

Article 1F(b): Freedom Fighters, Terrorists, and the Notion of Serious Non-Political Crimes

WALTER KÄLIN¹ & JÖRG KÜNZLI²

1. Introduction

Would Spartacus who organized an unsuccessful revolt against the Roman slave-masters in 73–71 BC be recognized as a refugee if he applied for asylum today? What about William Tell guilty of killing the oppressive knight who forced him to shoot an apple from his son's head? Would we consider as refugees the proponents of the French Revolution or those Americans who organized the 1773 Boston Tea Party and subsequently fought with their weapons against the British troops at Lexington in 1775 for the independence of their country if they had failed? All the mythological or real heroes revered today for their decisive role in the formation of modern nation States were the trouble-makers or terrorists of their time, and today's terrorists might become the freedom fighters and founding fathers of tomorrow.

The application of the exclusion clause of Article 1F(b) of the 1951 Convention on the Status of Refugees (CSR51) for 'serious non-political crimes' raises particularly difficult questions where refugees, that is, persons with well-founded fear of persecution in the sense of Article 1A(2) CSR51 or fleeing situations as described in Article 1 of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, have committed acts of violence against life and limb constituting a 'serious' crime in the country of origin but claim that the use of force was legitimate. After the end of the great ideologies — republicanism vs. monarchism in the 19th and capitalism vs. communism in the 20th century — it has obviously become more difficult to distinguish between those deserving of asylum and those unworthy of refugee protection. Whereas nobody in Western Europe ever would have considered to

¹ Professor of Law, University of Bern, Switzerland.

² Dr. iur., LL.M, Institute of Public Law, University of Bern.

examine whether a refugee should be excluded who had been throwing Molotov cocktails against Russian tanks in 1956 Budapest or 1968 in Prague, activists from the many troubled regions in this world are increasingly often suspected of terrorism when applying for asylum today. But it is not only the loss of seemingly clear ideological criteria allowing us to easily distinguish between right and wrong which turns the topic of refugee protection for persons who have used violence into a moral minefield, but also the disturbing proliferation of political violence all over the world.

This article discusses the dilemmas involved from a legal perspective. It rests on the assumption that in order to understand and conceptualize exclusion from refugee protection of those who have committed serious non-political crimes it is necessary to use a novel approach which goes beyond the 1951 Refugee Convention and to look at other relevant areas of law which address and assess the issue of permissible violence by individuals. Guidance can first be found by asking if and under what circumstances international law, including international humanitarian law, permits or at least legitimizes the use of force by *individuals* (part 2). The paper subsequently turns to some of those instances when States are not ready to extradite an offender and hand him over to the prosecuting State (part 3). Only then can the question be addressed as to how and to what extent the results of this analysis can be reflected in the application of the exclusion clauses of Article 1F CSR51 (part 4).

This article is not an attempt to downplay the seriousness of threats emanating from terrorism and cross-border activities of criminal organizations. To look at situations of legitimate use of violence by individuals in the course of political conflicts, however, is a useful exercise as it helps both to identify situations where exclusion would not seem to be justified as well as to clarify the proper role of exclusion from refugee protection.

2. Legitimizing the use of force by individuals

2.1 A right to resistance?

The idea of a right to resist against a government which disregards and violates the most basic tenets of natural justice can be found in different parts of the world. In China, for example, the Confucian tradition taught that in cases of extreme tyranny, people are expected to resist the unjust ruler.³ 'Do not support injustice and do not wait upon a non-benevolent

³ See Du Gangjian & Song Gang, *Relating Human Rights To Chinese Culture: The Four Paths of the Confucian Analects and the Four Principles of a New Theory of Benevolence*, in HUMAN RIGHTS AND CHINESE VALUES, 34, 44–49 (Michael C. Davis ed., 1995).

monarch', wrote Confucius in his *Analects*,⁴ and Mencius (Mengzi) later even suggested the use of violence to resist the tyrant.⁵

In Europe, the idea of a right to resistance can be traced back to antiquity.⁶ For the ancient Greeks, violent resistance was permissible if the ruler contravened the divine order. Tyranny violated divine law and the cosmic world order if it was to the advantage of the tyrant alone and not to that of his subjects. The restoration of a so-imperiled order by all possible means — including the killing of the tyrant — was a right and duty of the citizens. The early fathers of the Christian Church held the view that not only individuals but also the State should be subject to God's commandments and, for that reason, the authority of the State had to observe moral precepts. In the Middle Ages, the concept of a right of resistance was further developed by Thomas Aquinas. He saw in the *lex aeterna*, as the wisdom of God, a justification for all other laws; consequently, in order for the laws of man to be binding, they had to respect divine law. An uprising against government, although in itself a serious sin, was admissible against a ruler who had assumed power unlawfully or governed in disregard of God's laws and the welfare of the people. In the tradition of these theories, several classical authors of international law, such as Hugo Grotius and Francisco Suarez, held the view that violent resistance was justified if power was exercised in a tyrannical manner.

A second strand of legitimate resistance can be found in the tradition of social contract theories.⁷ John Locke stressed that the power of the ruler was conferred upon him by the sovereign people. If the ruler holding sway breaks the law, his power will revert to the people. Hence, the people who have to assert their original legislative power possess the right to rebel against the unlawfully exercised authority of the State. Similarly, Jean-Jacques Rousseau emphasized that the ruler who violates the laws ceases to administer the State in accordance with the social contract and, therefore, can be chased away as an unlawful tyrant.

While the concept of a right to resistance at times disappeared in continental Europe during the era of absolutism and in the later period of positivism, it retained its importance in England and North America. As a right to freedom from 'arbitrary power and oppression,' it signified,

⁴ Ibid., 48.

⁵ Ibid., 49.

⁶ See, for example, the summary in MICHAEL GEISTLINGER, *VÖLKERRECHT UND REVOLUTION — VÖLKERRECHTSDOGMATISCHE GRUNDLEGUNG DER VORAUSSETZUNGEN UND DES INHALTES EINES WAHLRECHTS IN BEZUG AUF VORREVOLUTIONÄRE VÖLKERRECHTLICHE RECHTE UND PFLICHTEN* 355 et seq. (1991).

⁷ See, for example, Leo Delfos, *Alte Rechtsformen des Widerstandes gegen Willkürherrschaft*, in *WIDERSTANDSRECHT UND WIDERSTANDSPFLICHT DES STAATSBÜRGERS*, 59 et seq. (Kaufmann ed., 1972).

in England as in the United States of America, the actual guarantor of all fundamental rights. The introduction to the American Declaration of Independence of 1776 lays down an obligation to resist despotism,⁸ and an earlier declaration in Massachusetts actually expressed the right of resistance as being the ‘Christian and social duty of every individual.’ These considerations found their way into various national documents on fundamental rights,⁹ and finally into the preamble to the Universal Declaration of Human Rights.¹⁰

After the Second World War, the idea of a constitutional right to resistance was embodied in Article 20 of the German Basic Law, stating that ‘all Germans have the right to resist any person seeking to abolish [the] constitutional order, should no other remedy be possible.’ Today, at least in States based on democratic premises and the rule of law, it is hardly contested that a right of resistance exists in situations of grave injustice exceeding the bounds of constitutionality. In addition, this right may justify acts of violence in extreme situations of particularly severe and systematic violations of fundamental human rights. As a result of the process of transition from dictatorial regimes to democratic States governed by the rule of law in many parts of the world, recent constitutional developments have strengthened constitutional recognition of the notion of resistance against States not governed by the rule of law in exceptional circumstances.¹¹ A number of recent constitutions in Europe, Africa and Latin America acknowledge that resistance, if necessary by force, is admissible as a *subsidiary remedy* (that is, in cases where the effective and constitutional authority of the State ceases to exist) in order:

- To defend the constitutional order against attempts to overthrow it;¹²

⁸ ‘But when a long train of abuses and usurpations pursuing invariably the same object evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such Government, and to provide new guards for their future security.’ THE DECLARATION OF INDEPENDENCE, Introduction, (U.S. 1776), quoted in Aldo Virgilio Lombardi, *BÜRGERKRIEG UND VÖLKERRECHT*, 54 fn. 89 (1976).

⁹ See, for example, the Preamble to the French Constitution of 1946.

¹⁰ Universal Declaration on Human Rights, UNGA res. 217A (III), UN doc. A/810 at 71 (1948) [hereinafter UDHR48]. See below, section 2.2.1.

¹¹ The concept of legitimate resistance may also be recognized in many countries which have refrained from including a right of resistance in the texts of their constitutions. For example, Switzerland’s Federal Office of Justice has stated that ‘with the recognition of fundamental rights in State constitutions, a right of resistance to protect the established order is guaranteed “as ultima ratio” either expressly or implicitly.’ Report of the Federal Office of Justice, 4 November 1985, 50 *Verwaltungspraxis der Bundesbehörden*, No. 5, 53–54 (1986).

¹² See GERMAN BASIC LAW, Art. 20. The Preamble of the Constitution of the Congo (Brazzaville) of 15 March 1992 proclaims the right and duty of every citizen to resist attempts ‘to overthrow the constitutional regime, to take power by a coup d’état or exercise in a tyrannical manner.’ See also Art. 17. Uganda’s Constitution of 1995 provides in Article 3 the right ‘to resist any person or group of persons seeking to overthrow the established constitutional order,’ and stresses that anyone who ‘resists the suspension, overthrow, abrogation or amendment of this Constitution commits no offence.’

- To oppose particularly severe violations of human rights;¹³
- To protect territorial integrity against occupation and foreign rule.¹⁴

These examples show that although the principles of the classical right of resistance against unjust authority of government have lost their practical significance in democratic and constitutionally established States, they are still relevant today in cases where a legitimate constitutional order is overthrown or is totally absent. To defend the constitutional order against those who want to overthrow it or to protect the territorial integrity of a State against occupation and foreign rule constitute legal acts, at least from the perspective of international law, and therefore do not constitute crimes in the sense of Article 1F(b) of the UN Convention relating to the Status of Refugees (hereinafter CSR51) even if those defending these values lose their battle and are punished by the oppressors who gained power in that particular State. Therefore, these persons should be considered as refugees and cannot be excluded. The case of those opposing serious human rights violations is more complex, and therefore, needs a closer analysis.

