassiouni, *supra* note 17, at xxi. The same ideology is embodied in the old Greek saying that “no victim is more agreeable to god than the blood of a tyrant.” Ninian Stephen, *Toward a Definition of Terrorism*, in TERRORISM AND JUSTICE: MORAL ARGUMENT IN A THREATENED WORLD 1, 2 (Tony Coady & Michael O’Keefe eds., 2003) (paraphrasing the Roman philosopher and playwright Lucius Annaeus Seneca).

commonly used maxim.<sup>66</sup> The underlying assumption raises the same question of justifiability that was discussed in the previous section. Professor Bassiouni suggests that the ambiguity is in fact desirable for some governments that do not necessarily share common values and goals.<sup>67</sup> Based on that premise, he proposed perhaps one of the most widely accepted definitions of terrorism using norms of international law as a parameter. According to him, terrorism may be defined as

an ideologically-motivated strategy of internationally proscribed violence designed to inspire terror within a particular segment of a given society in order to achieve a power-outcome or to propagandize a claim or grievance irrespective of whether its perpetrators are acting for and on behalf of themselves or on behalf of a state.<sup>68</sup>

This definition narrows the scope by including a motive element linked to ideology, and limits the nature of the violence to internationally proscribed conduct. Professor Bassiouni had in mind anyone who commits these acts whether that person acts alone, as a member of an organization, or is a government official.<sup>69</sup> Although almost all international attempts to define terrorism since then have failed for some of the problems indicated in the previous section,<sup>70</sup> Professor Bassiouni's use of

66. Some cite to this maxim with approval, while others dislike the expression. Compare GUPTA, *supra* note 13, at xvii ("The old adage 'one man's terrorist is another man's freedom fighter' is indeed true. It is imperative to remember . . . how we describe a certain event has a lot to do with how we choose to deal with it."), with WAYNE MCCORMACK, *UNDERSTANDING THE LAW OF TERRORISM* 19 (2007) ("[T]his [expression] is an almost silly argument because universal law criminalizes attacks on civilian populations without regard to political motivations of the actor. The difficulty is not whether there could be justification for an attack on civilians because legally there cannot be. The difficulty is in determining by what process to respond to such attack."). McCormack seems to assume that Bassiouni's usage of the word "hero" in the maxim includes even those who use violence against civilians. See MCCORMACK, *supra*, at 19.

67. Bassiouni, *supra* note 17, at xxi–xxii.

68. *Id.* at xxiii.

69. *See id.*

70. *See supra* note 67 and accompanying text; *see also* U.N. Ad Hoc Comm. on Terrorism, *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, ¶ 5, U.N. Doc. A/62/37 (Feb. 15, 2007) ("Some other delegations emphasized the importance of including . . . a legal definition of terrorism to distinguish it from the legitimate struggle of peoples for self-determination. In addition, other delegates expressed the view that State terrorism would have to be included in any comprehensive convention on international terrorism. It was reiterated that acts of state terrorism were of serious concern to the international community and that such acts only contributed to a vicious cycle of terrorism."); MCCORMACK, *supra* note 66, at 20

international legal norms as the basic standard steadily gained acceptance. In the decades that followed, although the international community avoided a strict definition of terrorism, it took “a pragmatic, empirical, problem-oriented, step-by-step” definition of conduct considered terrorist activity.<sup>71</sup> Evidence of this problem-oriented, step-by-step approach can be found in the more than a dozen international treaties.<sup>72</sup>

Of all these instruments, however, the International Convention for the Suppression of the Financing of Terrorism is the only one that contains a provision that may be construed as a definition of terrorism.<sup>73</sup> It states:

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the

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(“The major problems are in determining whether terrorism encompasses only nonstate actors and whether to exempt actions against oppressive regimes.”).

71. SAUL, *supra* note 1, at 133 (citing ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 123 n.5 (2003)). An older study identified about 109 such different national and international definitions of terrorism. *Id.* at 57 (citing ALEX P. SCHMID & A.J. JONGMAN, POLITICAL TERRORISM 119–52 (1983)).

72. *See, e.g.*, International Convention for the Suppression of Acts of Nuclear Terrorism, G.A. Res. 59/290, U.N. Doc. A/RES/59/290 (Apr. 13, 2005); International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, S. TREATY DOC. NO. 106-49, 2178 U.N.T.S. 229; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1998, S. TREATY DOC. NO. 106-6, 2149 U.N.T.S. 256; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, S. TREATY DOC. NO. 103-8, 2122 U.N.T.S. 374; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, S. TREATY DOC. NO. 101-1, 1678 U.N.T.S. 221; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, S. TREATY DOC. NO. 101-1, 1678 U.N.T.S. 304; Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, S. TREATY DOC. NO. 100-19, 1589 U.N.T.S. 474; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, T.I.A.S. No. 11,080, 1456 U.N.T.S. 124; International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention on Offences and Certain Other Acts Committed On Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.

73. Professor McCormack uses the term “resembles a definition.” *See* MCCORMACK, *supra* note 66, at 21.



knowledge that they are to be used, in full or in part, in order to carry out:

....

(b) *Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.*<sup>74</sup>

This definition of terrorism is the closest to an international consensus yet to be achieved. Adopted in New York on December 9, 1999, it has 171 state parties.<sup>75</sup> All four of Australia,<sup>76</sup> Canada<sup>77</sup> the United Kingdom,<sup>78</sup> and the United States,<sup>79</sup> have ratified this treaty and have even enacted implementing legislation that

74. International Convention for the Suppression of Financing of the Financing of Terrorism, *supra* note 72, art. 2(1) (emphasis added). The treaty also criminalizes inchoate offenses:

3. For an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, subparagraphs (a) or (b).

4. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article.

5. Any person also commits an offence if that person:

(a) Participates as an accomplice in an offence as set forth in paragraph 1 or 4 of this article;

(b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 4 of this article;

(c) Contributes to the commission of one or more offences as set forth in paragraphs 1 or 4 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or

(ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article.

*Id.* arts. 3–5.

75. *See* Status of the International Convention for the Suppression of the Financing of Terrorism, U.N. Treaty Collection, [http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=XVIII-11&chapter=18&lang=en](http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=XVIII-11&chapter=18&lang=en).

76. *Id.* (signing on October 15, 2001, and ratifying on September 26, 2002).

77. *Id.* (signing on February 10, 2000, and ratifying on February 19, 2002).

78. *Id.* (signing on January 10, 2000, and ratifying on March 7, 2001).

79. *Id.* (signing on January 10, 2000, and ratifying on June 26, 2002).

incorporates the definition.<sup>80</sup> The emerging consensus thus limits the definition of terrorism to at least two fundamental notions—violence against civilians and political or ideological motivations.<sup>81</sup> This emerging consensus still comes with a little bit of a caveat. For example, all of the jurisdictions, save for Australia, have recorded an objection to Jordan’s understandings of and explanations to the definition contained under article 2(1)(b).<sup>82</sup> Jordan’s reservation reads: “The Government of the Hashemite Kingdom of Jordan does not consider acts of national armed struggle and fighting foreign occupation in the exercise of people’s right to self-determination as terrorist acts within the context of paragraph 1(b) of article 2 of the Convention.”<sup>83</sup> The United States, the United Kingdom, and Canada objected to this in almost identical language.<sup>84</sup> For example, the U.S. objection reads:

The Government of the United States of America, after careful review, considers the statement made by Jordan relating to paragraph 1(b) of Article 2 of the Convention (the Declaration) to be a reservation that seeks to limit the scope of the offense set forth in the Convention on a unilateral basis. The Declaration is contrary to the object and purpose of the Convention, namely, the suppression of the financing of terrorist acts, irrespective of where they take place or who carries them out. The Government of the United States also considers the Declaration to be contrary to the terms of Article 6 of the Convention, which provides: “Each state party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.”<sup>85</sup>

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80. *See infra* Part II.

81. This emerging consensus, particularly the political motivation aspect of it is very intriguing. For a similar suggestion, see MCCORMACK, *supra* note 66, at 21.

82. *See* Status of the International Convention for the Suppression of the Financing of Terrorism, *supra* note 75.

83. *Id.*

84. *Id.*

85. *Id.* The United States submitted its objections on October 6, 2004, and the United Kingdom and Canada did the same on November 22, 2002, and August 22, 2004, respectively. *Id.*

It can be safely concluded that, as far as the definition of terrorism is concerned, this is essentially where international law stands today.<sup>86</sup> The absence of a universally accepted and comprehensive international definition made a multitude of national definitions and processes inevitable. Against this background, Parts II and III identify and critically analyze the terrorism-related asylum exclusion provisions of the four jurisdictions in light of the above discussed doctrinal dilemma and the identified international standards.

## II. DESCRIPTION OF THE SOURCES AND CONTENTS

The common source of international legal obligation for the protection of refugees is the 1951 U.N. Convention Relating to the Status of Refugees (“Refugee Convention”).<sup>87</sup> The convention defines the eligibility for refugee status<sup>88</sup> and also

86. It is important to note that the effort in the United Nations to adopt a comprehensive international terrorism treaty may make some progress towards a universally agreed upon definition of terrorism. For an update of the status of U.N. efforts to define terrorism, see Ad Hoc Committee Established by Resolution 51/210—Terrorism, <http://www.un.org/law/terrorism/> (last visited Mar. 30, 2010).

87. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150 [hereinafter *Refugee Convention*]. Adopted to address refugee problems in Europe after World War II, its applicability was geographically limited to Europe and temporally limited to events before 1950. *See id.* art. 1(B)(1). These limitations were lifted by the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter *Refugee Protocol*]. Although the protocol is an independent legal instrument, it incorporates the basic principles of the convention by reference, *id.* art. 1(1), but includes the definition of a refugee without the temporal and geographic limitations. *Id.* arts. 1(2)–(3). All the four jurisdictions in this study are state parties to either or both of these instruments. *See* Status of the Convention Relating to the Status of Refugees, U.N. Treaty Collection, [http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=V-2&chapter=5&lang=en](http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=V-2&chapter=5&lang=en); Status of the Protocol Relating to the Status of Refugees, U.N. Treaty Database, [http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=V-5&chapter=5&lang=en](http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=V-5&chapter=5&lang=en). The convention is a standard-setting human rights instrument of profound importance. In the course of the last half century, extensive scholarly literature expounded almost every aspect of the convention. For some of the most notable works include GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* (2d ed. 1996); ATLE GRAHL-MADSEN, 1–2 *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* (vol. I, 1966, vol. II, 1972); JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* (2005).

88. *See* Refugee Convention, *supra* note 87, art. 1(A)(2) (defining “refugee” 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; or who, not having a nationality and

provides several grounds for exclusion.<sup>89</sup> For purposes of this Article, the most relevant exclusion ground is contained in article 33(1) of the convention, which is considered to be the *jus cogens* of international protection for refugees.<sup>90</sup> The article reads in full:

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee *whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*<sup>91</sup>

Although the convention does not use the word terrorism, state parties often place terrorism under the rubric of the article 33(2) national security ground for exclusion. The parties to the convention retain authority, however, to define what constitutes a danger to their respective jurisdiction within their own domestic laws.<sup>92</sup> All four jurisdictions in this study have rightfully done so. Each jurisdiction, however, has defined what constitutes danger to their security and justifies the exclusion of otherwise deserving refugees with varying degrees of liberty. This Part surveys and critically analyzes the domestic laws of the four jurisdictions relating to the terrorism bar.

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being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”).

*Id.* art. 1(A)(2).

89. *See id.* art. 1(F) (excluding from the convention “any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; [or] (c) he has been guilty of acts contrary to the purposes and principles of the United Nations”).

90. *See id.* art. 33 (establishing the principle of nonrefoulement).

91. *Id.* (emphasis added).

92. *See id.* arts. 35–36; *see also* Refugee Protocol, *supra* note 87, arts. 2–3.

A. *UNITED STATES*

The primary legislation incorporating the fundamental principles of the Refugee Convention into U.S. domestic law is the Refugee Act of 1980.<sup>93</sup> The Act adopts the grounds of qualification and disqualification for refugee status under the convention<sup>94</sup> and also streamlines adjudicative procedures.<sup>95</sup> The substantive laws and the procedures relating to the exclusion of terrorists, as amended by a number of subsequent laws,<sup>96</sup> are briefly described below.

## 1. Substantive

The provisions of the Immigration and Nationality Act (“INA”) dealing with the terrorism exception are complex. This section describes the substantive law and highlights the interplay of these provisions.

While the INA adopts the core elements of a refugee as defined by the Refugee Convention,<sup>97</sup> it broadens the grounds for exclusion by including an unnecessarily complex definition of terrorism.<sup>98</sup> Although the details are intricate, an examination of the most relevant provisions is essential to understanding the substantive scope of the exclusion. The INA provides that an alien is not eligible for asylum if

the alien is described in subclause (I), (II), (III) (IV), or (VI) of [8 U.S.C. § 1182(a)(3)(B)(i)] or [§ 1227(a)(4)(B)] (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of [§ 1182(a)(3)(B)(i)],

93. Pub. L. No. 96-212, 94 Stat. 102 (1980) (amending portions of the Immigration and Nationality Act (“INA”) of 1952 to revise the procedures for admission of refugees).

94. *See id.* § 201(a) (codified at 8 U.S.C. § 1101(a)(42) (2006)) (defining refugee).

95. *See id.* § 201(b) (codified at 8 U.S.C. §§ 1157-59 (2006)) (establishing procedures for overseas refugee program and asylum proceedings).

96. *See, e.g.*, Consolidated Appropriations Act, Pub. L. No. 110-161, div. J § 691(a), 121 Stat. 1844, 2364-65 (2007); REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, §§ 403, 411-13, 417(d), 115 Stat. 272, 343-55 (2001); Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 354(a)(5), 110 Stat. 3009-546, 3009-643 (1996); Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, §§ 302, 401-42 110 Stat. 1214, 1248-50, 1258-80 (1996).

97. *See* Immigration and Nationality Act of 1952 § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006 & Supp. 2008).

98. *See* 8 U.S.C. § 1158(b)(2)(A).

the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States[.]<sup>99</sup>

The cross-referenced subclauses of § 1182(a)(3)(B)(i) in turn exclude two broad categories of persons based on either conduct or affiliation:<sup>100</sup> those who have engaged, or are likely to engage in "terrorist activity" and those who are affiliated with "terrorist organizations" in different capacities.<sup>101</sup>

"Terrorist activity" is defined under the INA as

any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State), and which involves any of the following:

...

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapons or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

*with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.*<sup>102</sup>

The INA provides a tripartite breakdown of "terrorist organizations," which are commonly referred to as tier I, tier II, and tier III terrorist organizations based on the corresponding provision of the INA. Tier I terrorist organizations are foreign terrorist organizations designated by the Secretary of State under § 1189.<sup>103</sup> An important step in the designation process is the determination that the foreign terrorist organization threatens

99. *Id.* § 1158(b)(2)(A)(v).

100. Other categories that may not nicely fit under either conduct or affiliation include endorsing or espousing terrorist activity, those who have received military training on behalf of a terrorist organization, and those who are the spouse or child of one who engages in terrorist activity. *See id.* § 1182(b)(3)(B)(i)(VII)–(IX).

101. *See id.* § 1182(b)(3)(B)(i)(I)–(VI).

102. *Id.* § 1182(b)(3)(B)(iii) (emphasis added).

103. *See id.* § 1182(b)(3)(B)(vi)(I); *see also id.* § 1189 (establishing an elaborate procedure under which the Secretary of State can formally designate groups as terrorist organizations).

the interest and security of the United States and that it has the capability to do so.<sup>104</sup> Tier II terrorist organizations are similarly designated by the Secretary of State in consultation with the Attorney General and Department of Homeland Security.<sup>105</sup> Although this designation process does not follow the procedures that apply for tier I organizations, the tier II designation also takes the activities of the organization in to account. The designation is also subject to public scrutiny through publication in the Federal Register.<sup>106</sup> More interesting is the definition of a tier III terrorist organization. That subdivision captures within the definition of terrorist organization any entity “that is a group of two or more individuals, whether organized or not, which engages in, or a has subgroup which engages in, the activities described in subsections (I) through (VI) of clause (iv).”<sup>107</sup> The cross-referenced activities include preparing, advocating, inciting, or soliciting funds for the commission of terrorist activity,<sup>108</sup> which in turn is defined in the manner described above.<sup>109</sup> This definition of terrorist activities includes not only endorsing or espousing terrorist activity but also being a spouse or child of one who does.<sup>110</sup>

The scope of “engaging” in terrorism includes preparation, incitement, and solicitation (of membership and funds), and also providing material support.<sup>111</sup> Affiliation with a terrorist organization in any capacity, including as a representative or even as a mere member, is also grounds for exclusion.<sup>112</sup>

The proper application of these provisions leads to the following absurd, but real, results. At some time in 2006, Saman Kareem Ahmed arrived in the United States on a special visa

104. See 8 U.S.C. § 1189(a)(1)(B)–(C). For the U.S. State Department’s list of designated terrorist organizations, see U.S. Dep’t of State, Foreign Terrorist Organizations, <http://www.state.gov/s/ct/rls/other/des/123085.htm>.

105. See 8 U.S.C. § 1182(a)(3)(B)(vi)(II); see also, e.g., Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001) (authorizing the Secretary of State and the Secretary of Treasury to freeze the assets of certain groups or individuals that they designate as terrorist entities in consultation with other leaders in cabinet-level positions).

106. See 8 U.S.C. § 1182(a)(3)(B)(vi)(II).

107. *Id.* § 1182(a)(3)(B)(vi)(III).

108. See *id.* § 1182(a)(3)(B)(iv).

109. See *supra* note 102 and accompanying text.

110. See *supra* note 100. The child or spouse bar to admissibility has an exception for those who did not know or should not have known. See 8 U.S.C. § 1182(a)(3)(B)(ii).

111. 8 U.S.C. § 1182(b)(3)(B)(iv).

112. See *id.* §§ 1182(b)(3)(B)(i)(IV)–(VI).

available for those who assist U.S. forces in Iraq.<sup>113</sup> His visa was obtained at the recommendation of many U.S. officials, including the top U.S. commander in Iraq, General David H. Petraeus.<sup>114</sup> Once he arrived in the United States, he was granted asylum because his life was threatened in Iraq as a result of his support for U.S. forces.<sup>115</sup> He applied for adjustment of status to lawful permanent resident after a year of asylum that was granted to him lapsed.<sup>116</sup> His adjustment was denied on terrorism grounds,<sup>117</sup> which would also mean that his asylum would be revoked.<sup>118</sup> According to the media, “his application for permanent residence was denied last month on grounds he had once served Kurdish military forces that fought against Hussein.”<sup>119</sup> The letter from Citizenship and Immigrations Services denying Ahmed’s petition said that the Kurdish Democratic Party (“KDP”) forces fit the terrorist definition, based on information it had gleaned from public websites, because KDP forces “conducted full-scale armed attacks and helped incite rebellion against Hussein’s regime, most notably the Iran-Iraq war, Operation Desert Storm and Operation Iraqi Freedom.”<sup>120</sup> This draconian form of immigration control was not unknown to immigration authorities. Immigration and Customs Enforcement (“ICE”) had taken the exact same position two years earlier in *In re Ma San Kywe*.<sup>121</sup> In this case, counsel posed the hypothetical question during oral argument before a local immigration court about whether Mohammed Odeh Al Refaiel, an Iraqi lawyer who helped U.S. forces rescue a U.S. marine private from a hospital in Nassiriyah, would be

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113. Karen DeYoung, *Stalwart Service for U.S. in Iraq Is Not Enough to Gain Green Card*, WASH. POST, Mar. 23, 2008, at A1.

114. *See id.*

115. *See id.*

116. *See id.*

117. *See id.*

118. *See* 8 U.S.C. § 1158(b)(2), (c)(2).

119. Karen DeYoung, *U.S. to Stop Green Card Denials for Dissidents*, WASH. POST, Mar. 27, 2008, at A1.

120. *Id.*

121. *See* Won Kidane, *The Terrorism Exception to Asylum: Managing the Uncertainty in Status Determination*, 41 U. MICH. J.L. REFORM 669, 690–91 (2008) (citing GEORGETOWN LAW CTR. HUMAN RIGHTS INST., UNINTENDED CONSEQUENCES: REFUGEE VICTIMS OF THE WAR ON TERROR 12 n.84 (2006)).



excluded on terrorism grounds.<sup>122</sup> ICE unequivocally maintained that Al Refaiel would be excluded on terrorism grounds because he provided materials support to a terrorist organization.<sup>123</sup> The terrorist organization in this example was U.S. forces because they used weapons or dangerous devices, operated against the laws of Saddam Hussein, and caused injury to persons and damage to property, meeting all of the required elements of the definition under the INA.<sup>124</sup>

## 2. Procedural

Under the INA, refugee status is determined in one of two alternative procedures dependent on the location of the applicant. If the applicant is located outside of the United States, the application is processed under section 207 of the INA and corresponding regulations.<sup>125</sup> If the applicant is located within the United States, the application is processed under section 208 of the INA and corresponding regulations.<sup>126</sup>

As indicated above, the substantive criteria for refugee status and asylum status—including the exclusionary grounds—are identical. The procedures for the adjudication of the claims are, however, quite distinct. While refugee applications are processed in one of the overseas processing locations,<sup>127</sup> asylum applications are adjudicated in one of the asylum offices within the United States.<sup>128</sup> Perhaps the most notable distinction is the availability of appeals for those seeking asylum in the United States. Under the

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122. *See id.* The rescue operation was a subject of wide media coverage. *E.g.*, Dahleen Glanton & Douglas Holt, *Commandos Storm Iraqi Hospital to Rescue POW*, CHI. TRIB., Apr. 2, 2003, at A1; Donna Leinwand et al., *POW Rescue Sets Off Celebration*, USA TODAY, Apr. 3, 2003, at A5. The Iraqi, Mohamed Odeh Al Refaiel, who helped the U.S. forces rescue one of their own was granted a special visa and resettled in the United States. Although his situation was raised in this case, he was not a party to the litigation. *See* Kidane, *supra* note 121, at 690.

123. Kidane, *supra* note 121, at 690.

124. *Id.*; *see also supra* notes 99–112.

125. *See* Immigration and Nationality Act of 1952 § 207, 8 U.S.C. § 1157 (2006) (providing an overseas refugee process); 8 C.F.R. §§ 207.1–9 (2010).

126. *See* Immigration and Nationality Act of 1952 § 208, 8 U.S.C. § 1158 (2006) (providing a process for asylum applications); 8 C.F.R. §§ 208.1–30 (2010).

127. *See* 8 C.F.R. § 207.1(a) (setting forth the application process including the filing locations and process for aliens seeking refugee status).

128. *See id.* § 208.4(b) (setting forth the application process, including the filing locations and process for various categories of asylum seekers).

principle of consular nonreviewability,<sup>129</sup> decisions of an immigration officer in overseas refugee status adjudication are not subject to administrative or judicial review.<sup>130</sup> For an overseas refugee, the immigration officer's determination is final. By contrast, applicants in an asylum case may appeal the denial by an asylum officer to an Article III court<sup>131</sup> with an interesting exception relevant to the terrorism ground of inadmissibility.<sup>132</sup>

For asylum adjudication within the United States, there are at least four alternative procedures depending on the circumstances of each case. In a typical affirmative asylum request by a person that is not currently detained and who had already been admitted under some nonimmigrant category, an asylum officer ordinarily refers cases involving the terrorism bar to an immigration judge.<sup>133</sup> The immigration judge then adjudicates whether the claimant falls under the terrorism exception under the substantive criteria described above.<sup>134</sup> The decision of the immigration judge may be appealed to the Board of Immigration Appeals ("BIA").<sup>135</sup> Although in ordinary cases, the determination of the BIA is subject to judicial review, the INA expressly precludes judicial review of denials of asylum on grounds of terrorism.<sup>136</sup>

The second possible adjudicative procedure involves the certification power of the Attorney General. Under the INA, "the Attorney General may certify an alien under this paragraph if the Attorney General has reasonable grounds to believe" that the

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129. *See, e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972); *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1157–58 (D.C. Cir. 1999); *Ulrich v. Kellogg*, 30 F.2d 984, 986 (D.C. Cir. 1929).

130. *See* 8 C.F.R. § 207.4.

131. *See* 8 U.S.C. § 1252(a)(2)(B) (2006) (providing that the discretionary relief is not subject to judicial review but excepting asylum). Asylum under 8 U.S.C. 1158 is a discretionary form of relief as opposed to withholding of removal under the INA, which is nondiscretionary. *Compare* 8 U.S.C. § 1158(b)(2)(A)(v) (discussing the discretionary terrorism exception to asylum), *with* 8 U.S.C. § 1231(b)(3)(A) (discussing refugee status adjudication).

132. *See* 8 U.S.C. § 1158(b)(2)(D) (prohibiting judicial review of determinations made by the discretionary denial of asylum under section 1158(b)(2)(A)(v) of title 8).

133. *See* 8 C.F.R. § 208.14(c)(1).

134. *Id.* §§ 208.9–.19 (outlining procedure for reviewing asylum applications).

135. *See* 8 U.S.C. § 1158(d)(5); *see also* 8 C.F.R. §§ 208.9–.19, 1003.3(a).

136. *See supra* notes 131–32. Judicial review under the INA is a subject of continued controversy and litigation. The basic thrust of 8 U.S.C. 1252 is that it limits judicial review to final deportation order by courts of appeals and, even then, the review is limited to errors of law and constitutional issues. *See* 8 U.S.C. § 1252(a)(2)(D), (a)(5).

alien meets the definition of terrorism discussed above or is engaged in any other activity that jeopardizes the national security of the United States.<sup>137</sup> This certification authority cannot be delegated to anyone except the Deputy Attorney General.<sup>138</sup> While a certified terrorist is detained, the Attorney General is required to either charge him with criminal offense or initiate a removal hearing.<sup>139</sup> A certification by the Attorney General almost always bars the respondent from asylum.<sup>140</sup> The INA requires a periodic review of those who remain in detention because the government was unable to remove them to another country.<sup>141</sup> Certified persons may also seek judicial review of their detention by on collateral review by habeas corpus under limited circumstances.<sup>142</sup>

The third possible procedure applies to “arriving aliens.”<sup>143</sup> Aliens seeking admission at any port of entry are subject to a very swift and crude procedure. An immigration officer may order an arriving alien removed immediately upon arrival if the inspecting officer “*suspects* that an arriving alien may be inadmissible” on terrorism grounds described above.<sup>144</sup> The Attorney General is, however, provided with authority to review these orders.<sup>145</sup> If the Attorney General agrees with the determination of the immigration officer, the alien must be deported forthwith without any further hearing or review.<sup>146</sup> Finally, the Attorney General is permitted to use confidential evidence, which may not be shared with anyone, to reach his or her determination.<sup>147</sup>

Separate from these three avenues, there is a fourth set of procedures known as “Alien Terrorist Removal Procedures” that

137. See 8 U.S.C. § 1226a(a)(3).

138. See *id.* § 1226a(a)(4).

139. See *id.* § 1226a(a)(5).

140. See *id.* § 1158(b)(2)(A)(v).

141. See *id.* § 1226a(a)(6).

142. See *id.* § 1226a(b).

143. 8 C.F.R. § 1.1(q) (2010) (defining the the term “arriving alien” as a person who is seeking admission at a port of entry). Seeking “admission” is another term of art including not only those who have never been to the United States and just arrived, but also those who have had permanent residence but stayed outside of the United States for more than 180 days, and others who are considered to be seeking admission for commission of certain types of crimes. See 8 U.S.C. § 1101(a)(13).

144. See 8 U.S.C. § 1225(c)(1) (emphasis added).

145. See *id.* § 1225(c)(2)(A).

146. See *id.* § 1225(c)(2)(B).

147. See *id.* § 1225(c)(2)(B).

involve the Alien Terrorist Removal Court ("ATRC").<sup>148</sup> Although the ATRC has not been established yet, as will be elaborated in the last part of this Article,<sup>149</sup> it is perhaps the best system to deal with terrorism-related removal cases. Structurally, it designed to be an Article III court under the Supreme Court with five judges selected by the Chief Justice of the United States from among judges of the federal district courts.<sup>150</sup> The primary reason for the establishment of this court is to provide for a special forum for the adjudication of terrorism-related cases, especially when confidential evidence is likely to be used, and the traditional removal proceeding would not be appropriate for national security reasons.<sup>151</sup> The ATRC is also built with constitutionally sound due process guarantees.<sup>152</sup> More important among these guarantees is the right to a government-appointed counsel.<sup>153</sup> The INA does not provide this right in regular removal procedures.<sup>154</sup> Other rights include: adequate notice;<sup>155</sup> an expeditious and public hearing;<sup>156</sup> and a reasonable opportunity to introduce evidence,<sup>157</sup> including the use of subpoenas for the appearance of witnesses and records included at government expense.<sup>158</sup> The decision of the ATRC may be appealed to the U.S. Court of Appeals for the District of

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148. The ATRC was a result of the 1996 expansion of terrorism grounds of exclusion under the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 354(a)(5), 110 Stat. 3009 (1996), and the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

149. See discussion *infra* Part III.C.

150. See *id.* § 1532. The Chief Justice may appoint one or more of the judges currently serving on the Foreign Intelligence Surveillance Court, see *id.*, established in 1978 pursuant to 50 U.S.C. § 1803(a).

151. See *id.* § 1533(a)(1) (providing the requirements for the Attorney General to seek removal of an alien).

152. Interestingly, suspected terrorists subjected to this process seem to have more rights and due process guarantees than suspected terrorists subject to the regular removal proceedings. See 8 U.S.C. § 1533.

153. See 8 U.S.C. § 1532(e) (establishing a panel of special attorneys to review classified evidence filed against the alien); 8 U.S.C. § 1534(c)(1) (providing the right to be present and the right to counsel).