2.2 Defence of human rights

2.2.1 *Resistance against those responsible for especially serious human rights violations*

These constitutional developments have not found any direct expression in international law. Up until the end of the Second World War, the right of a State to treat its citizens according to governmental will belonged to the core of national sovereignty. Only when it was realized that internally aggressive and inhumane regimes frequently direct their aggressiveness towards the exterior, and thus represent a potential danger to other countries, was the dogma of fundamental rights as a purely internal affair of States gradually rejected.

In Latin America, Article 3 of the Constitution of Honduras of 11 Jan. 1982 entitles the citizens to rebel against military regimes or other usurpers of government power. The same guarantee appears in Article 138 of the Paraguayan Constitution of 1992 and Article 46 of the Peruvian Constitution of 1993. The right to resist persons encroaching upon the constitutional order and democratic system by force is established in detail in Article 36 of the Argentine Constitution of 22 Aug. 1994.

¹³ See, for example, PORT. CONST., art. 21: 'Every person shall have the right to resist any order which infringes his rights, freedoms or guarantees, and to repel any assault by force, if it is not possible for him to have recourse to the authorities.' Article 32 of the Slovak Constitution of 1 Sept. 1992, goes beyond this right of individual self-defence and lays down the following: 'Citizens have the right to put up resistance to anyone who would eliminate the democratic order of human rights and basic liberties listed in this Constitution if the activity of constitutional bodies and the effective use of legal means are rendered impossible.'

¹⁴ See LITH. CONST., Art. 32: 'The people and every citizen shall have the right to oppose anyone who encroaches on the independence, territorial integrity, or constitutional order of the State of Lithuania by force.' See also EST. CONST., Art. 54, para. 2.

The trend began with the Universal Declaration of Human Rights of 1948 and gave rise in the ensuing decades to the elaboration of a variety of instruments for the protection of human rights, reaching a temporary peak with the wave of ratifications in the 1990s.¹⁵ For the purpose of securing these rights, instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR50) and the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR66) grant individuals the status of parties before judicial or quasi-judicial organs established under international law; these procedures show that individuals have the right to take peaceful action against a State which fails to observe its human rights obligations and which does not afford individuals procedural safeguards.

However, none of the human rights treaties embodies a right of individuals to resist an unconstitutional, totalitarian regime with violent means. The only reference to such an entitlement appears in paragraph 3 of the preamble¹⁶ to the UDHR48:¹⁷

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law . . . the General Assembly proclaims this Universal Declaration of Human Rights.¹⁸

This wording expresses the idea that a right of resistance already exists as a natural right, preceding the recognition of human rights as juridical guarantees. Therefore, within the context of international protection afforded by human rights, entitlement to resist is superseded by an entitlement to resort to constitutional procedures before national and international authorities responsible for ensuring the safeguarding of human rights positions. According to this model, the clearest situation of a justification for resistance against a Government would be where fundamental human rights are systematically violated and the victims have no possibility of defending themselves by lawful means (ranging from the use of freedom of expression to the filing of legal proceedings

¹⁵ The two United Nations Human Rights Covenants have been ratified by some three-quarters of all States and the Convention on the Rights of the Child by virtually all countries (with the notable exception of the USA).

¹⁶ In a preamble, no actual statutory obligations are imposed on States, but the statements contained in it are of importance in connection with a systematic interpretation of the substantive provisions of a treaty (Article 31 of the Convention on the Law of Treaties); See, for example, MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS — CCPR COMMENTARY 2 et seq. (1993).

¹⁷ Although the UDHR48 does not have legally binding force as such, it expresses, as is apparent from its preamble, a 'common standard of achievement for all peoples and all nations.' UDHR48, Preamble (1948).

¹⁸ Several drafts of the Universal Declaration of Human Rights contained express forms of a right of resistance, formulated as individual guarantees; see GEISTLINGER, above n. 6, at 360.

at the national or international level).¹⁹ However, the status of such a right to resistance remains unclear, as it has not been taken up in any other modern human rights instrument.²⁰

In addition, the Universal Declaration does not define what ‘tyranny and oppression’ mean. This leaves the question of what degree of human rights violations is needed to trigger this ‘right to rebellion’. Here, the concept of ‘international crime’ as defined by the International Law Commission (ILC) in its Draft Code on State Responsibility,²¹ might be helpful. The ILC divided State action in breach of international law into international delicts and the qualified form of ‘international crimes’. The latter, somewhat unfortunate, term refers not to the conduct of Governments and members of State authorities in relation to criminal law, but to States’ breaches of international law which are of such a serious nature that the entire community of States is affected. In this case, the State responsible can be held accountable not just by the country directly injured but by every other State, too (the *erga omnes* effect). Under Article 19 of the Draft Articles, a State’s international crimes may include a ‘serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid,’ that is, a systematic and serious violation of the most basic human rights. This provision could establish a yardstick for the scope of application of legitimate resistance; however, it has not yet come into force and debate is still in progress concerning the very concept of international crimes. Nevertheless, the *erga omnes* effect of systematic and serious violations of human rights is today generally recognized and has on various occasions been reaffirmed

¹⁹ According to GEISTLINGER, above n. 6, at 371, the right to resist recognizes no material limitations and is not subject to any overriding limits. See also LOMBARDI, above n. 8, at 73, who postulates a right of resistance under international law if the development of human rights in a given situation is impeded. However, the author bases this opinion, not on the above-quoted provision of the Preamble to the Universal Declaration of Human Rights, but on the fact that certain human rights instruments, such as the ICCPR66 and the ECHR50, recognize certain guarantees as inviolable and thus as inalienable. A right of resistance to defend oneself against human rights violations or to assist others against direct attacks on their most fundamental human rights is also accepted by Thomas Discher, *Wehrdienstentziehung als Asylgrund*, 18 ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK 220 (1998).

²⁰ Insofar as no grounds are clearly apparent in the *travaux préparatoires* of the ICCPR66 for justifying non-incorporation of any reference to an individual right of resistance in the preamble to this binding instrument; see generally, MARC J. BOSSUYT, GUIDE TO THE TRAVAUX PRÉPARATOIRES OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1–18 (1987).

²¹ International Law Commission, Draft Articles on State Responsibility, reproduced in UN doc. A/51/10, 125 et seq. (1996).

by the International Court of Justice in connection with State responsibility.²²

States' *erga omnes* responsibility for serious and systematic violations of human rights may also find expression in the imposition of sanctions or military measures by the Security Council on a specific country for such breaches in accordance with Chapter VII of the Charter of the United Nations. The imposition of sanctions and the authorizing of military enforcement action in situations of severe and systematic violations of human rights,²³ clearly illustrate the fact that the international community of States regards such breaches as being of such a serious nature that they have to be opposed with force. The resolutions of the Security Council do not empower individuals within such States to carry out acts of violence against the authorities responsible, but nevertheless show these in a far more favourable light than common crimes.

2.2.2 Conclusions

The concept of international human rights and the rules concerning reactions to serious breaches of those rights provide some indications for assessing the legitimacy of acts of violence against States carried out by individuals. Resistance would appear to be legitimate if the following requirements are met: (1) A State policy of serious and systematic violations of fundamental human rights towards the entire population or towards significant parts of it (for example, ethnic or religious minorities) is in operation; (2) Institutionalized and effective forms of legal redress against such violations are not available at the national or international level; (3) The act of resistance is directed against a person who is responsible for, or has ordered or perpetrated, such violations of fundamental human rights; and (4) The act of resistance is aimed, within a specific State, at preventing a specific violation or at stopping a regime which does not respect human rights. How these principles can be applied within the framework of Article 1F(b) CSR51 has to be discussed later.²⁴

²² Corfu Channel, 1949 I.C.J. Reports at 22; Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. Reports at 23; Barcelona Traction, Light and Power Company Ltd., Second Phase, 1970 I.C.J. Reports at para. 33; United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. Reports at 42.

²³ See, for example, UN doc. S/RES/688 (1991), UN doc. S/RES/751 (1992), UN doc. S/RES/752 (1992), UN doc. S/RES/757 (1992), UN doc. S/RES/794 (1992), UN doc. S/RES/814 (1993), UN doc. S/RES/841 (1993), UN doc. S/RES/929 (1994), and, as a most recent example, Security Council resolution 1160 of 31 March 1998 concerning the human rights situation in Kosovo. UN doc. S/RES/1160 (1998).

²⁴ See below, section 4.1.

2.3 Resistance against orders to commit war crimes or crimes against humanity

2.3.1 Relevant categories of offences

In international law, crimes against peace, war crimes and crimes against humanity as defined by relevant instruments,²⁵ establish individual criminal responsibility.²⁶ Whereas crimes against peace, in principle, can only be committed by persons who discharge a function within an organ of a State or de facto State, individual responsibility arising out of the prohibition of genocide expressly concerns private individuals (Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide). War Crimes can be committed by every individual when being a part of a plan or policy or as part of a large-scale commission of such crimes during either an international or an internal armed conflict.²⁷ Crimes against humanity, finally, do not require any personal qualification nor do they need a jurisdictional nexus with an armed conflict as long as they are committed as part of a widespread or systematic attack directed against a civilian population.²⁸

The situation is less clear regarding acts of terrorism which are today referred to in several conventions.²⁹ Until now it has not been possible to codify direct responsibility for such crimes under international law. The different instruments aimed at combatting international terrorism oblige State parties only to either try the perpetrators of certain crimes or to extradite them to another State for purposes of prosecution (*aut dedere aut iudicare*). Since criminal liability for these offences has to be based on *domestic* criminal law, one can at most speak of an indirect liability for such offences under international law.³⁰ Thus, acts of terrorism not constituting war crimes or crimes against humanity have not yet been recognized as international crimes of the same seriousness as those mentioned in Article 1F(a); in contrast, they may fall under Article 1F(b) CSR51.³¹

²⁵ See the 1945 Charter of the International Military Tribunal; in particular the instruments dealing with international humanitarian law (Articles 129 et seq. of the 1949 Third Geneva Convention and Articles 146 et seq. of the 1949 Fourth Geneva Convention or Article 85 of the 1977 Protocol I); 1993 and 1994 Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda; 1996 I.L.C. draft Code of Crimes against the Peace and Security of Mankind; and the Statute of the International Criminal Court of 17 July 1998 (I.C.C. Statute).