154. See *id.* § 1229(b)(4).

155. See *id.* § 1534(b).

156. See *id.* § 1534(a)(1)(2). Although the hearing is public, confidential evidence is examined *in camera*. See *id.* § 1534(d)(5), (e)(3)(A). Although the alien is denied direct access to classified information, a specially appointed attorney can review the evidence and the alien is entitled to a summary of the evidence. See *id.* § 1534(e)(3)(F).

157. See *id.* § 1534(c)(2).

158. See *id.* § 1534(d)(1)-(2).

Columbia Circuit.<sup>159</sup> Unlike in regular removal proceedings, a petition for review automatically stays removal.<sup>160</sup> Where a summary of confidential evidence is denied to an alien lawfully admitted for permanent residence, appellate review is automatic unless the alien waives it.<sup>161</sup> Finally, the alien may also petition the Supreme Court for a writ of certiorari.<sup>162</sup> For several reasons, including the obstacle that this elaborate due process might create in removing anyone suspected of terrorism, as of yet, this court only exists on the books. This Article argues that installing this court with some structural modifications might be the best solution to the problem of excluding genuine refugees on terrorism grounds. This argument is further developed in Part III.C.2 below.

### B. *United Kingdom*

The United Kingdom ratified the Refugee Protocol, which incorporates the Refugee Convention, in 1968<sup>163</sup> and enacted a comprehensive Asylum and Immigration Appeals Act in 1993, giving effect to the basic principles of the protocol.<sup>164</sup> The United Kingdom's national immigration legislation has undergone significant revisions since its enactment in 1993.<sup>165</sup> Although antiterrorism laws in the United Kingdom have a long history,<sup>166</sup> the antiterrorism provisions of most current importance to immigration regulation include the Terrorism Act of 2000,<sup>167</sup> the Anti-Terrorism, Crime and Security Act of 2001,<sup>168</sup> the Nationality, Immigration and Asylum Act of 2002,<sup>169</sup> the

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159. *See* § 1535(c)(1).

160. *See id.*

161. *See id.* § 1535(c)(2).

162. *See id.* § 1535(d).

163. *See* Status of the Protocol Relating to the Status of Refugees, *supra* note 87.

164. Asylum and Immigration Appeals Act, 1993, c. 23.

165. *See, e.g.*, Immigration, Asylum and Nationality Act, 2006, c. 13; Asylum and Immigration Act, 2004, c. 19; Nationality, Immigration and Asylum Act, 2002, c. 41; Immigration and Asylum Act, 1999, c. 33.

166. *See generally* LAURA K. DONAHUE, COUNTER-TERRORIST LAW AND EMERGENCY POWERS IN THE UNITED KINGDOM 1922–2000 (2001) (providing a thorough account of the United Kingdom's relatively older anti-terrorism laws including emergency powers in the context of the conflict in Northern Ireland).

167. Terrorism Act, 2000, c. 11.

168. Anti-terrorism, Crime and Security Act, 2001, c. 24.

169. Nationality, Immigration and Asylum Act, 2002, c. 41.

Prevention of Terrorism Act of 2005,<sup>170</sup> the Immigration, Asylum and Nationality Act of 2006,<sup>171</sup> and the Terrorism Act of 2006.<sup>172</sup> Together these laws provide for the United Kingdom's substantive and procedural framework for the determination of asylum status including the terrorism exclusionary grounds.

### 1. Substantive

The Terrorism Act of 2000 employs several provisions in an attempt to define "terrorism."<sup>173</sup> A close reading of these provisions suggests that there are generally three levels of involvement that could lead to the finding of terrorism: commission, association, and support. A person who uses or threatens to use force to influence government<sup>174</sup> or to intimidate the public or a section of the public<sup>175</sup> for the purpose of advancing a political, religious, or ideological cause and it results in serious violence to persons or serious damage to property,<sup>176</sup> endangers a person's life, or creates a risk to health commits terrorism.<sup>177</sup> As far as terrorism by association is concerned, any membership or professed membership to a proscribed organization results in the finding of terrorism, provided that the association occurred at a time when the organization was proscribed.<sup>178</sup> The Secretary of State is provided authority to add groups to the list of proscribed organizations, attached as schedule two to the Act,<sup>179</sup> if he or she "believes that it is concerned in terrorism."<sup>180</sup> The phrase "concerned in terrorism" is interpreted to include preparation, encouragement,

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170. Prevention of Terrorism Act, 2005, c. 2.

171. Immigration, Asylum and Nationality Act, 2006, c. 13.

172. Terrorism Act, 2006, c. 11.

173. See Terrorism Act, 2000, c.11, §§ 1–13.

174. This language encompasses any government in the world. *See id.* § 1(4)(d).

175. This language encompasses the public of any country in the world. *See id.* § 1(4)(c).

176. This language encompasses persons or property situated anywhere in the world. *See id.* § 1(4)(b).

177. *See id.* § 1(1)–(2).

178. *See id.* § 11(1)–(2).

179. *See id.* sched. 2.

180. *See id.* § 3(4). Elaborate provisions govern the conditions of challenging proscription in court. *See id.* §§ 4–9. For the United Kingdom's list of designated terrorist organizations, see Home Office, Proscribed Terrorist Groups, <http://security.homeoffice.gov.uk/legislation/current-legislation/terrorism-act-2000/proscribed-groups.html> (last visited Jan. 24, 2010).

participation, or commission of acts of terrorism, which are described above.<sup>181</sup> Finally, support includes any kind of aid or assistance including, but not limited to, inviting support, arranging and managing meetings, encouraging support, fund-raising, and receiving money when there is reason to suspect it will be used for terrorism.<sup>182</sup>

The breadth of the definition contained in the 2000 Terrorism Act being evident,<sup>183</sup> it bears note that subsequent U.K. enactments broadened it even further. The most notable expansion of the definition is contained in the Terrorism Act of 2006.<sup>184</sup> Although the basic substance of the definition remains the same, elaborate provisions were added in the areas of preparation, encouragement, incitement, receiving terrorist

181. *See id.* §§ 3(5)(a)–(d).

182. *See id.* §§ 11–15. Section 13 is notable for its peculiarity and freedom of speech concerns. *Id.* § 13 (“A person in a public place commits an offence [of terrorism] if he (a) wears an item of clothing, or (b) wears, carries or displays an article, in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organization.”).

183. Since its enactment, the Terrorism Act of 2000 has been a subject of serious criticism. Commentators have called it the harshest terrorism law in force and have noted its effective impact on those seeking asylum. *See, e.g., The Terrorism Act—Embracing Tyranny*, CAMPAIGN AGAINST RACISM & FASCISM (Campaign Against Racism & Fascism, London), June–July 2001, available at <http://www.irr.org.uk/carf/feat51.html>. The crux of the criticism is contained in this passage:

The impact that the Act, and the proscription of several mainstream liberation organisations, will have on the right to asylum, will be vast. If it is a criminal offence to belong, or to profess support for, the PKK or the LTTE or the Mujahideen, what can an asylum-seeker say, who fears persecution at home for his or her support for one of these organisations? Support for the liberation struggle is the foundation for most asylum claims by Tamils, Turkish Kurds, Kashmiris and others. Someone who supports the Kurdish liberation movement will almost invariably support the PKK—and if he doesn't, he'll certainly be suspected of it. Assertion of an asylum claim could thus lead to criminal charges. The Home Office has, according to immigration lawyers, told its civil servants who present immigration and asylum appeals to notify it of anyone who claims on appeal to be a member or supporter of any of the listed organisations. It is likely that the information will be passed on to police. It's a case of “damned if you do; damned if you don't”—an asylum-seeker who claims support or membership of a listed group risks arrest, and one who disavows support for the group will have the claim rejected on the ground that he or she is not persecuted at home. Many people, faced with this dilemma, are likely not to claim asylum at all, although they deserve to be granted refugee status.

*Id.*

184. *See* Terrorism Act, 2006, c. 11, §§ 13, 21–27, 29–30, 34, 37 (amending the Terrorism Act, 2000).

training, and the like.<sup>185</sup> A notable substantive revision of the definition is the addition of “an international governmental organization” to the list of entities whose decisions the use or threat of force must be designed to influence.<sup>186</sup> The most significant addition to the bar to asylum comes from section 54 of the Immigration, Asylum and Nationality Act of 2006, which states:

(1) In the construction and application of Article 1(F)(c) of the Refugee Convention the reference to acts contrary to the purposes and principles of the United Nations shall be taken as including, in particular—

(a) acts of committing, preparing or instigating terrorism (whether or not the acts amount to an actual or inchoate offence), and

(b) acts of encouraging or inducing others to commit, prepare or instigate terrorism (whether or not the acts amount to an actual or inchoate offence).<sup>187</sup>

The addition of this provision doubles the avenue of exclusion which was originally limited to finding a link between the terrorist act and the threat to national security.<sup>188</sup> In other

185. *See id.* § 1.

186. *See id.* § 34.

187. *See* Immigration, Asylum and Nationality Act, 2006, c. 13, § 54.

188. The precise nature of this link is not clear under U.K. law. For example, in *Secretary of State for the Home Department v. Rehman*, [2001] UKHL 47, [2003] 1 A.C. 153 (appeal taken from Eng.), the Secretary ordered Rehman, a Pakistani national, deported on national security grounds. *Id.* at [1]. He appealed to the Special Immigration Appeals Commission. *Id.* The Commission reversed the Secretary’s decision for lack of evidence showing the impact of the alleged activities on United Kingdom national security. *See id.* at [2]. The Secretary appealed to the Court of Appeal. *Id.* at [6]. The Court of Appeal reversed. *Id.* Rehman then appealed to the House of Lords. *Id.* at [13]. In affirming the decision of the Court of Appeal, Lord Slynn observed importantly:

I accept that there must be a real possibility of an adverse affect on the United Kingdom for what is done by the individual under inquiry but I do not accept that it has to be direct or immediate. Whether there is such a real possibility is a matter which has to be weighed up by the Secretary of State and balanced against the possible injustice to that individual if a deportation order is made.

*Id.* at [16]. Lord Slynn went on to say:

In conclusion even though the Commission has powers of review both of fact and of the exercise of the discretion, the Commission must give due weight to the assessment and conclusions of the Secretary of State in the light at any particular time of his responsibilities, or of Government policy and the means at his disposal of being informed of and understanding the problems involved. He is undoubtedly in the best position to judge what national security requires even if his decision is open to review. The assessment of what is needed in the



words, whosoever is considered a terrorist pursuant to the above described definition may be denied asylum under the independent ground of article 1(F)(c) of the Refugee Convention even if there are some conceivable ways that he may not be considered a threat to national security.<sup>189</sup> A comparative analysis of this definition and the other three jurisdictions is provided in Part III below.<sup>190</sup>

## 2. Procedural

The United Kingdom took a procedurally significant step when it enacted the Immigration, Asylum and Nationality Act of 2006. This Act allows the Secretary of State for the Home Department to certify asylum-seekers as terrorists and exclude them on grounds of national security even if they meet all the asylum requirements.<sup>191</sup> The Act mandates the administrative tribunals that adjudicate asylum, particularly the Asylum and Immigration Tribunal, to consider the certification before they adjudicate the asylum claim, and to summarily dismiss the case if they agree with the Secretary's disposition.<sup>192</sup> If the Secretary of State "acting in person"<sup>193</sup> certifies the asylum applicant on national security grounds, an appeal "may not be brought or continued" in the regular administrative system.<sup>194</sup> Instead, cases

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light of changing circumstances is primarily for him. On an appeal the Court of Appeal and your Lordships' House no doubt will give due weight to the conclusions of the Commission, constituted as it is of distinguished and experienced members, and knowing as it did, and as usually the court will not know, of the contents of the "closed" evidence and hearing. If any of the reasoning of the Commission shows errors in its approach to the principles to be followed, then the courts can intervene. In the present case I consider that the Court of Appeal was right in its decision on both of the points which arose and in its decision to remit the matters to the Commission for redetermination in accordance with the principles which the Court of Appeal and now your Lordships have laid down. I would accordingly dismiss the appeal.

*Id.* at [26].

189. These circumstances are obviously narrow in view of the *Rehman* case cited and discussed *supra* note 188. See Kate O'Hanlon, *Law Report: Threat to National Security Did Not Have to be Targeted at United Kingdom*, INDEPENDENT (London), Oct. 17, 2001, at 6; *The Terrorism Act—Embracing Tyranny*, *supra* note 183.

190. See *infra* Part III.A.

191. See Immigration, Asylum and Nationality Act, 2006, c. 13, § 55(1).

192. See *id.* § 55(3)–(4).

193. See Nationality, Immigration and Asylum Act, 2002, c. 41, § 97(4).

194. See *id.* § 97(1)–(3).

rejected on national security grounds may be appealed to the Special Immigration Appeals Commission (“SIAC”).<sup>195</sup>

As the name indicates, the SIAC is a specialized “superior court of record” created by the Special Immigration Appeals Commission Act 1997.<sup>196</sup> It hears appeals in cases where the Home Secretary exercises statutory powers to exclude or deport a noncitizen from the United Kingdom on national security grounds.<sup>197</sup> Although the SIAC is referred to as a “court of record,” it appears to be a specialized quasi-judicial, quasi-administrative body. As currently constituted by the Lord Chancellor pursuant to his statutory authority,<sup>198</sup> the commission has a panel of three members: one who has held high judicial office, one with experience serving on the Asylum and Immigration Tribunal, and one with experience in national security matters.<sup>199</sup> The Commission has elaborate rules of procedure.<sup>200</sup> The evidentiary records of the published cases appear to be thorough, and the decisions seem to be well reasoned.<sup>201</sup> The individual appealing to the SIAC is even entitled to appointed counsel.<sup>202</sup> Finally, an appellate court with appropriate jurisdiction can review questions of law material to the decision of the SIAC.<sup>203</sup> However, the SIAC Act authorizes the

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195. See Special Immigration Appeals Commission Act, 1997, c. 68, § 2(1)(g).

196. See *id.* § 1(1); see also Special Immigration Appeals Commission (SIAC)—About Us, <http://siac.tribunals.gov.uk/aboutus.htm> (last visited Jan. 24, 2010).

197. See § 2(1); see also Special Immigration Appeals Commission (SIAC)—About Us, *supra* note 196.

198. See Special Immigration Appeals Commission Act sched. 1, § 2(1) (specifying that the commission “shall consist of such number of members appointed by the Lord Chancellor as he may determine”).

199. See Special Immigration Appeals Commission (SIAC)—About Us, *supra* note 196.

200. See Special Immigration Appeals Commission (Procedure) Rules, 2003, S.I. 2003/1034.

201. See, e.g., *DD v. Sec’y of State for the Home Dep’t*, [2007] UKSIAC 42/2005 (granting appeal of a Libyan asylum-seeker, who was excluded on terrorism grounds, because the commission suspected that, although the Libyan government offered diplomatic assurances against torture, the assurances were not likely to be honored), *aff’d*, *A.S. (Lybia) v. Sec’y of State for the Home Dep’t*, [2008] EWCA (Civ) 289, [2008] H.R.L.R. 28; *G v. Sec’y of State for the Home Dep’t*, [2007] UKSIAC 2/2005 (dismissing an appeal of an Algerian asylum-seeker on terrorism grounds after a thorough consider of the evidence).