²⁶ For these different categories, see the discussion of Article 1F[a] by Jelena Pejić, this issue, above 11–45.

²⁷ See I.C.C. Statute, Art. 8.

²⁸ See I.C.C. Statute, Art. 7.

²⁹ Cf. below n. 136.

³⁰ See VERDROSS & SIMMA, *UNIVERSELLES VÖLKERRECHT*, 260 et seq. (1984).

³¹ Cf. below at section 4.3.

2.3.2 Exclusion of the defence of superior orders as nucleus of a right to resist

Is it possible to legitimize the use of violence in certain situations on the basis of international criminal law? Modern international criminal law does not recognize any additional defences justifying a prohibited act which are not already known in domestic criminal law. In particular, a defence in law based on superior orders is excluded,³² although, in extreme cases, such orders may be recognized as a mitigating factor in determining the degree of culpability.³³

However, non-recognition of a defence of superior orders arguably contains the essence of a limited right of resistance applicable in specific circumstances. If the offences established in international criminal law impose an obligation on individuals not to violate, through either acts or omissions, the human rights protected by that law, non-admittance of the plea of superior orders as a defence in law establishes the requirement that the person concerned has to put up resistance against an order to commit such offences. Therefore, it can be argued that persons who are directly subject to governmental or quasi-governmental authority, for example, as officials or soldiers, are entitled to put up even violent resistance against a policy that systematically violates the most fundamental of human rights,³⁴ even if such resistance would constitute a serious crime under domestic law. How this principle can be reflected in the application of Article 1F(b) will be discussed below.³⁵

³² 'The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires.' I.C.C. Statute, Art. 33. This is virtually identical to Article 7 of the Statute of the International Criminal Tribunal for the former Yugoslavia and Article 6 of the Statute of the International Criminal Tribunal for Rwanda.

³³ That is, where the offender's freedom of choice was virtually non-existent, for example, if the subordinate clearly manifested his opposition to the order but was unable to secure acceptance of that opposition; *I.L.C. Commentary to the Draft Code of Crimes against the Peace and Security of Mankind*, 18 H.R.L.J.107 and 121 (1997). It is extremely controversial as to what extent superior orders leading to situations of coercion which in practice exclude freedom of will should be recognized as mitigating factors in assessing culpability. See International Criminal Tribunal for the former Yugoslavia, Case No. IT-96-22-T, *The Prosecutor vs. D. Erdemovic*, Sentencing Judgement of the Trial Chamber of 29 November 1996, paras. 49 et seq. In the Appeal Chamber's ruling of 7 October 1997, the Tribunal could not agree on this matter on a joint statement of grounds but referred to the separate and/or dissenting opinions of the individual judges. *Ibid.*, para. 19.

³⁴ See Discher, above n. 19 (without reference to the concept of superior orders he accepts a right of resistance in order to avoid a situation where one would become guilty of human rights violations). Draft Protocol I to the Geneva Conventions provided that 'no person shall be punished for refusing to obey an order of a superior which, if carried out, would constitute a grave breach of the Geneva Conventions.' Owing to fears regarding a possible breakdown of military discipline, that provision was not included in the final version of Protocol I. See Maurice Aubert, *The Question of Superior Orders and the Responsibility of Commanding Officers*, in *REVIEW OF THE INTERNATIONAL RED CROSS* 109 (1988).

³⁵ See below, section 4.1.

2.4 Self-determination of peoples

2.4.1 External self-determination

The realization of the right of self-determination³⁶ is recognized as one of the goals of the United Nations.³⁷ Common Article 1 of the 1966 Human Rights Covenants restates that right in greater detail. Based on this, the right of *external* self-determination of peoples under colonial rule, within the meaning of a *right of secession from colonial power*, has long been undisputed as an instance of permissible use of force against unjust oppression.³⁸ Beyond this core, which today has lost much of its practical significance, the right of self-determination of peoples is a concept whose personal and material scope of application has to date not been definable in a generally acceptable way, owing to its politically explosive nature. What categories of ‘peoples’ other than those under colonial power could be eligible as beneficiaries of the right of self-determination including the right to fight for one’s own destiny? Although any consensus on the definition of ‘peoples’³⁹ entitled to this right is still far away, it is accepted that at least the three following categories are entitled to such self-determination:⁴⁰ (1) The entire populations of independent and sovereign States against occupation by other States; (2) The entire populations of territories under colonial rule and comparable territories which have not yet achieved their independence; and (3) Sections of populations under foreign occupation or rule.⁴¹

The right to external self-determination thus essentially means the right of peoples to pursue their political and economic development *in freedom from foreign hegemony*. The generally recognized forms of implementing this right are the establishment of a new sovereign State, association or integration with an existing State, or amalgamation of different peoples

³⁶ See, for example, (from the extensive literature) NOWAK, above n. 16 at 5 et seq.; ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* (1995); and *Modern Law of Self-Determination*, (Christian Tomuschat, ed., 1993).

³⁷ U.N. CHARTER, Art. 1, para. 2 and Art. 55.

³⁸ See the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960, adopted by the United Nations General Assembly in resolution 1514 (XV): UNGA res. 1514 (1960).

³⁹ See, in this connection, the survey in NOWAK, above n. 16, 20 et seq. The Human Rights Committee, in its General Comment 12/21 on Article 1 ICCPR66, does not describe the term ‘people’ in greater detail.

⁴⁰ CASSESE, above n. 36, at 59; see also ROSALYN HIGGINS, *PROBLEMS AND PROCESS* 121–8 (1994).

⁴¹ See also Resolution on Definition of Aggression, General Assembly Resolution 3314(XXIX) of 14 December 1974: UN doc. A/9631, Art. 7, stating: ‘[n]othing in this Definition . . . could in any way prejudice the right of self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.’

into a federal State.⁴² Any such decision has to give due consideration to the free will of the people affected, that is, it must be taken on the basis of a referendum.

Examples of peoples recognized by the United Nations as being clearly entitled to independence from colonial and similar foreign dominance are no longer numerous.⁴³ Regarding other instances where peoples are living under foreign occupation, domination or subjugation, States are deeply divided.⁴⁴ It is clear, at one end of the spectrum, that minorities do not possess any right of secession if they live in multi-ethnic States which respect the principles of internal self-determination.⁴⁵ At the other end, it is undisputed that peoples whose territory is held by a foreign power by force,⁴⁶ or whose self-determination has otherwise been nullified in a manner contrary to international law,⁴⁷ have the right to gain independence from such illegal control. In all these cases, international law does not forbid the use of force, but, with the exception of States' self-defence against occupation by a foreign army, does not authorize it, either.⁴⁸ States as well as the United Nations normally do not expressly approve of the use of force by liberation movements that more or less represent those peoples, but nevertheless they tolerate it.⁴⁹

2.4.2 *Internal self-determination*

The right to internal self-determination⁵⁰ encompasses the right of a people within a State to determine its own political and socio-economic status freely and without oppression. This right may be realized by the conferring of autonomy on minority peoples within an existing State or

⁴² Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations. United Nations General Assembly Resolution, UN doc. A/RES/2625 (XXV) (1970).

⁴³ These essentially include the Western Sahara and Palestine. See also the case of East Timor.

⁴⁴ CASSESE, above, note 36, at 90 et seq.

⁴⁵ See United Nations General Assembly Resolution 2625, above n. 42: 'Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.' Similarly the final document adopted by the Vienna World Conference on Human Rights; UN doc. A/CONF.157/23, para. 2.

⁴⁶ CASSESE, above n. 36, at 99.

⁴⁷ A. CRISTESCU, THE RIGHT TO SELF-DETERMINATION, HISTORICAL AND CURRENT DEVELOPMENTS ON THE BASIS OF UNITED NATIONS INSTRUMENTS, UN Sales No. E.80.XIV.3, para. 173 (1980).

⁴⁸ CASSESE, above n. 36, at 153, speaks of a 'legal licence' in contrast to a 'legal right.'

⁴⁹ See, for example, VERDROSS & SIMMA, above n. 30, at 245, accepting an entitlement on the part of liberation movements to realize their right of self-determination 'by all necessary means.' A certain entitlement to the use of armed force by an organization representing the lawful holders of a right of secession can be concluded from the fact that the suppression by force of the right of self-determination constitutes a crime within the meaning of Article 19 of the Draft Articles on State Responsibility, and may therefore be classified as an act of self-defence.

⁵⁰ See CASSESE, above n. 36, at 101 et seq.; see also Allan Rosas, *Internal Self-Determination* in Tomuschat, above n. 36, at 230; and Nowak, above n. 16, at 23.

by granting them rights of participation in democratic decision-making equal to those of the majority population.⁵¹

What means are available to peoples in cases of constant violations of their right to internal self-determination? Are they entitled to the use of force? Many authors acknowledge, at least implicitly, a right of oppressed peoples to rise up in violent revolt in order to establish a government which allows the entire population without distinction to participate in the political process.⁵² The prohibition of force laid down in Article 2, paragraph 4, of the Charter of the United Nations does not conflict with this interpretation, since the use or threat of force is prohibited only in the international sphere.⁵³ Other authors go further and argue that political minorities which are severely discriminated against on account of their individuality ought to be granted a right of secession in the sense of a right of self-defence, which might even be realized by violent means in cases of military oppression.⁵⁴ However, this view conflicts with the practice of the overwhelming majority of States which have to date denied such groups a right to secession.⁵⁵

2.4.3 Conclusion

International law does not directly grant individuals participating in violent actions aimed at the exercise of the right of peoples to self-determination a right to use force. Self-determination is a collective right⁵⁶

⁵¹ See CASSESE, above n. 36, at 108 et seq. United Nations General Assembly Resolution 2625, above n. 42. See also the quotation in footnote 45. The assertion made in that declaration, according to which only a 'Government representing the whole people belonging to the territory without distinction as to race, creed or colour,' was expressly reaffirmed in the *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights, UN doc. A/CONF.157/23, para. 1.2.