202. See Special Immigration Appeals Commission Act § 6(1)–(3). *But see id.* § 6(4) (“A person appointed under subsection (1) above shall not be responsible to the person whose interest he is appointed to represent.”).

203. See *id.* § 7.

Lord Chancellor to make rules “enabling proceedings before the Commission to take place without the appellant [or his attorney] being given full particulars of the reasons for the decision which is the subject of the appeal.”<sup>204</sup> The appellant may receive a summary of the evidence heard *ex parte*.<sup>205</sup> These confidential proceedings are obviously a source of severe criticism.<sup>206</sup>

### C. *Canada*

The latest and most important Canadian immigration law is the Immigration and Refugee Protection Act of 2001 (“IRPA”).<sup>207</sup> The Act incorporates the basic provisions of the Refugee Convention, most particularly the inclusion and exclusion clauses.<sup>208</sup> This section briefly highlights the substantive provisions and procedures relating to the terrorism bar to asylum.

As a preliminary matter, Canada accords refugee protection to those who apply before or after entering the country.<sup>209</sup> Although the obligations of the Refugee Convention do not extend to the overseas refugee program, the substantive criteria for the determination of refugee status are identical.<sup>210</sup> As the focus of this Article is on the claims adjudicated within each jurisdiction, the peculiarities of the overseas program are not discussed here.

#### 1. Substantive

The IRPA’s relatively concise security-related grounds of inadmissibility are contained in section 34. It provides:

- (1) A permanent resident or a foreign national is inadmissible on security grounds for

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204. *See id.* § 5(3)(a).

205. *See id.* § 5(3)(d).

206. *See, e.g.,* *Deportation Policy Questioned by Court*, AMNESTY INT’L, Apr. 9 2008, <http://www.amnesty.org/en/news-and-updates/news/uk-deportation-policy-questioned-court-20080409>.

207. *See* Immigration and Refugee Protection Act, 2001 S.C., ch. 27.

208. *See id.* § 96 (reproducing the definition of “refugee” found in the Convention Relating to the Status of Refugees’ (“Refugee Convention”)); *see also id.* § 98 (incorporating the exclusion provisions of the Refugee Convention).

209. *See id.* § 99(1).

210. *See id.* § 99(2).

- (a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;
- (b) engaging in or instigating the subversion by force of any government;
- (c) engaging in terrorism;
- (d) being a danger to the security of Canada;
- (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or
- (f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).<sup>211</sup>

The exception to this general rule renders the preceding text inapplicable against anyone who “satisfies the Minister that their presence in Canada would not be detrimental to the national interest.”<sup>212</sup>

Interestingly the IRPA does not directly define the terms “terrorism” or “danger to the security of Canada.” Canada’s definition of terrorism is contained in the Anti-terrorism Act of 2001 (“ATA”).<sup>213</sup> The ATA incorporates the definition of terrorism from all of the terrorism-related conventions to which Canada is a party, including the International Convention for the Suppression of the Financing of Terrorism.<sup>214</sup> The familiar concepts of engaging in terrorism, terrorist activity, and terrorist organizations are also employed to define the proscribed conducts and omissions.<sup>215</sup> Section 83.01(1)(b) defines “terrorist activity” as:

- (b) an act or omission, in or outside Canada,
  - (i) that is committed
    - (A) in whole or in part for a political, religious or ideological purpose, objective or cause, and

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211. *See id.* § 34(1).

212. *See id.* § 34(2).

213. *See* Anti-terrorism Act, 2001 S.C., ch. 41 (Can.).

214. *See id.* § 83.01(1)(a). For the incorporation of the definition of terrorism found in the International Convention for the Suppression of the Financing of Terrorism, *see id.* § 83.01(1)(a)(x).

215. *See id.* §§ 83.01–.05.

(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and

(ii) that intentionally

(A) causes death or serious bodily harm to a person by the use of violence,

(B) endangers a person's life,

(C) causes a serious risk to the health or safety of the public or any segment of the public,

(D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or

(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C),

and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, *for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.*<sup>216</sup>

“Terrorist group” means:

(a) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or

(b) a listed entity,

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216. *See id.* § 83.01(1)(b) (emphasis added).

and includes an association of such entities.<sup>217</sup>

The Canadian officials that certify noncitizens as a national security threat apply this substantive definition of terrorism to arrive at a certification conclusion. It bears note that this definition of terrorism was recently upheld on constitutional grounds. In *Suresh v. Canada*,<sup>218</sup> the Canadian Supreme Court held that despite the apparent vagueness of the definition contained in various conventions, the term “terrorism” provides a “sufficient basis for adjudication” of claims and as such is not constitutionally void for vagueness.<sup>219</sup> *Suresh* is perhaps even more important for its discussion on national security determinations. Substantively, *Suresh* stands for the proposition that a person will only be considered a danger to Canada if, in addition to falling under the definition of terrorism,

he or she poses a serious threat to the security of Canada, whether direct or indirect, and bearing in mind the fact that the security of one country is often dependent on the security of other nations. The threat must be “serious,” in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible.<sup>220</sup>

Procedurally, the Supreme Court articulated a *Chevron*-type deferential standard for security threat determinations by administrative authorities.<sup>221</sup> In relation to this, the court said:

In reviewing ministerial decisions to deport under the Act, courts must accord deference to those decisions. If the Minister has considered the correct factors, the courts

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217. *Id.* For Canada’s list of designated terrorist organizations, see Public Safety Canada, Currently Listed Entities (Jan. 13, 2010), <http://www.publicsafety.gc.ca/prg/ns/le/cle-eng.aspx>.

218. [2002] 1 S.C.R. 3, 2002 SCC 1.

219. *Id.* at [93].

220. *Id.* at [90].

221. *Compare id.* at [29]–[34] (“We agree with Robertson J.A. that the reviewing court should adopt a deferential approach to this question and should set aside the Minister’s discretionary decision if it is patently unreasonable in the sense that it was made arbitrarily or in bad faith, it cannot be supported on the evidence, or the Minister failed to consider the appropriate factors. The court should not reweigh the factors or interfere merely because it would have come to a different conclusion.”), *with* *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (holding that the decisions of an administrative agency entrusted with the task of administering a statute must be given deference if the statute is ambiguous).

should not reweigh them. Provided the . . . decision is not patently unreasonable—unreasonable on its face, unsupported by the evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures—it should be upheld. At the same time, the courts have an important role to play in ensuring that the Minister has considered the relevant factors and complied with the requirements of the Act and the Constitution.<sup>222</sup>

Even though the Supreme Court announced this deferential standard of review, it set aside the lower court's ruling affirming the government's decision to deport a Sri Lankan refugee on the basis of insufficient procedural due process.<sup>223</sup>

## 2. Procedural

Multiple departments and administrative agencies are involved in the enforcement of Canada's immigration law.<sup>224</sup> The principal Canadian authorities entrusted with the task of administering the IRPA are the Minister of Citizenship and Immigration ("Immigration Minister"),<sup>225</sup> and the Minister of

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222. See *Suresh*, 2002 SCC at [41]. The Canadian Supreme Court relied on the House of Lords' decision in *Secretary of State for the Home Department v. Rehman*. See [2001] UKHL 47, [2003] 1 A.C. 153 (appeal taken from Eng.). In particular, the Court quoted the following statement of Lord Hoffmann:

I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. *This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security.* It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.

*Suresh*, 2002 SCC at [33] (quoting *Rehman*, [2001] UKHL at [62] (Hoffman, L.J.)).

223. See *Suresh*, 2002 SCC at [130]. In particular the court held that the danger the individual is supposed to pose to the safety of Canada must be weighed against the danger the individual may face if deported to his country. *Id.* at [129]. In this case, it was settled that the claimant would face torture in his home country of Sri Lanka because of his support for the Liberation Tigers of Tamil Ealam (LTTE). See *id.* at [7]–[12].

224. See generally Immigration and Refugee Protection Act, 2001 S.C., ch. 27, § 4 (Can.) (enumerating the various departments that administer the immigration law).

225. See *id.* § 4(1).

Public Safety and Emergency Preparedness (“Public Safety Minister”).<sup>226</sup> The Public Safety Minister’s power extends to:

- (a) examinations at ports of entry;
- (b) the enforcement of [the] Act, including arrest, detention and removal;
- (c) the establishment of policies respecting the enforcement of this Act and inadmissibility on grounds of security, organized criminality or violating human or international rights; or
- (d) determinations under any of subsections 34(2), 35(2) and 37(2).<sup>227</sup>

The most relevant of the cross-referenced sections is section 34(2), which relates to security threat determination.<sup>228</sup> That provision gives the Public Safety Minister the power to waive the security-related exception to admissibility if “the foreign national . . . satisfies” the Minister that his or her “presence in Canada would not be detrimental to the national interest.”<sup>229</sup>

The principal administrative agency that adjudicates immigration cases is the Immigration and Refugee Board (“IRB”).<sup>230</sup> It is the largest Canadian independent administrative tribunal.<sup>231</sup> The IRB consists of the Refugee Protection Division, the Refugee Appeal Division, the Immigration Division, and the Immigration Appeals Division.<sup>232</sup> Evidently, refugee issues are adjudicated by separate and specialized divisions of the IRB under elaborate and separate sections of the IRPA.<sup>233</sup>

A claim for refugee status must be made to an immigration officer within the Canadian Ministry of Immigration and Citizenship,<sup>234</sup> at any location including at the ports of entry.<sup>235</sup> The officer then prescreens the application to determine if there

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226. *See id.* § 4(2).

227. *See id.*

228. *See id.* § 34(2).

229. *See id.*

230. *See id.* § 151.

231. Immigration and Refugee Board of Canada, About the Board (Apr. 16, 2009), <http://www.irb-cisr.gc.ca/eng/brdcom/abau/>.

232. Immigration and Refugee Protection Act § 151.

233. *See id.* §§ 95–111.

234. *See* Citizenship and Immigration Canada, What We Do (July 30, 2009), <http://www.cic.gc.ca/english/department/what.asp>.

235. *See* Immigration and Refugee Protection Act § 99(3).



are any grounds of inadmissibility that would preclude consideration of the refugee status application.<sup>236</sup> If there appears to be a possibility that an alien is inadmissible on one of these grounds, the case will be referred to the Refugee Protection Board for an admissibility hearing.<sup>237</sup> The refugee status consideration is then suspended until the results of the admissibility hearing are known.<sup>238</sup> To this effect, the IRPA provides that

(1) Proceedings of the Refugee Protection Division and of the Refugee Appeal Division are suspended on notice by an officer that

(a) the matter has been referred to the Immigration Division to determine whether the claimant is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.<sup>239</sup>

This would mean that if security-related grounds of inadmissibility are implicated, the refugee status determination would have to wait until those inadmissibility grounds are adjudicated separately through the admissibility hearings of the Immigration Division under part 1 of the IRPA and not part 2, which deals with refugee issues. After the admissibility hearing, if the Immigration Division determines that the applicant for refugee status is not inadmissible for security or other grounds, then the adjudication of refugee status by the Refugee Protection Division proceeds as usual, including judicial review where applicable.<sup>240</sup> If, however, the claimant is determined to be

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236. *See id.* § 100(1) (“An officer shall, within three working days after receipt of a claim referred to in subsection 99(3), determine whether the claim is eligible to be referred to the Refugee Protection Division and, if it is eligible, shall refer the claim in accordance with the rules of the Board.”).

237. *See id.* § 100(2).

238. *See id.* § 100(2)(a).

239. *See id.* § 103(1)(a).

240. *See id.* § 103(2). This could include appeal to the Refugee Appeal Division. *See id.* § 110. This could also include judicial review under sections 72 to 75. *See id.* §§ 72–75; *see also id.* § 74(d) (“[A]n appeal to the Federal Court of Appeals may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.”). However, leave for judicial review is rarely granted, and even when it is granted, review results in reversal of the decisions of the administrative agencies in less than one percent of the cases. *See* JASON KENNEY, IMMIGRATION AND REFUGEE BOARD OF CANADA, PERFORMANCE REPORT FOR THE PERIOD

inadmissible for security reasons, then the initial refugee status claim is terminated.<sup>241</sup>

Where the security grounds of inadmissibility are invoked, a separate security threat certification, detention, and removal process is triggered.<sup>242</sup> Under section 77(1) of the Act, the Public Safety Minister and the Immigration Minister are authorized to jointly certify a noncitizen as a security threat,<sup>243</sup> and refer the case to the Canadian Federal Court. When the certificate is referred to the federal court, the Act provides that:

the Minister shall file with the Court the information and other evidence on which the certificate is based, and a summary of information and other evidence that enables the person who is named in the certificate to be reasonably informed of the case made by the Minister but does not include anything that, in the Minister's opinion, would be injurious to national security or endanger the safety of any person if disclosed.<sup>244</sup>

The court reviews the certificate and accompanying records for reasonableness, and "shall quash the certificate" if it determines that it is unreasonable.<sup>245</sup> If not quashed, the security certificate is considered to be "conclusive proof that the person named in it is inadmissible and is a removal order that is in force without it being necessary to hold or continue an examination or admissibility hearing."<sup>246</sup> The federal court's reasonableness determination may be appealed to the Federal Court of Appeals only if the judge who made the determination "certifies that a serious question of general importance is involved and states the question."<sup>247</sup>

If a person is certified as a security threat in this way and ordered removed, two provisions of last resort come into play. The first one is predicated on the nonrefoulement provision of

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ENDING MARCH 31, 2008 at 4 (2008), available at <http://www.tbs-sct.gc.ca/dpr-rmr/2007-2008/inst/irb/irb-eng.pdf>.

241. See Immigration and Refugee Protection Act § 104(1)(b), (2)(a).

242. See generally *id.* §§ 77–87 (providing for detailed rules of certification, detention, release, and removal on security grounds).

243. See *id.* § 77(1).

244. See *id.* § 77(2).

245. See *id.* § 78.

246. See *id.* § 80.

247. See *id.* § 79.

the Refugee Convention.<sup>248</sup> It provides that “a protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution . . . .”<sup>249</sup> However, this bar to refoulement does not benefit a person who is considered inadmissible for security reasons if “*in the opinion of the Minister*, the person should not be allowed to remain in Canada on the basis of the nature and severity of the acts committed or danger to the security of Canada.”<sup>250</sup> This provision applies only to “protected persons” defined to include those who had already been recognized as convention refugees or those who benefit from removal stay under a last resort procedure called “pre-removal Risk Assessment.”<sup>251</sup> The IRPA provides for a separate pre-removal risk assessment procedure.<sup>252</sup> A person named in a section 77(1) certificate may apply to the Minister for a risk assessment before removal.<sup>253</sup> The risk assessment takes into account the likelihood and nature of the risk on the one hand and the nature and severity of the danger the applicant poses to Canada on the other.<sup>254</sup> If the factors weigh in favor of the certified person, removal to the particular country where the danger is feared will be stayed.<sup>255</sup> The risk assessment proceeding may or may not involve a hearing depending on the Minister’s “opinion” of the need to conduct a hearing.<sup>256</sup>

#### D. *Australia*

As a party to the Refugee Convention<sup>257</sup> and the Protocol,<sup>258</sup> Australia has a long history of providing protection to offshore

248. *See supra* notes 90–91 and accompanying text.