⁵² See NOWAK, above n. 16, at 23 and Rosas, above n. 50, at 249, referring to Article 20, paragraph 2, of the African Charter on Human and Peoples' Rights, which explicitly states that 'oppressed peoples' have the right to 'free themselves from the bonds of domination by resorting to any means recognized by the international community.' See also CASSESE, above n. 36, at 145 and 198. He is less explicit but, he too, does not rule out a right to resistance by force. See also OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 119 (1995).

⁵³ Albrecht Randelzhofer, Article 2(4), in *THE CHARTER OF THE UNITED NATIONS — A COMMENTARY* 112 et seq. (Hermann Mosler and Bruno Simma, eds., 1994).

⁵⁴ See, for example, Karl Doehring, *Das Selbstbestimmungsrecht der Völker als Grundsatz des Völkerrechts*, *BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT* 49 (1974); and Karl Doehring, *Self-Determination*, in Mosler and Simma, above n. 53, at 70, describing the right of self-determination in cases of grave violation of fundamental rights of a minority people as a right of self-defence which may possibly justify the use of force. See also Dietrich Murswick, *The Issue of a Right of Secession Reconsidered*, in Tomuschat, above n. 36, 38–9; and Cristescu, above note 47, at para. 173. UNGA res. 2625 (XXV), above n. 45 also seems to point in the same direction, since it permits the converse conclusion that the right of self-determination may rank above the principle of territorial sovereignty in cases of infringement of the right to internal self-determination. Citing this provision, CASSESE, above, note 36, at 120, argues that between the two aspects of the right of self-determination a link could thus be established which may make legitimate a right to secession of 'racial or religious groups.' This interpretation is, however, strongly rejected by Daniel Thürer in *Self-Determination*, 8 *EPIL*, at 474.

⁵⁵ See, for example, CASSESE, above n. 36, at 122.

⁵⁶ See, for example, NOWAK, above n. 16, at 14–15.

from which it is not possible directly to deduce an entitlement to individual use of force against a State. However, as will be shown in the next section, international humanitarian law entitles combatants to fight in international armed conflicts as well as national wars of liberation. In other situations, the right of self-determination, as recognized in international law, lends the use of violence by individuals a certain legitimacy if such acts were performed by them as members of a liberation movement which can invoke this right on grounds recognized or validated by international law. Within the framework of Article 1F(b) CSR51, this can be reflected by properly construing the notion of non-political crime.⁵⁷

2.5 Armed combat in international humanitarian law

Modern international law forbids the use of force and war as means of settling disputes between States.⁵⁸ Exceptions to this are the right to self-defence of States under attack,⁵⁹ and the power of the United Nations Security Council to order or authorize, on the basis of Chapter VII of the UN Charter, coercive measures in situations that threaten world peace. That system is not called into question by international humanitarian law. As *jus in bello*, this branch of international law gives no indication as to when a State or any other group is permitted to resort to measures of force.⁶⁰ It takes war as a fact and is generally applicable whenever armed conflicts actually occur, despite the existing prohibition of force. For this reason, rights of individuals to take action against State authorities may be inferred from international humanitarian law to a very limited extent only. The limited scope of applicability of humanitarian law to armed conflict as defined by the 1949 Geneva Conventions on international armed conflicts and the two Protocols Additional to the Geneva Conventions of 1977 further limits the possibilities of invoking this branch of international law to justify the use of force. Where acts of violence do not exceed a specific threshold defined by these agreements, the conflict will fall outside the scope of application of international humanitarian law.

2.5.1 Combatant status in international armed conflicts and national wars of liberation

In the case of *international* armed conflicts, that is, conflicts between States, international humanitarian law recognizes a right of soldiers to fight, that is, permits them, in accordance with the *jus in bello*, to take part in hostilities without being held accountable under criminal law for their

⁵⁷ See below, section 4.1.

⁵⁸ See U.N. CHARTER, Art. 2, para. 4.

⁵⁹ See U.N. CHARTER, Art. 51.

⁶⁰ See, for example, Hans-Peter Gasser, *International Humanitarian Law*, in HUMANITY FOR ALL, THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT 506–7 (Haug, ed., 1995).

actions. This idea was not codified until 1977 when the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) was adopted.⁶¹ Article 43(2) of this Protocol provides that ‘Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains . . .) are combatants, that is to say, they *have the right to participate directly in hostilities*’ (emphasis added). Article 43(1) defines as ‘armed forces of a Party to a conflict’, ‘all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party.’

Entitlement thus exists to exercise force, subject to the limitations of the law of warfare (the ‘law of The Hague’), without personal accountability⁶² only if the following requirements are met:⁶³ (1) *Membership of an armed group which is under a command, that is, organized on a military basis.* Persons who carry out acts of violence as terrorists or in an otherwise unorganized manner cannot therefore claim combatant status;⁶⁴ (2) *Affiliation of such armed group to a party to the conflict.* Since only international conflicts are dealt with in Protocol I, the armed group has to have links with a State or other subject of international law;⁶⁵ and (3) *The existence of an internal disciplinary regime.*⁶⁶ This requirement is intended to ensure that the rules of armed conflict are observed by the members of armed forces.

⁶¹ Gasser, above n. 60, at 512. A forerunner of the modern definition of ‘combatant’ does, however, appear in the Regulations Respecting the Laws and Customs of War on Land, Annex to The Hague Convention respecting the Laws and Customs of War on Land, of 18 October 1907, and indirect definitions are contained in the different descriptions of protected persons in the First, Second and Third Geneva Conventions; see for example, Geneva Convention (I) on the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Art. 13, 75 *UNTS* 31 (1950) and Geneva Convention (III) Relative to the Treatment of Prisoners of War, Art. 4, 75 *UNTS* 135 (1950).

⁶² See MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 239 (1982).

⁶³ *Ibid.*, 237–38, and Knut Ipsen, *Combatants and Non-Combatants*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 65 et seq. (Michael Bothe & Dieter Fleck, eds., 1995).

⁶⁴ See BOTHE ET AL., above n. 62, at 237, and Gasser, above n. 60, at 541: ‘Volunteer corps or . . . self-appointed fighters have always been excluded from military operations under the law of war.’ Under Article 44, paragraph 3, of Protocol I, combatants have to distinguish themselves from the civilian population by openly carrying arms. An exception to this rule is, however, granted if members of an armed group cannot reasonably be expected to fulfil that requirement owing to the ‘nature of the hostilities’; this is accepted in the case of national wars of liberation or the use of guerrilla methods in the event of armed occupation. See Gasser, above n. 60, at 542–43; BOTHE ET AL., above n. 62, at 251 et seq., and COMMENTARY TO THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, OF 8 JUNE 1977, 530 et seq. (Yves Sandoz et al., eds., 1986).

⁶⁵ That does not, however, mean that only members of national armies are covered by this stipulation; in the case of a military occupation, for example, resistance groups also have links with a party to the conflict. However, members of guerrilla movements fighting against a State do not qualify for combatant status.

⁶⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Art. 43(1).

According to Article 1, paragraph 4, of Protocol I, the same rules apply in the case of conflicts ‘in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination’. The lawful holders of a right to self-determination are therefore privileged under international humanitarian law, with their status being deemed equivalent to that of States.⁶⁷ Therefore, armed members of any such privileged resistance or liberation movement enjoy combatant status in the same way combatants in international armed conflicts do.

It may be concluded from the rules of the law of war that in situations of interstate armed conflicts, regardless of the question of admissibility of the conflict in itself, international humanitarian law deems acts of violence to be irrelevant for purposes of criminal law if carried out against military targets by a member of an armed group serving in that function. This is, however, only true in respect of acts of violence which do not constitute war crimes⁶⁸ and crimes against humanity.

2.5.2 Internal armed conflicts

International humanitarian law applicable to internal armed conflicts,⁶⁹ that is, a situation of war which essentially differs from a typical international conflict only insofar as no military units of a second State are actively involved in the conflict, does *not recognize* insurgents as *combatants*. Should insurgents in civil wars fall into the power of the State, they will not have prisoner-of-war status even if they belong to an organization which satisfies the definitional requirements of ‘armed forces’ within the meaning of Article 43 of Protocol I.⁷⁰ Although such persons are protected by the fundamental guarantees set forth in Articles 4 to 6 of Protocol II,⁷¹ it is not prohibited to *punish* them for having taken part

⁶⁷ This is so whenever the authority representing a people undertakes, by means of a declaration, to the depositary of the Geneva Conventions, to observe the Conventions and Protocol I (Art. 96, para. 3). On the other hand, it should be noted that Article 1, para. 4, of Protocol I says nothing about when peoples are entitled to exercise their right of self-determination, but refers in this connection to general international law; see, for example, BOTHE ET AL., above n. 62, at 50 et seq.; SANDOZ, above n. 64, at 52 et seq.; and HEATHER A. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS 149 et seq. (1988).

⁶⁸ Articles 145 and 146 of the Fourth Geneva Convention and Articles 85 et seq. of Protocol I on grave breaches of international humanitarian law are of special importance. On the law of warfare see, for example, Gasser, above n. 60, at 539–40 and 544 et seq., and Stefan Oeter, *Methods and Means of Combat*, in FLECK, above n. 63, 111 et seq.

⁶⁹ Under Article 1 of Protocol II the guarantees set out in this agreement apply only if the following requirements, which are to be met cumulatively, are satisfied: (1) Control by the insurgents of a part of the territory of the State, (2) A certain degree of organization on the part of the rebels, and (3) The regular army’s participation in the conflict on the opposite side.

⁷⁰ See above, section 2.5.1.

⁷¹ These articles actually constitute a mini-convention of human rights which have to be respected in such situations of violence and which partly go beyond the inviolable guarantees that are provided for in the human rights treaties and are also applicable in such situations. In particular, insurgents are to be treated humanely and guaranteed adequate care and a means of subsistence. See Protocol II, Art. 5, above n. 69.

in the armed conflict if, as would usually appear to be the case,⁷² such acts are stated as being punishable under national criminal law.⁷³ However, Article 6(5) of Protocol II makes a concession for the fact that these acts were committed in a general situation of war by providing that, following the termination of the armed conflict, the parties have to endeavour to offer the broadest possible amnesty.⁷⁴ However, no actual obligation to do so exists.⁷⁵

Article 3 common to the four Geneva Conventions has a less clearly worded but undoubtedly wider scope of application than that of Protocol II. Despite the lack of a precise description of the applicability requirements of Article 3, there is general agreement in the literature that its basic stipulations apply not only in situations of internal armed conflicts as defined by Protocol II but are also valid in situations that, owing to the sporadic nature of the use of force or to the absence of permanent territorial control by one party, cannot be described as a typical civil war.⁷⁶ A party which holds adversaries in its power is, in situations covered solely by the provisions of Article 3, *not obliged* to refrain from punishing those persons on account of their participation in the armed hostilities, but must treat them humanely.