249. *See* Immigration and Refugee Protection Act § 115(1).

250. *See id.* § 115(2)(b).

251. *See id.* § 115(1) (limiting this protection to “a protected person” defined under section 95(2)); *see also infra* notes 252–56 and accompanying text.

252. *See* Immigration and Refugee Protection Act §§ 112–14.

253. *See id.* § 112(1).

254. *See id.* §§ 113(d)(i)–(ii).

255. *See id.* § 114(1)(b).

256. *See id.* § 113(b).

257. Status of the Convention Relating to the Status of Refugees, *supra* note 87 (indicating accession to the convention as of January 22, 1954).

258. *See* Status of the Protocol Relating to the Status of Refugees, *supra* note 87 (indicating accession to the additional protocol as of December 13, 1973).

and onshore refugees.<sup>259</sup> Although Australia allocates the majority of its protection visas for offshore refugees,<sup>260</sup> the focus of the discussion of procedures and the substantive criteria here is limited to the onshore asylum status determination. This focus is meaningful because the primary concern of this Article is on the substantive and procedural aspects of the terrorism bar that applies to both instances.<sup>261</sup>

### 1. Substantive

The principal Australian legislation defining terrorism is the 2002 Suppression of the Financing of Terrorism Act.<sup>262</sup> This Act is designed to implement the Suppression of Financing of Terrorism Convention, to which Australia is a party.<sup>263</sup> Consistent with the convention, the Act not only defines what constitutes a “terrorist act,” but also what does not. As discussed in the comparative analysis section below, the Australian Act is unique in this respect. The definition reads in full:

terrorist act means an action or threat of action where:

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259. For a description and assessment of Australia’s history of refugee protection, see CATHERINE DAUVERGNE, *HUMANITARIANISM, IDENTITY, AND NATION, MIGRATION LAWS IN CANADA AND AUSTRALIA* 91–96, 136–37 (2005). See also Ratna Kapur, *Travel Plans: Border Crossings and The Rights of Transnational Migrants*, 18 HARV. HUM. RTS. J. 107, 131 (2005) (“The policy toward ‘unlawful non-citizens’ in Australia has treated the families of asylum-seekers as though they were criminal and dangerous, reprehensible for their condition.”); Catherine Skulan, *Australia’s Mandatory Detention of “Unauthorized” Asylum Seekers: History, Politics and Analysis Under International Law*, 21 GEO. IMMIGR. L.J. 61, 93–103 (2006) (suggesting that some of the measures that Australia has taken over the years, including mandatory detention and forcible return of some violated its international obligations under the Refugee Convention); Human Rights Watch, *By Invitation Only: Australian Asylum Policy*, at 1 (Dec. 2002), available at <http://www.hrw.org/legacy/reports/2002/australia/australia1202.pdf> (making interesting observations relating to measures that Australia took to deter unwanted arrivals).

260. Penelope Mathew, *Current Development: Australia Refugee Protection in the Wake of the Tampa*, 96 A.J.I.L. 661, 662 n.21 (2002) (“Protection visas are the usual way that Australia meets its obligations under the Refugee Convention . . .”).

261. Australia considers the offshore refugees more deserving of protection than those who manage to reach its shores. For a harsh criticism of this position as an excuse to mistreat and detain unauthorized entrants, see Kapur, *supra* note 259, at 126–34.

262. Suppression of the Financing of Terrorism Act, 2002, No. 66 (amending Criminal Code Act, 1995, No. 12).

263. Status of the International Convention for the Suppression of the Financing of Terrorism, *supra* note 75 (indicating Australia’s ratification of the convention as of September 26, 2002).

(a) the action falls within subsection (2) and does not fall within subsection (3); and

(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and

(c) the action is done or the threat is made with the intention of:

(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country; or

(ii) intimidate the public or a section of the public.

....

(2) Action falls within this subsection if it:

(a) causes serious harm that is physical harm to a person; or

(b) causes serious damage to property; or

(c) causes a person's death; or

(d) endangers a person's life, other than the life of the person taking the action; or

(e) creates a serious risk to the health or safety of the public or a section of the public; or

(f) seriously interferes with, seriously disrupts, or destroys, an electronic system . . .

(3) Action falls within this subsection if it:

(a) is advocacy, protest, dissent or industrial action; and

(b) is not intended:

(i) to cause serious harm that is physical harm to a person; or

(ii) to cause a person's death; or

(iii) to endanger the life of a person, other than the person taking the action; or

(iv) to create a serious risk to the health or safety of the public or a section of the public.<sup>264</sup>

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264. Criminal Code Act, 1995, § 100.1(1), *amended by* Suppression of the Financing of Terrorism Act. Subsection 3 of the same provision adds: "In this Division: (a) a reference to any person or property is a reference to any person or property wherever

The Attorney General of Australia also maintains a list of terrorist organizations.<sup>265</sup> An organization is listed as a terrorist organization by regulation or court order if the organization meets the definition set forth in the Suppression of Terrorism Act of 2002.<sup>266</sup> By far the most interesting and unique consideration is the relevance that the Act gives to the United Nations Security Council decision relating to terrorism on a particular group. The Attorney General should consider the Security Council's determination.<sup>267</sup> Moreover, he should have reasonable grounds to believe that the organization is involved in terrorism.<sup>268</sup>

Explaining the reasons why Australia considered the adoption of the Suppression of Financing of Terrorism Convention consistent with its laws, the Australian Parliament's Joint Standing Committee on Treaties made an interesting observation relating to the fundamental doctrinal dilemma discussed earlier in this Article:

The Committee raised the possibility that the Convention could infringe upon the activities of Australians who support organizations such as the African National Congress . . . . These organizations have supported and participated in armed resistance and were, as a consequence, proscribed as terrorist organizations by the governments whom they offered resistance. However, some Australians viewed these organizations as representing principles of human rights and social justice against repressive regimes and so supported them financially as well as in other ways.

The Department of Foreign Affairs and Trade gave evidence to the effect that tolerance in the community has decreased dramatically for organizations that use violence against civilians and property to pursue political goals. However:

That does not mean that the political pursuit of human rights, good governance, the end of oppression and so

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situated, within or outside Australia; and (b) a reference to the public includes a reference to the public of a country other than Australia." *Id.* § 100.1 (3).

265. See Australian National Security—Listing of Terrorist Organisations (Dec. 15, 2009), [http://www.ag.gov.au/agd/www/nationalsecurity.nsf/page/what\\_governments\\_are\\_doinglisting\\_of\\_terrorism\\_organisations](http://www.ag.gov.au/agd/www/nationalsecurity.nsf/page/what_governments_are_doinglisting_of_terrorism_organisations).

266. Criminal Code Act, 1995, § 102.1 (1), *amended by* Suppression of the Financing of Terrorism Act.

267. See Security Legislation Amendment (Terrorism) Act 2002, c. 5, § 102.1 (3).

268. *Id.*

on are not just as vigorous in the international arena . . . it means that using violence against civilians as a tool for such a campaign will not be tolerated in any circumstances.

A further insurance of the civil liberties of Australians to support regimes proscribed as terrorist in other countries that may not be proscribed in Australia is the requirement that a person or organization must show to have intended that their contributions would be used to finance terrorist acts.<sup>269</sup>

This shifts the burden to the government to prove that the individual acted with the knowledge that the contribution will be used for committing terrorist acts. This statement is consistent with the language of article 2 of the Suppression of the Financing of Terrorism Convention.<sup>270</sup>

Finally, Australia has a public safety exception in addition to national security bar contained in the Refugee Convention. Either one of these exclusionary grounds may be invoked independently or cumulatively.<sup>271</sup>

## 2. Procedural

The principal domestic Australian immigration legislation is the Migration Act of 1958.<sup>272</sup> The Act incorporates the inclusion and exclusion criteria of the Refugee Convention in their entirety by reference.<sup>273</sup> The Australian administrative body entrusted with the task of administering the immigration laws is the Department of Immigration and Citizenship (“DIC”).<sup>274</sup> As

269. JOINT STANDING COMM. ON TREATIES, REPORT 47: TREATIES TABLED ON 18 AND 25 JUNE 2002, at 30–31 (2002) (Austl.) (citation omitted), available at [http://www.aph.gov.au/house/committee/jsct/18\\_25\\_june\\_2002/report/fullreport.pdf](http://www.aph.gov.au/house/committee/jsct/18_25_june_2002/report/fullreport.pdf).

270. See International Convention for the Suppression of the Financing of Terrorism, *supra* note 72, art. 2.

271. See Savitri Taylor, *Guarding the Enemy from Oppression: Asylum-Seekers Rights Post-September 11*, 26 MELB. U. L. REV. 396, 409–11, 415–16 (2002).

272. Migration Act, 1958, No. 62.

273. See *id.* § 36(2) (“A criterion for a protection visa is that the applicant for the visa is: (a) a non-citizen of Australia to whom the Minister is satisfied Australia has protection obligations under the Refugee Convention as amended by the Refugee Protocol . . . .”); see also §§ 91R, 91S, 91T.

274. See NAT’L COMM’NS BRANCH, DEP’T OF IMMIGRATION & CITIZENSHIP, FACT SHEET 61—SEEKING ASYLUM WITHIN AUSTRALIA (2008), available at

delegates of the Minister of Immigration and Citizenship, officers within the DIC adjudicate asylum or protection applications.<sup>275</sup> In adjudicating these claims, they consider security assessments from the Australian Security Intelligence Organisation (“ASIO”).<sup>276</sup> Interestingly, the adjudicating officers do not have access to the security assessment files, and must take the adverse security determination of the ASIO at face value in adjudicating the asylum claim.<sup>277</sup> Moreover, as indicated above, Australia has a public safety exception, which may be invoked independently.<sup>278</sup> Ordinarily, denials by the DIC officers may be appealed to one of two appellate bodies called the Refugee Review Tribunal (“RRT”)<sup>279</sup> and the Administrative Appeals Tribunal (“AAT”),<sup>280</sup> respectively. A denial based on terrorism or other security-related grounds must be appealed to the AAT.<sup>281</sup> The Minister maintains the authority to reverse decisions of these tribunals at any time.<sup>282</sup> He may also personally certify a claimant excludable on security grounds if he deems it necessary because of the importance of the case.<sup>283</sup> There is no meaningful judicial review of these administrative decisions.<sup>284</sup>

The *Sultan* case demonstrates the nature of Australia’s exclusion process concerning national security issues.<sup>285</sup> Sultan, a Kuwaiti asylum seeker, was denied asylum on the basis of an

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<http://www.immi.gov.au/media/fact-sheets/61asylum.htm> (providing information on the Department of Immigration and Citizenship and its responsibilities).

275. See Migration Act § 65.

276. See Taylor, *supra* note 271, at 410–11.

277. *Id.* It appears that the adjudicating officers are not given access to the details of the security assessment. All they receive is notice that the security assessment is adverse. *Id.* In fact, Professor Taylor of La Trobe University in Australia, concludes that “since the entire screening process is the opposite of transparent, it cannot be ruled out that asylum-seekers in respect of whom there are security concerns will simply be ‘screened out’ and removed without ever being given an opportunity to make a protection visa application.” *Id.* at 400.

278. See *id.* at 409–11, 415–16.

279. See Migration Act § 500(4).

280. See *id.* § 500(1)–(4).

281. See *id.* § 500(1)(c).

282. See *id.* § 417.

283. See *id.* § 502.

284. See *id.* § 474(1)–(3).

285. See *Dir. Gen. Sec. v. Sultan* (1998) 90 F.C.R. 334, 335; see also Taylor, *supra* note 271, at 411–12 (discussing the *Sultan* case and particularly highlighting the errors of the Australian Security Intelligence Organisation).



adverse security assessment by the ASIO.<sup>286</sup> The nature and content of the adverse security assessment was disclosed to neither Mr. Sultan nor his attorneys.<sup>287</sup> The asylum procedures described above do not provide an opportunity to challenge the adverse security assessments. In most instances, they remain unchallenged and the refugees are inevitably deported. In this particular case, however, Sultan's representatives lodged an extraordinary administrative complaint unrelated to the asylum process and discovered that the information that the ASIO relied on for its adverse security assessment was utterly flawed.<sup>288</sup> The information was obtained from security services of other nations, but it was uncorroborated, internally inconsistent, and lacked credibility given the human rights record of the authorities supplying the information.<sup>289</sup> After the internal administrative reviews revealed these defects, Mr. Sultan was allowed to seek asylum anew and succeeded.<sup>290</sup>

### III. *COMPARATIVE ANALYSIS*

For Plato, studying the laws of even "ill-ordered cities" was so beneficial to the Athenian democracy that he used to send mature members of the Athenian citizenry to different cities for this purpose.<sup>291</sup> Aristotle himself engaged in comparative studies of the constitutions of the various city-states of Greece as far back as 350 B.C.E.<sup>292</sup> Throughout history, comparative perspectives have helped refine the contours of law and legal institutions in many ways than one. As this and Part IV of this Article demonstrate, a closer look at the various ways that nations resolve common problems could easily increase the benefits of perspectives and wisdoms that may not otherwise be independently available. Consistent with this view, this part provides a detailed comparative analysis of the substantive and procedural laws of the four jurisdictions discussed above,

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286. *Sultan*, 90 F.C.R. at 335.

287. *Id.* at 335–36.

288. Taylor, *supra* note 271, at 412 (quoting INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY, ANNUAL REPORT 1999–2000 ¶159 (2000)).

289. *Id.*

290. *Id.*

291. See JAMES BECKMAN, *COMPARATIVE LEGAL APPROACHES TO HOMELAND SECURITY AND ANTI-TERRORISM* ix (2007).

292. *See id.*

synthesizes the best practices of all four, and proposes a novel approach that combines the best aspects of each one of the four jurisdictions.

### A. *Substantive Provisions*

The relevant substantive international provisions that are common to all four jurisdictions are the article 33(2) of the Refugee Convention<sup>293</sup> and article 2 of the Suppression of the Financing of Terrorism Convention.<sup>294</sup> The substantive provisions of all of the domestic laws are broader than these provisions of the international conventions. This section provides a detailed analysis of the domestic provisions of the four jurisdictions vis-à-vis the international standards.

#### 1. Some Basic Commonalities

Linked to the conceptual uncertainty surrounding terrorism, none of the four jurisdictions utilize an uncomplicated formula that could help adjudicators sort real terrorists from those that are not. Their basic approach in defining terrorism is almost identical. All four focus on three levels of involvement: direct commission of “terrorist acts,” defined somewhat differently in their respective statutes; various degrees of participation in the commission of the defined acts; and different levels of association with terrorist groups or organizations, which they all identify with varying degrees of inclusiveness. Although they all adhere to the definition set forth under article 2 of the Convention for the Suppression of Financing of Terrorism, the individual definitions diverge in some significant ways.

#### 2. Degree of Approximation to the International Definition of Terrorism

##### a. Terrorist Act

The most important subpart of the definition contained in the Suppression of the Financing of Terrorism Convention defines a “terrorist act” as

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293. *See supra* note 91.

294. *See supra* note 74.

[an] act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.<sup>295</sup>

Under this generally agreed definition, many elements distinguish a terrorist act from other types of violence. The elements, which need to be met cumulatively, are: (1) intent to cause death or serious bodily injury, suggesting a specific intent requirement and limiting the types of injury to death or serious bodily harm; (2) the victim must be a civilian or a person who does not take an active part in hostilities, suggesting that attacks on legitimate military targets may not be considered terrorist acts; and (3) the purpose of the attack must be to intimidate a population or compel a government to do or refrain from doing something. Although the addition of these qualifiers seems to suggest that there is a consensus on at least those elements, the reservations submitted by the United States, United Kingdom, and Canada to Jordan's statement<sup>296</sup> adds some doubt as to the exact nature of legitimate resistance that may be exempted in the three jurisdictions.<sup>297</sup> However, there are at least two pieces of evidence that Australia may exempt the kinds of movements that Jordan is concerned about from terrorism. The first is simply the absence of reservation on that particular issue unlike the other three. The second is the suggestion contained in the report by Australia's Joint Standing Committee on Treaties. The report noted that the inclusion of certain acts in the definition of a terrorist act "does not mean that the political pursuit of human rights, good governance, the end of oppression and so on are not just as vigorous in international arena . . . it means that using violence against civilians as a tool for such a campaign will not be tolerated in any circumstances."<sup>298</sup> This clearly limits acts of terrorism to internationally proscribed conduct, or in other words, deliberately targeting civilians.

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295. International Convention for the Suppression of Financing of Terrorism, *supra* note 72, art. 2(1)(b).

296. *See supra* notes 82–85 and accompanying text.

297. *See supra* Part I.B.

298. JOINT STANDING COMM. ON TREATIES, *supra* note 269, at 31.

The United States seems to have no confusion on this issue, however. Evidence of that is the clear understanding that it submitted when it ratified the convention. After vigorously objecting to Jordan's national armed struggle exemption, the United States added its own understanding:

(1) EXCLUSION OF LEGITIMATE ACTIVITIES AGAINST LAWFUL TARGETS. The United States of America understands that nothing in the Convention precludes any *State Party* to the Convention from conducting any legitimate activity against any lawful target in accordance with the law of armed conflict.

(2) MEANING OF THE TERM "ARMED CONFLICT". The United States of America understands that the term "armed conflict" in Article 2 (1)(b) of the Convention does not include internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature.<sup>299</sup>

According to this understanding, the only exemption that the United States would allow is a military operation by one of the state parties against legitimate military objectives. That, in effect, excludes any military operations by nonstate actors even if their military operations are against legitimate military objectives. Consistent with this position, the United States is the only one of the four jurisdictions that does not include the motive and purpose elements in its definition of terrorist activity for immigration purposes. The United Kingdom, Canada, and Australia attempted to approximate their domestic definitions of "terrorist act" to the international definition by adding ideological motives and coercive purposes to distinguish terrorist acts from ordinary violence.<sup>300</sup> Unlike the other three jurisdictions, the U.S. definition of "terrorist activity" does not contain such qualifications.<sup>301</sup>

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299. Depository Notification—United States of America: Ratification, International Convention for the Suppression of Financing of Terrorism, U.N. Doc. C/N/697 (2002) (emphasis added).

300. See *supra* notes 174–77, 216, 264; see also International Convention for the Suppression of the Financing of Terrorism, *supra* note 72, art. 2(b) (defining terrorist act as for the ideological purposes and with coercive purposes).

301. See *supra* note 102 and accompanying text.

Going back to the Saman Kareem Ahmed case,<sup>302</sup> the terrorist activity that resulted in the denial of immigration benefits in the United States was his involvement in the Kurdish resistance movement against the Ba'ath government under Saddam Hussein.<sup>303</sup> Would the other three jurisdictions have qualified him for asylum? The denial letter states that the Kurdish Democratic Party ("KDP"), to which Ahmed belonged, "conducted full-scale armed attacks and helped incite rebellion against Hussein's regime, most notably the Iran-Iraq war, Operation Desert Storm and Operation Iraqi Freedom."<sup>304</sup>

The United States is the only one of the four jurisdictions that does not require a nexus between the terrorist conduct that disqualifies the claimant and U.S. national security.<sup>305</sup> In other words, a U.S. claimant will be excluded even if the act he is accused of has nothing to do with U.S. national security if the broad definition is met.<sup>306</sup> The other three jurisdictions require some type of nexus between the terrorist act and their respective nation's national security. For complex jurisprudential reasons, however, the prospect of Ahmed's success in the other three jurisdictions is uncertain. *Rehman* suggests that "there must be a real possibility of an adverse affect on the United Kingdom for what is done by the individual under inquiry," but that it does not have to be "direct or immediate."<sup>307</sup> On the other hand, the House of Lords gave the administrative officials unreviewable discretion to determine whether there is any direct or indirect threat. For example, in *Rehman*, the Secretary of State for the Home Department considered the respondent, a Pakistani national, "not conducive to the public good for reasons of national security"<sup>308</sup> because of his involvement in Islamic organizations in the Indian continent. Although the Secretary recognized that he posed no direct threat to the United Kingdom, he was excluded on poorly articulated grounds of indirect threat. The court deferred to the Secretary's

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302. See *supra* text accompanying notes 113–24.

303. See *supra* text accompanying notes 113–24.

304. DeYoung, *supra* note 113.

305. See *supra* Part II.A.1.

306. *But see infra* note 341.

307. See *Sec'y of State for the Home Dep't v. Rehman* [2001] UKHL 47, [16], [2003] 1 A.C. 153, 182 (appeal taken from Eng.) (U.K.); *supra* notes 188–89.

308. See *Rehman*, [2001] UKHL at [2]–[4].

determinations without any meaningful scrutiny.<sup>309</sup> Hence, the outcome of Ahmed's case in the United Kingdom would depend on whether the administrative officials, particularly the Secretary of State for the Home Department, would consider armed struggle by the Kurdish people against Saddam Hussein as an indirect threat to the United Kingdom, which is not at all an inconceivable outcome.

The United Kingdom may also deny asylum to Ahmed on a separate but related provision. Consistent with the Suppression of Terrorism Convention, the United Kingdom considers a person who falls under the definition to have committed acts contrary to the purpose and principles of the United Nations, an independent ground of exclusion from asylum under article 1(F)(c) of the Refugee Convention, which makes up a part of U.K. asylum law.<sup>310</sup> The United Kingdom is the only one of the four jurisdictions that expressly added this independent ground of exclusion in its domestic law.<sup>311</sup>

A similar uncertainty befalls Ahmed in Canada as well. While the Canadian standard is very similar to the United Kingdom's in one respect, it is very dissimilar in another. The similarity pertains to the required nexus between the alleged terrorist activity and national security. Just like the United Kingdom, Canada requires a nexus. It is stated in the following terms: "The matters referred to in subsection (1) [terrorist acts] do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest."<sup>312</sup> The commonality does end there. The Canadian Supreme Court, in *Suresh v. Canada*, adopted a *Rehman*-type deference, albeit qualified in limited ways. The most important part of the ruling reads:

If the Minister has considered the correct factors, the courts should not weigh them. Provided the ... decision is not patently unreasonable—unreasonable on its face, unsupported by the evidence, or vitiated by

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309. *See id.* at [26].

310. *See* Terrorism Act, 2000, c. 11, § 54 (U.K.).

311. *See supra* note 186 and accompanying text.

312. Immigration and Refugee Protection Act, 2001 S.C., ch. 27 § 34(2) (Can.).

failure to consider the proper factors or apply the appropriate procedures—it should be upheld.<sup>313</sup>

This is more or less what could be considered *Chevron* deference in the United States.<sup>314</sup> With respect to the substantive disqualifying factors, Canada's approach is dissimilar. Despite Canada's objections to Jordan's reservations just like the United States and United Kingdom,<sup>315</sup> its Anti-terrorism Act explains that "for greater certainty," the meaning of a terrorist act:

[D]oes not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties . . . ."<sup>316</sup>

This paragraph suggests that the mere participation in an armed conflict by itself does not amount to a terrorist act unless it violates conventional or customary rules of warfare. Therefore, Ahmed might prevail in Canada under two alternative theories. First, he could argue that his conduct does not fall under the Canadian definition of terrorism because the above quoted provision suggests that a legitimate armed struggle is exempted. If he prevails on this argument, the next question would be whether he violated any rules of warfare by targeting civilians, in which case he may be considered a terrorist or even a war criminal. The Canadian authorities would have the burden of establishing that. Second, Ahmed could prevail under the national security nexus requirement.<sup>317</sup> But again, just like the United Kingdom, the Canadian Supreme Court in *Suresh* has afforded administrative officials almost unreviewable discretion to make that determination.<sup>318</sup> The outcome thus depends on whether the Canadian officials consider involvement in KDP an indirect threat to Canada's national security.

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313. *Suresh v. Canada*, [2002] 1 S.C.R. 3, 29, 2002 SCC 1, [41].

314. *See supra* note 221.

315. *See supra* text accompanying notes 82–85.

316. Anti-terrorism Act, 2001 S.C., ch. 41, § 83.01(1)(b) (Can.).

317. *See* Immigration and Refugee Protection Act, 2001 S.C., ch. 27 § 34(2) (Can.).

318. *See supra* Part II.C.1.

Although Ahmed may face a comparable uncertainty in Australia because of the independent determination of the nexus between alleged terrorist acts and Australian national security,<sup>319</sup> he may have a better chance of success there for two reasons. First, the Australian Joint Standing Committee on Treaties suggestion that the pursuit of human rights and good governance may be tolerated unless it involves targeting of civilians could benefit Mr. Ahmed's claim.<sup>320</sup> Second, unlike the other three jurisdictions, Australia's definition of a terrorist act contains not only acts that are considered terrorist acts, but also those that are not.<sup>321</sup> Included among the acts that are not considered acts of terrorism is "dissent."<sup>322</sup> Although the Act does not define the nature of this dissent, Ahmed could argue that dissent in the form of armed struggle must be included. Even though the decision eventually is up to the Australian administrative officials to decide whether the admission of Ahmed is conducive to the national security or interest, just like the United Kingdom and Canada, Australia seems to be the most sensitive to the issue of political dissent and national armed struggle. As such, it might be the best forum for Ahmed to seek asylum. But, again, this is based exclusively on the substantive laws. The procedural due process aspect of this issue is discussed in the following section.

#### b. Association

Association with a terrorist organization is by far the most common ground for denial of asylum. What is common to all four jurisdictions is the proscription approach. Each maintains their own list of proscribed terrorist organizations.<sup>323</sup> They use more or less the same criteria and that naturally produces a similar result.<sup>324</sup> However, a closer look suggests some notable differences in their approaches.

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319. *See supra* notes 276–78 and accompanying text.

320. *See supra* note 269 and accompanying text.

321. *See supra* note 264 and accompanying text.

322. *See* Suppression of the Financing of Terrorism Act, 2002, No. 66, § 100.1 (2A).

323. *See supra* text accompanying notes 104, 179–80, 217, 265.

324. *See* Wikipedia, List of Designated Terrorist Organizations, [http://en.wikipedia.org/wiki/Terrorist\\_organization](http://en.wikipedia.org/wiki/Terrorist_organization) (last visited Jan. 24, 2010) (comparing the designated organizations by multiple jurisdictions).



Only the United States has different tiers of terrorist organizations depending on the procedures of their designation or proscription. While elaborate substantive and procedural safeguards are built in to the designation of tier I terrorist organizations, including possessing the capability to harm U.S. interest, the authority to designate tier II terrorist organizations is within the exclusive province of the Secretary of State, who should reach the Secretary of Homeland Security and the Attorney General.<sup>325</sup> Low ranking administrative officials, including immigration judges, determine tier III terrorist organizations on an ad hoc basis.<sup>326</sup> The criteria for the determination of tier III terrorist organizations, however, are extremely broad.<sup>327</sup>

The proscription or designation of terrorist organizations by the other three jurisdictions is similar to the U.S. tier II designation process. In the United Kingdom, the Secretary of State for the Home Department is given a broad authority to proscribe terrorist organizations. The standard is very low; he or she only needs to “believe that [the organization] is concerned in terrorism.”<sup>328</sup> Unlike the U.S. tier II designation, there is no clear consultation obligation. Similarly, in Canada, under the Anti-terrorism Act, the Governor in Council may designate a terrorist group based on the recommendations by the Minister of Public Safety.<sup>329</sup> Unlike in the United Kingdom, the Canadian Minister must not only believe that the group is engaged in terrorist activity, but he should also have reasonable grounds for the belief.<sup>330</sup> Australia allows for procedures similar to the U.S. tier II and tier III designation process with significant differences relating to the tier II situation. What may correspond to the tier II process is Australia’s designation by regulation.<sup>331</sup> Under the Australian security legislation, the Attorney General may designate an organization as a terrorist organization if several requirements are met.<sup>332</sup> What might correspond to the U.S. tier

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325. *See supra* notes 103–04 and accompanying text.

326. *See supra* notes 105–06 and accompanying text.

327. *See supra* notes 107–10 and accompanying text.

328. *See* Terrorism Act, 2000, c. 11, § 3(4) (U.K.).

329. *See* Anti-terrorism Act, 2001 S.C., ch. 41, §§ 83.01, 83.05 (Can.).

330. *See id.* § 83.5(b).

331. *See* Security Legislation Amendment (Terrorism) Act 2002, c. 5, § 102 (Austl.).

332. *See supra* notes 265–66.

III situation is Australia's use of administrative officials for the determination of whether a certain group is a terrorist organization or not on a case-by-case basis. To this effect, the Act reads: "(a) an organization that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs); or (c) an organization that is specified by the regulations for the purposes of this paragraph."<sup>333</sup> The first part of this paragraph suggests that such determination could be made on a case-by-case basis just like the U.S. tier III situation. The fundamental distinction here is that the U.S. tier III groups have broad but specific meaning. Australia's ad hoc determination must follow the general definition of acts of terror. In other words, a judge must determine whether an organization performs terrorist acts as defined in the statute. The U.S. approach is distinguishable in the sense that a tier III organization is defined independently of the definition of a terrorist act, and any association with it could be grounds for exclusion. A little bit more explanation of this particular issue is warranted given the importance of the distinction.

The United States is alone in its tier III approach, which adds needless complexity and over breadth. A tier III organization could be a group of two or more persons who cause damage to property or injury to persons using a dangerous device.<sup>334</sup> Anyone who associates with this kind of group or who provides "material support" to this group is considered a terrorist.<sup>335</sup> The most frequent infraction of this provision is the contribution of money to a humanitarian organization that in turn helps the humanitarian branch of a tier III type terrorist organization.<sup>336</sup>

A very good example demonstrating the over breadth of this provision is the story of the Iraqi lawyer, Odeh Al Refaiel, who

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333. See § 102.1.