That common fighters in an internal armed conflict or an Article 3 situation cannot be treated exactly like common criminals is increasingly accepted by States not only in situations where the insurgents manage to take power, but also where they cannot achieve this goal. Peace agreements in Central America,⁷⁷ Asia,⁷⁸ and Africa,⁷⁹ have recognized that persons belonging to the armed forces of insurgents will not be punished after the end of the conflict but rather be reintegrated into the community or, be released from detention or internment if still in custody. Such provisions probably are more an expression of a political necessity to forgive if one

⁷² See MICHEL VEUTHEY, *GUÉRILLA ET DROIT HUMANITAIRE* 223 et seq. (1976).

⁷³ See Protocol II, Art. 6, para. 2 (c). Another issue, of course, is the duty to punish such persons if they have committed war crimes and crimes against humanity.

⁷⁴ *Ibid.*, Art. 6, para. 5.

⁷⁵ See SANDOZ, above n. 64, at 1402.

⁷⁶ See, for example, COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 36–7 (Jean Pictet et al. eds., 1958).

⁷⁷ See, for example, Costa Rica — El Salvador — Guatemala — Honduras — Nicaragua: Agreement on Procedure for Establishing Firm and Lasting Peace in Central America, August 7, 1987; reprinted in I.L.M. 1164, para. 1.B (1987); Letter from El Salvador transmitting the text of the Caracas Agreement signed on 21 May 1990 by the Government of El Salvador and the FMNL, UN doc. A/46/23129; and Annex and Report of the Secretary-General on the Activities of ONUSAL Since the Cease Fire between the Government of EL Salvador and the FMNL, UN doc. S/23999, reprinted in THE UNITED NATIONS AND EL SALVADOR 1990–1995, at 165 and 238 (U.N., ed., 1995).

⁷⁸ See, for example, India-Sri Lanka Agreement to Establish Peace and Normalcy in Sri Lanka of July 29, 1987, I.L.M., 1175, para. 2.11 (1987); and Paris Conference on Cambodia, Agreements Elaborating the Framework for a Comprehensive Political Settlement of the Cambodia Conflict, Final Act of the Paris Conference on Cambodia, UN doc. A/46/608, I.L.M., Art. 21–2 (1992).

⁷⁹ See, for example, General Peace Agreement for Mozambique, UN doc. S/24635; reprinted in THE UNITED NATIONS AND MOZAMBIQUE 1992–1995, 105 et seq. (U.N., ed.).

wants to achieve peace and less an indication of an emerging *opinio juris* leading to new customary law prohibiting punishment for insurgents. They nevertheless indicate that States faced with problems of insurgency and civil wars accept that persons who have fought on the wrong side do not necessarily deserve the same treatment and punishment as common criminals unless they have committed war crimes or crimes against humanity.

2.5.3 Conclusion

Under international humanitarian law: (1) Participation in an international armed conflict does not constitute an offence unless an individual is accountable for war crimes or crimes against humanity; (2) The same is true of participation in a war of liberation against colonial or similar foreign rule; (3) Persons who have taken part in military action in civil wars may indeed be punished, but must receive better treatment than common offenders and should, as is confirmed by State practice, to the extent possible be able to benefit from an amnesty at the end of the conflict.

A person who has perpetrated acts of violence in military operations during *international* armed conflicts or in connection with military operations in wars of liberation will not therefore come under the non-political crime exclusion clause, as set forth in Article 1F(b) CSR51 since that person is not an offender. The questions as to how the preferential treatment of participants in an internal armed conflict can be reflected in the application of Article 1F(b) will be discussed below.⁸⁰ In both cases, the exclusion clause contained in Article 1F(a) remains applicable if there are serious reasons to consider that war crimes or crimes against humanity have been committed.

3. Privileges for offenders in extradition law

Extradition law privileges certain offenders through non-extradition not because it legitimizes the use of violence in certain situations but because States are of the opinion that, as in the case of non-extradition for military or political acts, there is no common interest of States to bring these offenders to justice or, as in the case of the so called discrimination clause, because the prosecution would violate the offender's basic human rights.

⁸⁰ See below, section 3.1.2.

3.1 Non-extradition for political offences

3.1.1 Background

Today most States accept the principle of non-extradition of political offenders in their statutes or extradition treaties.⁸¹ This bar to extradition is based on a variety of considerations.⁸² Historically, in relations between States having differing and incompatible political systems (republics and monarchies in the 19th century, socialist and capitalist States in the Cold War era, and so forth), it was a question of affording protection to one's own enemy's enemies. Following the end of these antagonisms, the thinking now prominent is rather that in such cases the prosecution of the offence is merely a pretext for political persecution or that the position of the person to be extradited would be considerably aggravated on account of his political opinions. Also important is the concern for avoiding foreign-policy problems. Since it is obviously not possible to extradite in all cases of political offences (for example, instances involving offences relating purely to the expression of opinions), States would, whenever they put forward the plea of a political offence, be obliged to comment on the illegitimacy of the prosecution and hence also on the political system of the requesting State, without being able to refer to established principles. In this context, Lammasch, one of the classic authors of the literature on extradition law, aptly noted as long ago as 1887 that if extradition for political offences cannot be granted in principle and in general, extradition in such cases has to be denied in principle.⁸³ Moreover, it was already recognized in the last century that both the dangers for the State of refuge and its interest in ridding itself of such criminals are far less in cases involving political crimes than in cases involving ordinary criminals.⁸⁴

Furthermore, there is an historical connection between the recognition of non-extradition for political offences and the right of resistance. Up to the beginning of the 19th century, extradition for crimes of a political nature was in fact the rule, and there were hardly ever any instances of extradition involving common crimes. The introduction of the political offence exception to extradition in the 19th century was, as Stein put it, the consequence of the liberal constitutional ideas of that time which

⁸¹ See, for example, 1957 European Convention on Extradition, Art. 3, *ETS* No. 024; United Nations Model Treaty on Extradition, Art. 3, UN doc. A/Res/45/116 (1991); Swiss Federal Law concerning International Judicial Assistance in Criminal Matters of 1981, Art. 3 (SR 351.1); and most bilateral extradition treaties. Regarding the elaboration of this concept, see, for example, PETER FELCHLIN, *DAS POLITISCHE DELIKT* 39 et seq. and 139 et seq. (1979); HANS SCHULTZ, *DAS SCHWEIZERISCHE AUSLIEFERUNGSRECHT* 407 et seq. (1953); TORSTEN STEIN, *DIE AUSLIEFERUNGS-AUSNAHME BEI POLITISCHEN DELIKTEN* 49 et seq. (1983); and *RESTATEMENT OF THE LAW, THIRD, THE FOREIGN RELATIONS LAW OF THE UNITED STATES*, vol. I, § 476 (2) (1987).

⁸² A survey of the various supporting reasons appears in FELCHLIN, above n. 81, 145 et seq.

⁸³ HEINRICH LAMMASCH, *AUSLIEFERUNGSPFLICHT UND ASYLRECHT* 235 (1887).

⁸⁴ *Ibid.*, 237–8.

subjected the State to legal boundaries and granted the citizen the *right to resist State authority* if that authority offended against justice and morality and ceased to be the expression of the will of the people.⁸⁵

3.1.2 The notion of political offences

Whereas it is accepted by most States that extradition for political crimes should not take place, a universally accepted definition of what constitutes such crimes is lacking. In State practice, different types of political offence can be distinguished:⁸⁶ *Absolute or purely political offences*, which generally give rise to refusal of extradition, are direct assaults on the integrity or security of the State or interferences with elections or ballots. These crimes include treason, espionage, subversive propaganda, founding of or membership in a prohibited political party or election fraud. *Relative or related political offences* are offences under ordinary law which are in themselves regarded as common crimes. However, they have been committed with a clear political motivation in order to bring about a change in the balance of political power within a specific State. Combinations of absolute and relative political offences may exist: *Compound political offences* are punishable acts whose constituent elements are the combination of a fully political offence and a common crime.⁸⁷ Crimes coming within the category of *connected political offences* are common crimes which precede a political offence in order to prepare for it, or which are committed simultaneously with a political offence in order to safeguard the consequences of the political crime or to avert criminal prosecution of such offences. Compound and connected political offences are treated like absolute political offences if the political character of the deed outweighs the character of a common crime.

While the category of absolute political crimes usually does not pose major demarcation difficulties, the relative political crimes are more difficult to define since they cannot be differentiated from a non-political crime by any objective factors. This is why some States do not consider them as a category of political crimes. Other States disagree about how to define this notion.

One approach which is particularly suited to respond adequately to situations of violent internal conflicts involving insurgents or resistance

⁸⁵ See STEIN, above n. 81, at 50. Regarding the acceptance under 19th century extradition law of the idea in principle that political, even revolutionary, rebellion against an absolute or otherwise unconstitutional rule should not be treated equally with common crimes, see, for example, OTTO LAGODNY, *DIE RECHTSSTELLUNG DES AUSZULIEFERNDEN IN DER BUNDESREPUBLIK DEUTSCHLAND* 33 et seq. (1987) and FELCHLIN, above n. 81, 149 et seq.

⁸⁶ See, for example, SCHULTZ, above n. 81, 415 et seq.; STEIN, above n. 81, 63 et seq. and KÄLIN, *GRUNDRISSE DES ASYLVERFAHRENS* 166, 212 et seq. (1990). For use of a somewhat different terminology, see also FELCHLIN, above n. 81, 92 et seq.