334. See *supra* notes 107–09 and accompanying text.

335. See *supra* note 111 and accompanying text.

336. See, e.g., Eleanor Acer et al., *Human Rights First, Abandoning the Persecuted: Victims of Terrorism and Oppression Barred from Asylum* (2006), <http://www.humanrightsfirst.info/pdf/06925-asy-abandon-persecuted.pdf>. For a detailed analysis of various scenarios relating to the application of tier III terrorist groups, see Kidane, *supra* note 121, at 704.

helped U.S. forces rescue a marine private.<sup>337</sup> It is clear that he would be excluded under U.S. law because of his association to a tier III terrorist organization for providing material support to two or more U.S. soldiers who carried dangerous weapons and caused damage to property and injury to persons.<sup>338</sup> Unlike Ahmed, who admitted to committing acts of warfare, Al Refaiel's exclusion would be based on mere association in the form of supplying information to a terrorist group. The distinction is crucial because while Ahmed may be denied asylum under the laws of all four jurisdictions, U.S. law is the only one that would exclude Al Refaiel. The reason is that none of the other jurisdictions have a definition of a terrorist group corresponding to the U.S. tier III category. Although Australia's ad hoc process of determining terrorist groups resembles this approach, the adjudicators there do not use the tier III broad definition of a terrorist group.<sup>339</sup> They focus on the question of whether the organization committed a terrorist act—defined in the statute as requiring ideological motives and coercive purposes.<sup>340</sup> The national security nexus requirement in all of the other jurisdictions casts Al Refaiel in a completely different light. Assuming Al Refaiel assisted the armed forces of any one of the three to rescue one of their own, the inquiry would focus on whether he is a threat to national security and not on whether he falls under the sweeping definition of terrorism. In that sense, almost without a doubt all of the other jurisdictions would grant him asylum. The United States is the exception in this respect also.<sup>341</sup> Moreover, the United States adds the child and spouse exclusion category.<sup>342</sup> Assuming Al Refaiel had a child or spouse, they too would be excluded based on his activities unless they

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337. *See supra* note 122 and accompanying text.

338. *See supra* notes 123–24 and accompanying text.

339. *See supra* Part II.D.1.

340. *See supra* Part II.D.1.

341. The only time a national security nexus is required under the INA is if the exclusion is because the claimant is a representative of terrorist organization. *See* Immigration and Nationality Act of 1952, § 212(b)(2)(A)(v), 8 U.S.C. § 1182(b)(2)(A)(v) (2006). This exception for representatives is strange in a situation where even “endors[ing] and espous[ing] terrorist activity” or even “support” or even being a spouse or a child of one who espouses or supports would be excluded. *See id.* § 1182(a)(3)(B)(i)(VII).

342. *See supra* note 100.

could demonstrate that they could not have known about his aid to U.S. forces, which they cannot do.<sup>343</sup>

In conclusion, it could be said that the substantive definition of terrorism of the United States is significantly broader than all of the other jurisdictions because of the addition of the tier III terrorist group category, the materials support bar linked to this particular category, the lack of a national security nexus requirement, and the addition of an independent children and spouses of terrorists category. The U.S. net is cast so wide that it is often likely to catch Burmese monks, not real terrorists. Although none of the jurisdictions are immune from mistakes, the degree of error that U.S. law produces is undoubtedly much higher. Perhaps the most conservative approach is that of Australia because its definition most approximates the international definition, includes a national security nexus requirement, and recognizes the different nature of dissent or national armed struggle to a certain degree. Moreover, Australia is the only one that did not object to Jordan's reservations which pointed out that Jordan does not consider armed struggle for national self-determination as constituting terrorism.<sup>344</sup> Furthermore, Australia has the shortest list of proscribed terrorist organizations,<sup>345</sup> suggesting a desire to limit the scope of terrorism-based criminalization and, as such, exclusion from asylum.

### B. *Procedures*

The adjudicative procedures are more divergent than the substantive laws. This section provides a detailed comparative analysis of the procedural rules of the four jurisdictions.

All four jurisdictions, the United Kingdom to a lesser extent, have both overseas and domestic refugee or asylum procedures. Since the overseas programs are purely humanitarian and not a function of international obligation,<sup>346</sup> the focus of this article has been exclusively on the domestic asylum processes.

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343. See *supra* note 110.

344. See *supra* notes 82–85 and accompanying text.

345. See *supra* note 265.

346. See, e.g., Immigration and Nationality Act of 1952, § 207(b), 8 U.S.C. 1157(b) (2006).

Consistent with that trend, the focus here is also limited to the domestic procedures.

### 1. Primary Decision Makers

An application for asylum is initially submitted to low ranking administrative officials within the respective immigration department in all four jurisdictions. In the United States, the primary decision maker could be an immigration officer or an immigration judge. If the claimant is an arriving alien, meaning a person who has just arrived and made a claim for asylum, an immigration officer may order him deported if he “suspects” that he falls under the terrorism exception.<sup>347</sup> If the claimant is not an arriving alien, an immigration judge makes the determination.<sup>348</sup>

In the other three jurisdictions, there is no such bifurcation. In the United Kingdom, the administrative tribunal that adjudicates an asylum claim must first consider a certificate by the Secretary of State for the Home Department. If the certificate implicates the claimant with terrorism, the tribunal must deny the claim on terrorism grounds.<sup>349</sup> Although the United States also utilizes certification by the Attorney General,<sup>350</sup> it is not the principal way of adjudicating terrorism related cases. While Australia does not utilize a certification procedure, the asylum adjudicators must consider a security report by Australia’s security agency ASIO.<sup>351</sup> In fact, the ASIO determinations are conclusive.<sup>352</sup> The adjudicators are not even given access to the details of the security determinations.<sup>353</sup> This is perhaps the worst system of all because the asylum adjudicators are overridden by the security agency, which is not required to share information with the asylum adjudicators or justify its position in any meaningful way. As indicated in Part II.D.2 above, it is most liable for abuse. Canada’s approach is similar to Australia’s in that distinct authorities consider the security and asylum claims separately. However, it has its own peculiarities. Once the claim is submitted, administrative officials prescreen the case for grounds

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347. *See supra* notes 144–47 and accompanying text.

348. *See supra* notes 133–36 and accompanying text.

349. *See supra* notes 191–92 and accompanying text.

350. *See supra* notes 137–40 and accompanying text.

351. *See supra* note 276 and accompanying text.

352. *See supra* note 277 and accompanying text.

353. *See supra* note 277 and accompanying text.

of inadmissibility independently of the merits of the case.<sup>354</sup> A separate administrative body adjudicates the grounds of inadmissibility, in this case terrorism, independently of the asylum claim which is usually adjudicated by the regular process before the Immigration and Refugee Board (“IRB”).<sup>355</sup> If the claimant falls under the terrorism exception, he would be precluded from having his asylum claim reviewed and put through an independent and separate certification and deportation process.<sup>356</sup> In what appears to be a measure of compliance with the principle of nonrefoulement, Canada has a unique procedure called “Pre-removal Risk Assessment.”<sup>357</sup> This is a completely discretionary procedure designed to weigh the risk to national security that the claimant poses, and the severity of the danger the claimant may face upon deportation.<sup>358</sup> The proceeding may or may not be accompanied by a hearing.<sup>359</sup> Although discretionary, this last resort procedure is perhaps the best safety net that any one of the four jurisdictions puts in place. Significantly, it gives the authorities the chance to balance the seriousness of the national security risk with the likelihood and severity of the persecution that the claimant would face. None of the other three jurisdictions has this kind of last resort protection against refoulement. In fact, the United States, for example, is explicit in its rejection of this kind of process and as such there is no opportunity for the balancing of the danger to national security with the risk to the individual.<sup>360</sup>

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354. See *supra* note 236 and accompanying text.

355. See *supra* note 237 and accompanying text.

356. See *supra* notes 242–47 and accompanying text.

357. See *supra* notes 252–56 and accompanying text..

358. See *supra* note 254 and accompanying text.

359. See *supra* note 256 and accompanying text.

360. See Immigration and Nationality Act of 1952, § 242(b)(3)(B), 8 U.S.C. § 1252(b)(3)(B) (2006) (providing that the principle of nonrefoulement or withholding of removal does not apply to a person falling under section 237(a)(4)(B), which the terrorism bar provision). As State Parties to the Convention Against Torture, all jurisdictions theoretically observe the principle of nonrefoulement, which makes no exception for terrorists. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. TREATY DOC. NO. 100-22, 1465 U.N.T.S. 85.

## 2. Administrative Appeals

The administrative appeals processes have some significant differences. In the United States, an arriving alien ordered removed by an immigration officer on suspicion of terrorism may have his case reviewed by the Attorney General.<sup>361</sup> If the Attorney General agrees with the officer, the case ends there—there are no more avenues of administrative or other appeals.<sup>362</sup> In ordinary cases not involving an arriving alien, the immigration judge's decision may be appealed to the BIA, which will look at the merits of the decision, including whether the claimant falls under the terrorism exception.<sup>363</sup> The Canadian bifurcated system adds another layer of complexity because the exception must be adjudicated separately from the main claim. There is no meaningful administrative appeal on the initial finding of terrorism because the separate procedure leads to a certification and removal process.<sup>364</sup> Certification is made jointly by the Immigration and Public Safety ministers.<sup>365</sup> A federal court may review it only for reasonableness.<sup>366</sup> Because the security process is separate from the merits of the asylum claim, the Canadian authorities deprive themselves of an important perspective that they could have obtained by hearing the merits of the claim and having an understanding of the totality of the circumstances. The Canadian approach seems to be deficient in this respect. Australia and the United Kingdom have separate appeals tribunals for terrorism-related cases. In Australia, the AAT reviews the decisions of the DIC.<sup>367</sup> The Minister maintains the authority to reverse the AAT's decision,<sup>368</sup> just like the Attorney General may reverse the BIA's decision in the United States.<sup>369</sup> The United Kingdom has the best administrative review process primarily because the administrative appeals body, the SIAC, is a quasi-judicial body with three members who should have diverse but complementing expertise—currently there is one with

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361. *See supra* note 145 and accompanying text.

362. *See supra* note 146 and accompanying text.

363. *See supra* note 135 and accompanying text.

364. *See supra* notes 242–247 and accompanying text.

365. *See supra* notes 243 and accompanying text.

366. *See supra* notes 244–47 and accompanying text.

367. *See supra* note 281 and accompanying text.

368. *See supra* note 282 and accompanying text.

369. *See supra* note 145 and accompanying text.

security expertise, one with asylum law expertise, and another one with experience in a high judicial office.<sup>370</sup> A close reading of the decisions by this tribunal clearly shows the maturity of the panel.<sup>371</sup>

### 3. Judicial Review

In the United States all questions of law are ordinarily reviewable by the Court of Appeals after a final removal order is rendered.<sup>372</sup> A removal order based on the terrorism bar is, however, expressly precluded from judicial review.<sup>373</sup> In this respect the law is unequivocal; it provides: "There shall be no judicial review of a determination of the Attorney General under subparagraph (A) (v) [which is the terrorism bar.]"<sup>374</sup> This means that an asylum denial by the BIA based on the terrorism grounds is effectively final and unreviewable. A conflicting INA provision seems to suggest that constitutional claims and other questions of law still might be reviewable.<sup>375</sup> Australia's preclusion of judicial review of administrative decisions involving the terrorism bar is even more sweeping. The Australian law reads:

A privative clause decision [almost any administrative decision made under the Act], (a) is final and conclusive; and (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.<sup>376</sup>

Despite this sweeping language, just like the United States, it is suggested that constitutional claims and other questions of law still may be reviewable.<sup>377</sup>

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370. See *supra* note 199 and accompanying text.

371. See *supra* note 201 and accompanying text.

372. See *supra* note 131; see also *supra* notes 136, 142, 159 and accompanying text.

373. See *supra* note 132 and accompanying text.

374. Immigration and Nationality Act of 1952 § 208(b)(2)(D), 8 U.S.C. § 1158(b)(2)(D) (2006).

375. See 8 U.S.C. § 1252(a)(2)(D). There is an apparent inconsistency between this provision and the bar for the terrorism exception. Compare *id.*, with 8 U.S.C. § 1158(b)(2)(D).

376. See Migration Act, 1958, No. 62, § 474(1).

377. See Taylor, *supra* note 271, at 409 (suggesting that although some of the decisions may be challenged on constitutional grounds, there is not any meaningful judicial review of the administrative decisions).



There is no express preclusion of judicial review in the United Kingdom or Canada, however, and the standards of review are very deferential. The extent of the deference is difficult to measure based exclusively on statutory or judicial language. It appears, however, that they are in the *Chevron*-genre in the U.S. context. The U.S. Supreme Court in *Chevron v. Natural Resources Defense Council, Inc.*<sup>378</sup> articulated what has become to be known as *Chevron* deference. In that case, the Court held that courts must defer to the interpretations of the administrative agency entrusted with the task of interpreting a statute as long as the statute is ambiguous and the interpretation is reasonable.<sup>379</sup> The agency's interpretation must be upheld even if the court would have chosen a different interpretation.<sup>380</sup> The U.K. and Canadian standards of review approximate *Chevron*.

In the United Kingdom, the SIAC, the specialized tribunal that reviews appeals from denials of asylum based on terrorism bar, is quasi-judicial; however, its decisions may be judicially reviewed.<sup>381</sup> The *Chevron*-type standard of deference could be gleaned from the following statement of Lord Hoffmann of the U.K. House of Lords in the *Rehman* case:

[I]n matters of national of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security.<sup>382</sup>

The court further noted that the Secretary of State for the Home Department is in the best position to weigh the danger that the admission of a refugee may present based on information at his disposal, and as such, his decisions must be given deference.<sup>383</sup> The Canadian Supreme Court's articulation of the deference is identical with that of the U.K. House of Lords. In fact, the

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378. 467 U.S. 837 (1984).

379. *See id.* at 844.

380. *See id.*

381. *See supra* note 203 and accompanying text.

382. *Sec'y of State for the Home Dep't v. Rehman*, [2001] UKHL 47, [62], [2003] 1 A.C. 153, 195 (appeal taken from Eng.) (Hoffman, L.J.).

383. *Id.* at [26].

Canadian Supreme Court relied on the same language as in *Rehman* to reach that conclusion.<sup>384</sup>

What is most interesting is that the U.S. Congress designed what could perhaps be the best system of judicial intervention in these and related issues when it enacted the provisions relating to the establishment of the ATRC, which has not yet been installed.<sup>385</sup> Although there is some similarity between the ATRC and the United Kingdom's SIAC, their differences are fundamental. In fact, a procedural structure that combines the two might be the best system yet.

### C. *Identifying a Model*

The principal objective of the forgoing discussions has been to evaluate the strengths and shortcomings of the domestic antiterrorism laws of the four jurisdictions, in particular the provisions relating to the terrorism bar to asylum, in a comparative perspective. The discussions suggest that although the laws are designed to solve the same kinds of challenges and have identical international underpinnings, the differences in the various approaches are quite remarkable. None of the four approaches is without significant flaws. What is most interesting, however, is that a closer look reveals that each one has unique and exemplary approaches in some discrete areas that benefit the others. This section synthesizes the best practices of each and proposes an approach that combines these best practices.

#### 1. Refining the Substantive Scope

The insurmountable challenge is defining terrorism in such a way that it covers only those who are considered either undeserving of protection or dangerous to the host nation. Identifying the undeserving terrorist is relatively easy as the inquiry pertains to the gravity of prior acts such as war crimes. Much of the controversy relates to the extent of the relationship between prior acts of a noncriminal nature, including association and national security. There is always a risk associated with the admission of every single refugee. However, the system of law is

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384. See *Suresh v. Canada*, [2002] 1 S.C.R. 3, 2002 SCC 1, [33] (quoting *Rehman*, [2001] UKHL at [62] (Hoffman, L.J.)).

385. See *supra* Part II.A.2.

supposed to be designed to make a sound judgment that balances the risk with the humanitarian objectives. A look back to history suggests that since World War II, millions of refugees have gained protection in these four nations alone, however, to date, a single refugee is yet to be implicated in real terrorist attacks of the host community.<sup>386</sup> All of the recent laws that have been discussed above have lost any reasonable sense of proportion. An excellent description of this kind of sense of proportion is contained in a dissenting opinion written by Judge Johnnie C. Rawlinson of the Ninth Circuit Court of Appeals in *Cheema v. Ashcroft*.<sup>387</sup> In this case, he opined that no kind of resistance could be ignored as irrelevant for U.S. national security no matter how remote it might seem.<sup>388</sup> To support his conclusion, he cited to the assassination of Archduke Franz Ferdinand on June 28, 1914, in Sarajevo as the event that was responsible for the start of World War I.<sup>389</sup> This rationale obviously did not impress the majority of his colleagues. The majority of the court rejected the idea that every militant activity that occurs around the world threatens U.S. national security and emphasized the need for some sense of proportionality.<sup>390</sup> Although *Cheema* is largely irrelevant, as it was decided under prior law and involved other issues, it injected some sense of proportionality to the debate. To this effect the court noted the example:

That terrorist activity affecting a country struggling with strife cannot be equated automatically with an impact on the security of the United States is dramatically illustrated by the case of Nelson Mandela. In 1961, Mandela organized a paramilitary branch of the African National Congress, Umkhonto we Sizwe (MK) or "Spear of the Nation," to conduct guerrilla warfare against the ruling white government. He then went into hiding to carry out the MK's mission: "to make government impossible," and began arranging for key leaders and their volunteers to go abroad for training in guerrilla warfare. Mandela was convicted by

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386. *E.g.*, *Refugee or Terrorist?*, TOMPAINE.COM, Dec. 19, 2006, [http://www.tompaine.com/articles/2006/12/19/refugee\\_or\\_terrorist.php](http://www.tompaine.com/articles/2006/12/19/refugee_or_terrorist.php) ("No known terrorist has ever entered the United States through the refugee program, largely because of its stringent screening process . . .").

387. 383 F.3d 848 (9th Cir. 2004).

388. *Id.* at 860.

389. *Id.*

390. *Id.* at 858.

the South African government of treason in 1964 and sentenced to life in prison. In 1986, Congress passed the Comprehensive Anti-Apartheid Act, stating that its goal was to pressure the South African government to release Nelson Mandela from prison. It would not be sensible to conclude that Congress, in aiding a man convicted of treason by his own government, endangered the security of the United States or that the alien supporters of Mandela in this country were all deportable as terrorists endangering our national security.<sup>391</sup>

As discussed above, that is the current state of the law of almost all of the four jurisdictions discussed above, perhaps with the exception of Australia. As such, a modified version of Australia's approach in defining terrorism might instill some sense to the substantive scope of the terrorism definition. Australia's approach is unique and better in many ways: (1) its lack of reservations on Jordan's position that national armed struggle for self-determination does not constitute terrorism suggests that its definition of terrorist act must be read in light of this understanding;<sup>392</sup> (2) the Standing Committee for Treaties expressly stated that support for political dissent does not constitute support for terrorism;<sup>393</sup> and (3) the definition itself uniquely and expressly carves out acts that are not considered terrorist acts.<sup>394</sup> It is necessary to reemphasize that particular provision here. It provides that an action or a threat of action does not fall within the meaning of a terrorist act if it:

- (a) is advocacy, protest, dissent or industrial action; and
- (b) is not intended:
  - (i) to cause serious harm that is physical harm to a person; or
  - (ii) to cause a person's death; or
  - (iii) to endanger the life of a person, other than the person taking the action; or

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391. *Id.* at 858–59 (citation omitted).

392. *See supra* notes 82–84 and accompanying text.

393. *See supra* note 269 and accompanying text.

394. *See supra* notes 261–62 and accompanying text.

(iv) to create a serious risk to the health or safety of the public or a section of the public.<sup>395</sup>

Mandela may have a chance of winning asylum under this Australian law because the actions he took could be classified as dissent that is not at all intended to cause a person's death or physical harm to a person or create a serious risk to the health and safety of the public. According to Mandela, as cited by the Ninth Circuit Court of Appeals in *Cheema*, his objective was to make the apartheid government "impossible."<sup>396</sup> His choice to avoid targeting persons is categorical as a matter of fact and principle. His admission of targeting infrastructure using dynamite is a matter of record.<sup>397</sup> As such, his dissent involved the use of force against property but not persons. The Australian law is remarkable in its exclusion of damage to property from the definition of a terrorist act.<sup>398</sup> That particular omission would enable the likes of Mandela to win asylum. In that sense, the Australian definition is perhaps the most sensible and workable definition of terrorism, which all the others could use to avoid absurd results like the exclusion Nelson Mandela on terrorism grounds.

The trickier question is whether legitimate military resistance against a tyrannical regime must invariably be considered a terrorist act as it inevitably involves the use of force against persons, at least the regime's soldiers. An even trickier, perhaps impossible, question is what kinds of regimes deserve armed resistance. According to renowned international jurist, Antonio Cassese, armed resistance is justifiable under international law only in three circumstances: "to resist the forcible denial of self-determination by (1) a colonial state, (2) an occupying power, or (3) a state refusing a racial group equal access to government."<sup>399</sup> His critics are acrimonious. They argue that if the legitimacy of armed resistance is confined to these three qualifiers, German Jews, for example, would have no right of self-defense against Hitler's government because they belong

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395. Criminal Code Act, 1995, No. 12, § 100.1(1), *amended by* Suppression of the Financing of Terrorism Act, 2002, No. 66 (Austl.).

396. *See Cheema*, 383 F.3d at 858.

397. *See supra* note 29–31 and accompanying text.

398. *See supra* note 264 and accompanying text.

399. *See* SMALL ARMS SURVEY 2004: RIGHTS AT RISK, *supra* note 38 (quoting Cassese, *supra* note 38).

to the same racial group and there was obviously no colonial occupation.<sup>400</sup> These two positions seem irreconcilable, but are fairly representative. Recognizing the difficulty demonstrated by these diverging lines of argument, Professor Bassiouni's several decades-old definition of terrorism discussed in Part I.B above, may help the international community's decade old, ongoing but unsuccessful effort of defining terrorism. To reiterate, Professor Bassiouni's definition of terrorism reads:

An ideologically-motivated strategy of internationally proscribed violence designed to inspire terror within a particular segment of a given society in order to achieve a power-outcome or to propagandize a claim or grievance irrespective of whether its perpetrators are acting for and on behalf of themselves or on behalf of a state.<sup>401</sup>

The key, of course, is an internationally proscribed conduct. Professor Bassiouni discusses this in light of proscriptions of conduct under international humanitarian law—mainly the prohibition of targeting civilians regardless of how legitimate the use of force may be.<sup>402</sup> The concept of internationally proscribed conduct itself begs the question that Cassese and his critics address, but predicating the definition on centuries-old customary and conventional international law would seem to have no better alternative.

What makes the most sense is a case-by-case determination of whether, regardless of the elements of some kind of definition of terrorism, the asylum-seeker poses a real threat to the national security of the receiving state. The United Kingdom, Canada and Australia resolve the impossible dilemma that is inherent in the definition of terrorism by requiring a nexus between the alleged terrorist acts with their national security. The United States does not require this nexus. That will continue to lead to utterly absurd results as in the case of Ahmed and Al Refaiel.

For those jurisdictions that require the link, the challenge is ensuring procedural due process. The following section looks at this issue.

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400. See *supra* note 42.

401. See BASSIOUNI, *supra* note 17, at xxiii.

402. See *id.*

## 2. Ensuring Procedural Due Process

None of the procedures of the four jurisdictions discussed in the previous sections independently provides a system that would endure appropriate levels of procedural due process. Fairness of the asylum procedures in all four jurisdictions is undoubtedly undermined by the relegation of the important decisions to low-ranking administrative officials, flawed administrative appeals processes, the use of confidential evidence, lack of meaningful representation, the complexity of the laws, and the absence of meaningful judicial oversight.

Each one of the four countries, except perhaps Australia, however, has a valuable and unique procedural approach that could inure to the benefit of each jurisdiction. Australia's procedures deny the asylum adjudicators access to the security or ASIO files.<sup>403</sup> On account of that alone, the procedures are deficient from the outset. Moreover, this flaw cannot be remedied through a judicial process because Australia's preclusion of judicial review is unequivocal and categorical.<sup>404</sup> Although the use of confidential evidence is also possible in the other jurisdictions, the complete and unchallengeable security veto is unique to Australia.<sup>405</sup> Canada's bifurcation of the inadmissibility adjudication, including security grounds, and the adjudication of the merits of an asylum application seem to produce a similar result as Australia's independent security override; however, Canada has a last resort remedial measure called the "pre-removal risk assessment procedure," which distinguishes its system from Australia.<sup>406</sup> The Canadian pre-removal risk assessment procedure could be noted as exemplary in this respect.

The United Kingdom's unique and interesting procedural addition is the composition of the administrative appellate review body known as the Special Immigration Appeals Commission. As indicated above, the SICA seems to be a quasi-judicial body because of its jurisdiction and composition. The jurisdiction is limited to security related cases,<sup>407</sup> which makes it remarkably

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403. See *supra* note 277 and accompanying text.

404. See *supra* note 284 and accompanying text.

405. See *supra* notes 282–83 and accompanying text.

406. See *supra* 252–56 and accompanying text.

407. See *supra* 197 and accompanying text.

specialized, and the three members combine relevant and complementary backgrounds.<sup>408</sup> Moreover, this body has elaborate and reasonable rules of procedure. This could be a good intermediate appellate body, which could enable all of the jurisdictions to provide reasonable levels of procedural due process.

As indicated in Part II.A.2 above, the United States has an excellent system in its books that to date is yet to be used—the ATRC. If installed with minor modifications, the ATRC could undoubtedly be the best system of all with the potential of enduring minimum levels of procedural due process. The ATRC is a specialized Article III court<sup>409</sup> with limited jurisdiction to adjudicate terrorism related removal cases.<sup>410</sup> Although it has its unique approaches to procedural due process, it naturally comes with all the inherent benefits of access to an Article III court.<sup>411</sup> These procedural guarantees bring some sense to the adjudication of security-related cases in the United States. Although the ATRC has unfortunately not been set up yet, all of the jurisdictions could benefit by adopting a similar approach to ensure reasonable levels of procedural due process. The important modifications that the ATRC might require would be the extension of its mandate to all cases triggering the terrorism bar to asylum, and the addition of jurisdiction to grant asylum and other forms of relief from deportation.<sup>412</sup> Reconstituted this way, the ATRC would be the best option available.

Since denial of asylum on grounds of terrorism is a serious allegation with dramatic consequences, carefully crafted procedural guarantees are essential. As such, a reasonably efficient but considerate system would utilize the United Kingdom's SICA as a primary decision maker, and the United States' ATRC as an appellate body, and additional layer of guarantee against sending refugees back to persecution by including Canada's pre-removal risk assessment procedure in the

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408. *See supra* note 199 and accompanying text.

409. *See supra* note 150 and accompanying text.

410. *See supra* note 151 and accompanying text.

411. *See supra* notes 152–62 and accompanying text.

412. In its current shape, its jurisdiction does not extend to all cases (e.g. arriving aliens seeking asylum would have no access to the court), and it does not have the jurisdiction to grant asylum. *See* Immigration and Nationality Act of 1952 § 504(k), 8 U.S.C. § 1534(k) (2006).



event of negative determinations by the ATRC. This may be adopted without precluding the reviewability of constitutional and other questions of law by appellate courts.

### CONCLUSION

Aspirations of cultural tolerance and convergence, and ambitions of civilized interaction, suffered a serious setback on September 11, 2001. Aspirations were replaced with fear, anger, resentment, and passion. This Article performed a sobriety test on the laws drafted with under this influence. The result is clear: they all fail not only as measured by standards of the traditional notions of fair play, but also in their capacity to achieve their stated objectives. Without a doubt nearly one hundred percent of persons rejected under the anti-terrorism provisions are neither real terrorists nor undeserving of protection. These laws are failures and must be amended. Criminalizing political dissent undercuts the very essence and foundation of the refugee law. As one observer has put it:

It's a case of "damned if you do; damned if you don't"—an asylum-seeker who claims support or membership of a listed group risks arrest, and one who disavows support for the group will have the claim rejected on the ground that he or she is not persecuted at home.<sup>413</sup>

In relation to this, the opinion of the Ninth Circuit Court of Appeals in *Cheema v. Ashcroft* is very instructive:

At least since 1848, the year of democratic revolutions in Europe, the United States has been a hotbed of sympathy for revolution in other lands, often with emigres to this country organizing moral and material support for their countrymen oppressed by European empires such as those of Austria, Britain and Russia. In the twentieth century, active revolutionaries such as De Valera and Ben Gurion worked in the United States for the liberation of their homelands. More recently, foreign anti-Communists living in the United States were active in encouraging and aiding movements against Communist tyranny in the Soviet Union and China. Much of this revolutionary activity would fall under the definition of terrorist activity as the Board interprets the statute. None of it had consequences for the lives and

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413. *The Terrorism Act—Embracing Tyranny*, *supra* note 183.

property of American citizens or the national defense, and the slight strains occasionally put on our foreign relations were more than offset by the reputation earned by the United States as a continuing cradle for liberty in other parts of the world.<sup>414</sup>

The fundamental notion of the court's opinion in the U.S. context is equally applicable to the other jurisdictions, all of which had a great history of protection of refugees. If the terrorism bar as currently reconstituted in the domestic laws of Australia, Canada, the United Kingdom, and the United States continues to be applied without reasonable restrictions on the scope of the substantive definition and the procedural guarantees along the lines described above, international refugee law will soon be history, at least for those who think persecution for resisting tyranny would entitle them to protection. Until such time that another wave of amendments to these laws substantially improves their fairness, asylum-seekers around the world must be seriously warned that the Western world's tolerance for political resistance against tyranny has grown remarkably smaller.

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414. *Cheema v. Ashcroft*, 383 F.3d 848, 858 (9th Cir. 2004).