⁸⁷ One example of such an offence is the assassination of a head of State, which combines elements of high treason and homicide.

groups has been developed by the Swiss Federal Tribunal. In its leading case, the Tribunal summarized and synthesized its case law, stressing that in order to be accepted as political, a common crime carried out with a political motivation must be of a predominantly political nature:

A predominantly political nature has to be assumed if the punishable act took place in connection with a struggle for power within the State or was committed for the purpose of freeing someone from the constraints of a State that admits no opposition. A close, direct and clear link must exist between such acts and the pursued aims. Moreover, it is necessary that the violations of the legally protected third-party interests are commensurate with the persecuted political aim and that the interests involved are sufficiently important for the act to appear at least as fairly understandable.⁸⁸

Similar concepts and considerations can be found, for example, in British and German extradition cases.⁸⁹ The classification of a crime as a political offence is accordingly possible if the offence satisfies the following requirements:⁹⁰ (1) In accordance with the ‘preponderance theory’, the offence has to have been perpetrated in connection with *a struggle for political power within the State or in the course of a rebellion or civil war*, or as part of a violent movement which seeks to alter the balance of power within the State, or as an incident or single occurrence of a general political movement in the struggle for power, where the parties resort to similar means.⁹¹ Even an isolated act of an individual can, according to the phrasing of the Swiss Federal Tribunal, be classified as a political crime if the offence is perpetrated in a totalitarian State and is directed against such a regime. (2) The offence must be *motivated by political ideology*. However, this motivation does not in itself lend the offence a predominantly political nature, even when it is recognized that such an offence was committed for altruistic, idealistic reasons.⁹² Rather, the act must at least be capable of leading to its attainment,⁹³ that is, there must be a close, direct and clear link between the act and the aim pursued.⁹⁴ (3) The means employed must be commensurate with the persecuted political interests, that is, there has to be *proportionality* between the aim pursued and the means employed.⁹⁵ This requirement is absent where the offence creates a collective danger which harms or at least imperils the life or physical integrity of an indeterminate number of persons who

⁸⁸ BGE 106 Ib 307, 309 (unofficial translation).

⁸⁹ Cf. STEIN, above n. 81, 183 et seq., 283 et seq.

⁹⁰ See STEIN, above n. 81, 62 et seq. and FELCHLIN, above n. 81, 334 et seq.

⁹¹ See FELCHLIN, above n. 81 at 336.

⁹² See BGE 101 Ia 605–06.

⁹³ See FELCHLIN, above n. 81 at 336.

⁹⁴ See BGE 110 Ib 280; BGE 109 Ib 64; and BGE 106 Ib 309.

⁹⁵ According to the Federal Tribunal, the violation of legally protected third-party interests must be in due proportion to the political aim, and the interests involved must make the offence appear at least as fairly understandable. See BGE 110 Ib 286; and BGE 109 Ib 64.

are not or only marginally involved in the political struggle.⁹⁶ Therefore, perpetrators of acts of terrorism, such as bomb attacks, who accept that their victims are arbitrarily chosen cannot be described as political offenders. In the case of deliberate killing outside the realm of armed conflicts it is additionally necessary that any such act be the only way to achieve the intended political aim; in contrast, military operations in situations of internal armed conflict and insurgencies most often fulfill these requirements.⁹⁷(4) Last, the relationship between the means employed and the aims to be achieved is further qualified by the limitation whereby the plea of a political offence may not be admitted if the State requesting extradition is a democratic State where change can be achieved by non-violent means and whose courts possess genuine autonomy vis-à-vis the political authority.⁹⁸ Conversely, therefore, a relatively political offence is all the more acceptable *the clearer is the unconstitutional nature* of the opposed regime.

3.1.3 Limiting non-extradition of political offences in cases of terrorism

In modern extradition law, certain offences, specifically listed in treaties⁹⁹ or statutes,¹⁰⁰ are expressly excluded from the political offence category.¹⁰¹

⁹⁶ See BGE 110 Ib 286.

⁹⁷ See BGE 109 Ib 71. The Swiss Federal Tribunal regards as disproportionate crimes of willful killing those which take place outside the realm of armed conflicts, and in which the victim held only a subordinate position within the organization of the State. See, for example, BGE 106 Ib 310.

⁹⁸ See BGE 115 Ib 85–6; and 113 Ib 180.

⁹⁹ See, for example, 1977 European Convention on the Suppression of Terrorism, Art. 1, 1137 UNTS 93 (1977); and, as a very recent example, 1998 Convention on the Suppression of Terrorist Bombing, Art. 1. See also Declaration to Supplement the Declaration on Measures to Eliminate International Terrorism, 17 Dec. 1996, Art. 6, A/52/653 (1996): ‘In this context, and while recognizing the sovereign rights of States in extradition matters, States are encouraged, when concluding or applying extradition agreements, not to regard as political offences excluded from the scope of those agreements offences connected with terrorism which endanger or represent a physical threat to the safety and security of person, whatever the motive which may be invoked to justify them.’

¹⁰⁰ See, for example, Swiss Federal Law concerning International Judicial Assistance in Criminal Matters of 1981, Art. 3(2), excluding the possibility to classify the offence as political if it is ‘(a) . . . aimed at the extermination or suppression of a section of the population on the grounds of its nationality, race or religion, or its ethnic origins, social tendencies or political opinions, or (b) Appears to be particularly atrocious because the perpetrator, through extortion or coercion, endangered or threatened to endanger the freedom, life or physical integrity of persons, in particular by hijacking, hostage-taking, or the use of means of mass extermination, or (c) Constitutes a serious breach of international humanitarian law within the meaning of the Geneva Conventions of 12 August 1949 and Protocols Additional thereto’ (unofficial translation).

¹⁰¹ See, for example, Additional Protocol to the European Convention on Extradition of 15 December 1975, Art. 1, ETS No. 086, which provides that: ‘[P]olitical offences shall not be considered to include the following: (a) the crimes against humanity specified in the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 by the General Assembly of the United Nations; (b) the violations specified in Article 50 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 51 of the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea, Article 130 of the 1949 Geneva Convention relative

This normative restriction on political offences is based on the reasoning that terrorist acts, such as hijacking, hostage taking or use of bombs and also genocide, war crimes or crimes against humanity, generally threaten the international community as a whole, and increased international cooperation is therefore necessary to combat them.¹⁰² However, the demarcation between terrorist and ‘normal’ offences is in itself often problematical and could give rise to problematic consequences, particularly in regard to the application of the exclusion clauses. Thus, for example, under Article 1(e) of the 1977 European Convention on the Suppression of Terrorism, an offence has to be classified as non-political if an automatic firearm is used in its perpetration. Strict transplanting of this norm from extradition law into refugee law would mean that all members of armed forces would have to be excluded from protection under the CSR51.

3.2 The discrimination clause: Non-extradition in cases of imminent political persecution

Since the 1950s there has been a growing recognition that extradition for non-political offenders should not take place if a request for extradition is submitted in respect of a common crime but is in fact made with the intention of prosecuting the extradited person on political grounds. Article 3(2) of the 1957 European Convention on Extradition provides that extradition shall not be granted ‘if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person’s position may be prejudiced for any of these reasons.’ This so called discrimination clause has its origins in moves by UNHCR to have Article 33 CSR51 incorporated in extradition law.¹⁰³ It has found its way into many other multilateral or bilateral treaties but is not yet universally recognized. It is significant that nowadays the applicability of the discrimination clause is even recognized in cases of terrorism.¹⁰⁴

to the Treatment of Prisoners of War and Article 147 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War; (c) any comparable violations of the laws of war having effect at the time when this Protocol enters into force and of customs of war existing at that time, which are not already provided for in the above-mentioned provisions of the Geneva Conventions.’

¹⁰² See, for example, STEIN, above n. 81, 86 et seq.

¹⁰³ Robert Linke, *Rapport*, REVUE INTERNATIONALE DE DROIT PÉNAL 454 (1968).

¹⁰⁴ See 1977 European Convention on the Suppression of Terrorism, above n. 99, Art. 5; and Convention for the Suppression of Terrorist Bombing, above n. 99, Art. 12.

4. Consequences for the application of the exclusion clauses

4.1 The notion of non-political crime in Article 1F(b) CSR51

Article 1F(b) CSR51 historically was introduced as an interface with extradition law and its concepts of 'political crimes'.¹⁰⁵ Thus, principles of extradition law may provide guidance to authorities when taking their decisions as to whether an offence is a common (non-political) crime within the meaning of Article 1F(b) CSR51,¹⁰⁶ or whether, as a political offence, it prevents exclusion from the protection afforded by the Convention. However, binding definitions of (non-)political crimes both in extradition and refugee law are lacking on the international level. This is one reason why State practice regarding Article 1F(b) is so varied. Despite this fact, it makes sense for authorities to refer to extradition law when applying Article 1F(b) CSR51.

In this context it is especially helpful to have a notion of relative political crimes which, as described above,¹⁰⁷ accepts the political character of a common crime if (1) the act has been perpetrated in connection with a struggle for political power and was (2) motivated by political ideology, if (3) there was not only a close, direct and clear link between the act and the aim pursued but also proportionality between the aim and the means employed (for example, no acts of terrorism, such as bomb attacks, where victims are arbitrary), and if (4) the means employed were commensurate with the persecuted political interests in the sense that there were no peaceful ways available to reach the goal (for example, because of a lack of democratic decision-making or judicial protection). Taking this approach one would often accept the political nature of a crime in cases of persons who have carried out military activities in situations of civil war if the offence was proportionate. In such cases, violent acts are carried out as part of a struggle over power in the State, they are politically motivated and there is a direct link between the act and the political aim if the activities concerned took the form of military actions, for example, armed attacks on military, para-military or armed police forces of the government. The requirement of proportionality is usually met in cases of military actions if, in an internal armed conflict in the sense of Protocol II or common Article 3, the norms of international humanitarian law have been respected by the perpetrator. Thus, it is correct not to exclude refugees who, in situations of civil war and

¹⁰⁵ GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 103–4 (1996).

¹⁰⁶ In addition, it has to be decided whether the crime in question is serious enough to warrant exclusion as not every extradition crime is automatically a 'serious' crime in the sense of Article 1F(b) CSR51. See GOODWIN-GILL, above n. 105, at 104–5.

¹⁰⁷ See above, section 3.1.2.

insurgencies, have participated in combat if they have limited their actions to attacks on their military adversaries.¹⁰⁸ This conclusion is supported by European practice not excluding refugees simply for membership in groups such as the Algerian FIS, the PKK in Turkey or the LTTE in Sri Lanka.¹⁰⁹

Outside actual situations of war, the political nature of an offence can, in repressive States where fundamental human rights are grossly and systematically violated, arguably be accepted nowadays if the offence was politically motivated and directed against the State's representatives directly responsible for such violations.

References to extradition law can often be found in exclusion cases. In Switzerland, for example, an attempt on the life of a Minister of Health belonging to an extremist party was judged to be a relative political offence in the sense of the Swiss Federal Tribunal's jurisprudence and the perpetrator of that act was granted asylum.¹¹⁰ The same conclusion was reached in a case involving the killing of the driver of a convict transporter during a violent operation to free a prisoner who had received the death sentence; here again, the carefully stated reasons for the ruling were founded on the principles of extradition law.¹¹¹ British practice most clearly tends towards extradition law, particularly where relating to relative political offences. In the case of *T*, for example, the House of Lords¹¹² upheld the judgment of the Court of Appeal¹¹³ that a bomb attack on Algiers airport by Islamic fundamentalists should not, despite the political context of a struggle for State power and the political motivation of the offender, be recognized as a relatively political offence owing to the danger to which numerous innocent persons were exposed.

Such use of principles of extradition law can only take place *by analogy*: First, as there are no universally binding definitions of the notion of (non-)political crime Article 1F(b) cannot require direct application of extradition law.¹¹⁴ On the domestic level, asylum authorities are neither experts in matters of extradition law nor are they directly bound by extradition laws and extradition treaties. What is even more important

¹⁰⁸ See above, section 2.5.2. If they have committed war crimes, genocide or crimes against humanity in the context of an internal armed conflict, they are to be excluded on the basis of Article 1F(a) CSR51.

¹⁰⁹ See the references to case law in Belgium, the UK and France in the contribution by Sibylle Kapferer, this issue below, 195–221.

¹¹⁰ Asylum Appeals Commission ruling of 18 September 1995 (unpublished).

¹¹¹ Asylum Appeals Commission Records, No. 8, 49 et seq. (1993) (contrary ruling by the Federal Office for Refugees).

¹¹² *T. v. Secretary of State for the Home Department* [1996] 2 All E.R. 865.

¹¹³ *T. v. Secretary of State for the Home Department* [1995] 2 All E.R. 1042, [1994] 1 W.L.R. 545.

¹¹⁴ The text of Article 1F(b) CSR51 does not make any direct references to extradition law and nothing in the drafting history suggests that the drafters who did refer to concepts of extradition law wanted to oblige States to always exclude if an extradition to the specific country of origin of a particular person would have been possible on the basis of the applicable extradition treaty.

is the different approach in extradition and asylum procedures. While, in the former, the application of the political crime clause is a question of establishing exceptions to the general principle of extradition of criminals, the issue with regard to asylum procedures is concerned with exceptions to the principle that politically or similarly persecuted persons are in need of and deserve international protection. The United Kingdom's House of Lords aptly stressed that in extradition cases 'the political nature of the offence is an exception to a general duty to return the fugitive, whereas in relation to asylum there is a general duty not to perform a *refoulement* unless the crime is non-political.'¹¹⁵ These differences must be taken into account when using extradition law in exclusion cases and they rule out any direct applicability of extradition law in exclusion cases. Thus, it would lead to absurd results if, in countries which extradite on the basis of treaties only, the exclusion clause only could be applied if, in the particular case, an extradition treaty is in force between the country of refuge and the country of origin of the applicant for asylum.

4.2 The discrimination clause of extradition law and the need to balance

The relationship between discrimination clauses in extradition law and Article 1F(b) is a complex one not only because such clauses did not really exist when the CSR51 was drafted but also because the similarity of the discrimination clause with concepts of persecution leading to inclusion. To explore the implications of the bar to extradition in cases where a risk of political persecution exists, four sets of circumstances must be distinguished where an excludable person often will be included as a refugee:¹¹⁶ (1) The person to be extradited has committed a crime which has the nature of a common offence but, owing to the political motivation or political context of the crime, that person must expect to suffer serious disadvantages to which the perpetrator of the same crime in a non-political context would not be subject. Such disadvantages may, for example, consist of a comparatively far harsher penalty or a far less fair trial or a situation where, unlike a 'non-political offender', he would be tortured or otherwise severely mistreated; (2) The offender of a common crime has not acted with a political motivation but displays certain racial or religious characteristics or has a particular political opinion leading to a far harsher sentence, a far less fair trial or far more severe treatment (torture, and so forth) than an offender not displaying such characteristics; (3) The request is submitted in respect of a common offence with no political links but the requesting State is expected to use the extradition

¹¹⁵ *T. v. Secretary of State for the Home Department* [1996] 2 All E.R. 865.

¹¹⁶ See, for example, KÁLIN, DAS PRINZIP DES NON-REFOULEMENT 240 et seq. (1982) with numerous references; and the International Law Association, Report of the Sixty-Seventh Conference held at Helsinki, Conference, Committee on Extradition and Human Rights, 225 et seq. (1996).

in order to prosecute the offender additionally (in breach of the principle of speciality under extradition law) on political grounds for another act which is unrelated to the offence; and (4) The extradition request is submitted in respect of a common offence with no political links that was never in fact committed at all, in order to secure the surrender of a person for persecution on political grounds.

In all these cases, the discrimination clause applies and it might bar extradition. These sets of circumstances are, by analogy, of relevance for applying Article 1F(b) of the 1951 Convention. However, it is especially here that the direct application of categories of extradition law to the operation of Article 1F(b) CSR51 can have problematic consequences. Taken to its logical conclusion, the threat of political and similarly motivated persecution in the sense of the discrimination clause would mean that Article 1F(b) could *never* lead to a person's exclusion from refugee status: If there is no such threat of persecution in the specific case in question, inclusion on the basis of Article 1A(2) CSR51 would be ruled out and one need not resort to exclusion; if, on the other hand, the risk of persecution does exist, it would be impossible to exclude as the discrimination clause protects persons in risk of persecution. On the other hand, an absurd outcome is also arrived at if the applicability of the plea of a threat of political persecution is totally excluded from the scope of operation of Article 1F(b). In such eventuality, persons whose extradition is not permissible precisely on account of their being politically persecuted would not be recognized as refugees in asylum procedures! This cannot be in keeping with the purpose of the 1951 Convention.

This brings us to the question of *balancing* as part of the application of Article 1F(b).¹¹⁷ The question whether a balance has to be struck between the seriousness of the offence and the degree of threatened persecution is an important but highly controversial issue. Recent decisions from common law countries (Canada, United Kingdom, Australia, New Zealand and now also the USA) have stressed that no balancing can take place in the application of Article 1F(b).¹¹⁸ However, this opinion conflicts with what still might be a majority view that favours such an approach. UNHCR has long emphasized that it is necessary 'to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared'.¹¹⁹ The Asylum

¹¹⁷ See also Michael Bliss, in this issue below, 92–132.

¹¹⁸ See, for example, *T. v. Secretary of State for the Home Department*, [1996] 2 All E.R. 865; *Malouf v. Canada* [1995] 190 N.R. 230; *Tenzin Dhayapka v. Minister for Immigration and Ethnic Affairs*, Federal Court of Australia Decision No. 942/95 (1995); *RDS v. RSA* [1997] High Court of New Zealand Decision No. 586/97; and *INS v. Aguirre-Aguirre*, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999). This last decision is based on US law only. It stresses the non-binding nature of the UNHCR Handbook and does not discuss Article 1F(b) from an international law perspective.

¹¹⁹ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1979, 37, para. 156.

Appeals Commission in Switzerland,¹²⁰ and the Supreme Court in the Netherlands,¹²¹ have stressed the need for the interests involved to be weighed. This approach has also been adopted by the European Union in its joint position of 1996 on the harmonized application of the definition of the term refugee.¹²² The prevailing doctrine also accepts the necessity of weighing up the interests involved.¹²³ Goodwin-Gill believes that ‘a balance must be struck between the nature of the offence presumed to have been committed and the degree of persecution feared. A person with a well-founded fear of very severe persecution, such as would endanger life or freedom, should be only excluded for the most serious reasons.’¹²⁴ At the same time, he stresses that exclusion is generally justified in the case of a serious crime.¹²⁵ This position has previously been adopted by Grahl-Madsen.¹²⁶ He too emphasizes that Article 1F(b) of the 1951 Convention has to apply if it is concluded that a crime is sufficiently serious to justify exclusion, and he fixes the threshold for this at a high level. Nevertheless, he can agree to the striking of a balance in cases where offenders are under threat of very severe political persecution in their home country.¹²⁷

In our opinion, *striking a balance*, as is recommended by UNHCR and the European Union, remains the only solution to the dilemma caused by the discrimination clause of extradition law presented above. Balancing places the seriousness of the offence in relation to the nature of the threatened persecution. A person who has perpetrated an especially cruel or grave non-political crime but can expect relatively minor disadvantages on account of his race, religion, political opinion, and so forth, does not merit the rather far-reaching protection of the Convention even though he or she might not be extradited. Conversely, persons who have committed a crime which, although serious, is not a particularly gross offence do not automatically forfeit the protection of refugee law if they are under threat of extremely harsh political persecution. Resorting to the device of weighing the interests involved is the only means of bringing the

¹²⁰ Asylum Appeals Commission Records, 1993, No. 8, 49 et seq.

¹²¹ *The State of the Netherlands v. V.*, UNHCR Data Bank CAS/NLD/013 (1988).

¹²² Joint Position of the Council of the European Union, of 4 March 1996, on the harmonized application of the definition of the term ‘refugee’ in Article 1 of the Geneva Convention of 28 July 1951 relating to the Status of Refugees: Paragraph 13.2 states the following with regard to Article 1F(b) of the 1951 Convention: ‘The severity of the expected persecution is to be weighed against the nature of the criminal offence of which the person concerned is suspected . . . Particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes. This applies both to the participants in the crime and to its instigators.’

¹²³ See GOODWIN-GILL, above n. 105 and ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW*, vol. I, (1966).

¹²⁴ GOODWIN-GILL, above n. 105, 106–7.

¹²⁵ *Ibid.*, 104.

¹²⁶ See GRAHL-MADSEN, above n. 123, at 297–8.

¹²⁷ *Ibid.*, 298.

Convention into line with the more recent development of discrimination clauses in extradition law and still retaining the possibility of exclusion as envisaged by Article 1F(b) CSR51.

Balancing also helps to solve the situations where international law legitimizes acts of violence which cannot be regarded as relative political offences.¹²⁸ Such cases include the following sets of circumstances discussed above as legitimate instances of violent resistance: (1) Violent, but proportional, resistance by an individual against persons attempting to order him to commit an international crime, in particular a war crime or a crime against humanity;¹²⁹ and (2) Proportional acts of self-defence or assistance to victims in a situation of distress against persons who are directly responsible for serious violations of human rights or war crimes.¹³⁰ If such persons have a well-founded fear of persecution, they deserve international refugee protection despite the fact that, objectively, they have committed acts of violence, as in these cases almost automatically the seriousness of persecution¹³¹ outweighs the seriousness of the crime committed.¹³²

4.3 The operation of Article 1F(b) in cases of terrorism

Specific issues are raised by politically motivated terrorism and related attempts to restrict the applicability of the 1951 Convention. Under a 1996 United Kingdom proposal for a United Nations General Assembly declaration, the Convention should not be applicable in cases involving terrorist activities.¹³³ That proposal has since been incorporated, in a modified and qualified form, in Article 3 of the Declaration to Supplement the 1994 Declaration on Measures to

¹²⁸ For example, because the political motivation is absent or the perpetrator is not acting with the intention of helping his group to seize State power, or because the victim of a crime of killing outside a situation of war did not hold a sufficiently high rank.

¹²⁹ See above, section 2.3. This category does not constitute a relatively political offence, since the motive is not a struggle for State power, but a personal motive. See in this regard Joint Position of 4 March defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees, para. 10: '... refugee status may be granted, in the light of all the other requirements of the definition, in cases of punishment of conscientious objection or deliberate absence without leave and desertion on grounds of conscience if the performance of his military duties were to have the effect of leading the person concerned to participate in acts falling under the exclusion clauses in Article 1F of the Geneva Convention.'

¹³⁰ See above, section 2.2.

¹³¹ In such cases, prosecution always will have an element of political persecution in the sense of the discrimination clause.

¹³² It also would be possible for a State to deny in such cases that a common crime in the sense of Article 1F(b) has been committed, as the relevant defences of law exclude culpability or wrongfulness.

¹³³ See UN doc. GA/L/3007 at 3 (a press release).

Eliminate International Terrorism.¹³⁴ Since, however, this instrument, which is not legally binding, does not specify which criminal offences are to be regarded as terrorist acts, it is first necessary to clarify the concept of terrorism.

There is no definition of terrorism of a general nature which is binding in international law.¹³⁵ A whole range of international treaties (which have not found universal ratification) list specific offences, such as hostage-taking, crimes against diplomatic personnel and offences committed on board aircraft, as terrorist acts.¹³⁶ On the basis of these treaties, the following elements can be set forth as constituting the commonality of terrorist acts: (1) A terrorist act exposes or threatens to expose persons to a danger to their life and physical integrity; (2) The act of violence is directed against an indeterminate group of people or has a specific aim but is directed against a category of persons in particular need of protection; and (3) The act is undertaken with a view to constrain a State or its representatives from taking specific actions.¹³⁷

The very uncertainty surrounding the definition of terrorism shows that a standard legal response, as applies, for example, in the case of crimes within the meaning of Article 1F(a) CSR51, is not possible in the case of offences of this kind. These elements will generally provide important indications regarding the applicability of subparagraph (b) of that article, but there can be no automatic operation for several reasons:

¹³⁴ 'The States Members of the United Nations reaffirm that States should take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not participated in terrorist acts, considering in this regard relevant information as to whether the asylum seeker is subject to investigation for or is charged with or has been convicted of offences connected with terrorism . . .' UN doc. A/Res/51/210 of 17 (1996).

¹³⁵ See Torsten Stein, *International Measures Against Terrorism and Sanctions By and Against Third States*, in *ARCHIVE DES VÖLKERRECHTS* 38 et seq. (1992). The International Law Association has defined terrorist acts as 'acts creating a collective danger to the life, physical integrity or liberty of person and affecting persons foreign to the motives behind them', Report of the Sixty-Third Conference, Warsaw, 1035 (1988).

¹³⁶ The following conventions have to date been codified, within the United Nations, in the area of anti-terrorist measures: Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963); Convention for the Suppression of Unlawful Seizure of Aircraft (1970); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (1973); International Convention against the Taking of Hostages (1979); Convention on the Physical Protection of Nuclear Material (1979); Convention for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988), and Convention on the Marking of Plastic Explosives (1991, not yet in force). Also, a very broad scope of application is defined in Article 2 of the 1998 Convention on the Suppression of Terrorist Bombing (not yet in force). According to this provision, any handling of explosives which is intended to kill or injure persons, to expose them to such a risk or to create a situation of fear and terror is classified as a terrorist act. At the European level, there is in addition the 1977 European Convention on the Suppression of Terrorism, above n. 99.

¹³⁷ See also STEIN, above n. 81, 39–40.

It is conceivable that the act was carried out in an armed conflict where combatants may be permitted what in times of peace would be branded as terrorism. It is also possible that an attack which in itself is classified as an act of terrorism¹³⁸ constitutes the only means of opposing very grave encroachments by the government authority in a State where the rule of law does not prevail.¹³⁹ Finally, the discrimination clause excluding extradition if the person to be extradited is under threat of political persecution is, as already mentioned, also valid in cases involving terrorism;¹⁴⁰ thus, the issue of prosecution in case of return also must be taken into account.

States which have ratified international treaties on terrorist crimes excluding the possibility to qualify certain offences as political crimes may take into account these treaties when applying Article 1F(b) but, at the same time, should resort to balancing if recognition of the persons concerned as a refugee would be possible.¹⁴¹ Using the principles of Article 1F(b) applicable to offenders of common crimes in cases of terrorist acts will allow for results to be reached which are both satisfactory and in line with legitimate interests of State to combat international terrorism and, at the same time, help to protect persons against very serious political persecution even if they, in fact, have used violence.¹⁴²

5. Conclusions

Persons who have committed serious crimes such as attacks on life most often do not qualify for refugee status because the authorities in the country of origin would not persecute them on account of their race, religion, political opinion or similar reasons but simply prosecute them for their offences. Thus, in most cases involving asylum seekers with a criminal past the question of exclusion does not arise if one first examines the question of inclusion. Where, however, a genuine refugee has committed serious non-political crimes before fleeing to the country of refuge, the following difficult questions cannot be avoided: How can Article 1F(b) CSR51 be applied in a way that does justice to those who have exercised legitimate resistance to very serious injustice or who

¹³⁸ Cf. above n. 136.

¹³⁹ Examples include taking as hostage a person who perpetrates genocide, or an attack with automatic weapons on the headquarters of such persons.

¹⁴⁰ See 1977 European Convention on the Suppression of Terrorism, above n. 99, Art. 5 and of the Convention for the Suppression of Terrorist Bombing, above n. 99, Art. 12.

¹⁴¹ In reality, the question of exclusion will not arise in many cases involving perpetrators of terrorist crimes simply because these persons are not qualifying as refugees in the sense of Article 1A(2) CSR51.

¹⁴² In particular, this approach will make it unnecessary to resort to a problematic use of Article 1F(c) declaring terrorism as contradicting the goals of the United Nations and thus expanding the sense of this clause far beyond its proper meaning.

deserve international protection because their quality of being bona fide refugees clearly outweighs their criminal past? This article has shown that this is a relevant question because present international law in fact does legitimize the use of individual force in certain, limited circumstances. In order to achieve the necessary distinction between ‘criminals’ and ‘refugees deserving international protection’ or, to use more political language, between ‘terrorists’ and ‘freedom fighters’, it is not necessary to develop new concepts. Rather, the necessary distinctions can be achieved by making the following distinctions:

- Certain acts of violence must not be treated as crimes in the sense of Article 1F(b) CSR51, as they are permissible under international law: Thus, individuals are entitled to violently oppose those who attempt to overthrow a constitutional order based on democracy and the rule of law and to defend their country against occupation and foreign rule.¹⁴³ The same is true for those fighting in an international armed conflict or a national war of liberation as combatants,¹⁴⁴ provided they have not committed war crimes or crimes against humanity.
- The notion of ‘non-political crimes’ as embodied in Article 1F(b) CSR51 should be interpreted in line with a notion of relative political crime in extradition law that accepts the political character of violent acts if they have been carried out as part of a struggle over power in the State, if they were politically motivated and directly linked to the political aim and if they meet the requirement of proportionality between the political aim and the means used in that struggle. This approach allows for the exclusion of perpetrators of terrorist acts but would grant refugee status to politically persecuted persons who have participated in armed combat of a clearly military character in a situation of civil war,¹⁴⁵ or have tried to topple a regime responsible for very serious human rights violations.¹⁴⁶
- In order to make the necessary distinction between common criminals and those who have exercised violent, but proportional, resistance against persons ordering the commission of a war crime or a crime against humanity,¹⁴⁷ as well as those responsible for proportional acts against persons who are directly responsible for serious violations of human rights or war crimes,¹⁴⁸ two methods can be used: Either one accepts these categories as cases where the use of violence is justified, thus concluding that such acts do not constitute serious crimes, or one treats these cases still as crimes but balances them against the

¹⁴³ See above, paras. 2.1 and 2.4.1.

¹⁴⁴ See above, section 2.5.1.

¹⁴⁵ See above, section 2.5.2.

¹⁴⁶ See above, section 2.2.

¹⁴⁷ See above, section 2.3.

¹⁴⁸ See above, section 2.2.

- seriousness of the persecution to be expected in the country of origin.
- Finally, it is necessary to balance the seriousness of persecution in the country of origin with the seriousness of the crime.¹⁴⁹ This requirement is not only an expression of the general principle of proportionality but also allows one to deal properly with situations where persons have committed non-political crimes but would not be extradited because of imminent political and similar persecution.¹⁵⁰

¹⁴⁹ See above, sections 3.2 and 4.2.

¹⁵⁰ This is true, in any case, for countries which treat the discrimination clause not as part of the notion of political crime but as a separate issue.