

THE CRIME OF TERRORISM AND THE RIGHT OF REVOLUTION IN INTERNATIONAL LAW

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The revolution you dream of is not ours.
You don't want to change the world, you want to blow it up.

— Jean-Paul Sartre, *Dirty Hands* (1948)

INTRODUCTION

On February 16, 2011, the Appeals Chamber of the Special Tribunal for Lebanon (STL) ruled that terrorism has become a crime under customary international law.¹ This idea has been advocated by Antonio Cassese,² a prominent Italian jurist who was one of the judges sitting in the Tribunal's Appeals Chamber. However, this is the first time an international court³ took such a standpoint.

The Appeals Chamber's analysis of international legal standards on terrorism resulted in the conclusion that the international crime of terrorism has three elements: (1) the perpetration of a criminal act (such as killing, kidnapping, hostage taking, etc.), or threatening such an act; (2) the intent to spread fear among the population or coerce a national or international authority to do something, or to refrain from doing it; and (3) the involvement of a transnational element.⁴ Although the STL's Decision has been disputed on various grounds,⁵ it represents an important step toward the affirmation of terrorism as a crime under international law.⁶

The correct analysis of international crimes lies in the common law scheme adopted in international criminal law: *offenses v. defenses*.⁷ Consequently, this Article is organized as follows: Part I surveys the process of recognition of terrorism as an international offense, and Part II analyses available defenses to allegedly terroristic acts.

In Part I, the STL's Decision shall be used as a springboard for assessing the theoretical approach to terrorism in international law. It is necessary to answer whether there really exists customary international law that introduces terrorism as

1. Prosecutor v. Ayyash, Case No. STL-11-01/I/AC/R176bis, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, ¶ II. B. (Special Trib. for Lebanon Feb. 16, 2011) [hereinafter STL's Decision].

2. See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 12, 162–69 (2d ed. 2008).

3. To be more precise, Special Tribunal for Lebanon is an internationalized or mixed tribunal, *i.e.*, a hybrid between a domestic and an international court. See *id.* at 332 for general information about current internationalized tribunals.

4. STL's Decision, *supra* note 1, at ¶ 85.

5. First, there was no reason for applying international law since Lebanese law on terrorism is neither unreasonable, nor unjust, nor inconsistent with international law. Kai Ambos, *Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism Under International Law?*, 24 LEIDEN J. INT'L L. 655, 664 (2011). Second, terrorism is not a "true" international crime, although it is close to becoming one. *Id.* at 667. See also ANDREA BIANCHI & YASMIN NAQVI, INTERNATIONAL HUMANITARIAN LAW AND TERRORISM 285 (2011) (saying that there is no consensus in international practice on terrorism); BEN SAUL, DEFINING TERRORISM IN INTERNATIONAL LAW 319 (2006) (arguing that there is insufficient evidence of state practice and *opinio iuris* supporting a definition of terrorism under customary international law).

6. See Ambos, *supra* note 5, at 675 (arguing that STL's Decision "has indeed made an important contribution with a view to the emergence of such a crime and to its definition"). See also BIANCHI & NAQVI, *supra* note 5, at 285 (emphasizing that the practice of courts, along with states' reactions, will be crucial for emergence of terrorism as a crime under international law, referring to the STL's Decision as the first such example).

7. Such analysis is also consistent with the civil law structure of crimes, such as the one in German law, which also recognizes justifications (Rechtfertigungsgründe) and excuses (Schuldausschließungsgründe + Entschuldigungsgründe). See KRISTIAN KÜHL, STRAFRECHT: ALLGEMEINER TEIL 326, 337 (6th ed. 2008).

an international crime, or whether this inclusion simply represents “wishful thinking” on the part of the judges sitting in the STL’s Appeals Chamber. This paper concludes that since international criminal law has not adopted a strict principle of legality and current standards of customary international law tend to be more progressive, terrorism qualifies as an international crime. The consequences of recognizing terrorism as an international crime will be revealed, and the argument made that criminalization of terrorism could live up to the objectives of international criminal justice, specifically because it could require a fair trial for terrorists and also have a deterrent effect in reducing the risk of future terrorist attacks. Finally, Part I assesses theoretical observations and conclusions in a hypothetical case study addressing ways to avoid impunity for the September 11 terrorist attacks.

In discussions about terrorism there is a common phrase that one man’s terrorist is another man’s freedom fighter. Is it possible among various definitions to find one that would most accurately reflect the enormous international documents dealing with terrorism? It is possible, but finding a good definition of terrorism will not solve the puzzle that really bothers contemporary scholars of international law: how to distinguish acts of terrorism from the legitimate acts of freedom fighters? Therefore, in Part II of this Article, a different sort of question will be posed: which defenses are applicable to terrorist acts under international law? The international community puts too much emphasis on finding the “correct” definition of terrorism⁸ when in reality, the distinction between acts of terrorists and freedom fighters lies in determining the possible justifications and excuses to those acts. These defenses include the right of revolution, combatant status, the right of self-defense, and necessity.

The right of revolution requires central attention because commentators have largely neglected this doctrine. There are three reasons for this. First is the global dominance of Western countries, which experienced their revolutions a long time ago. The most important ones include the American Revolutionary War (1775-1783), the French Revolution (1789) and the European revolutions of 1848. Although the pride of these revolutions has never ceased, paradoxically there is not much interest left in the Western view of international law to evoke the same principle they strongly defended two centuries ago. However, the Arab Spring is clear evidence that revolutions are happening even in the 21st century, and this will continue until the last tyrant is removed from Earth.

The second reason commentators neglect the right of revolution is that a complete list of criteria for the justification of revolutionary use of force does not exist. Part II will develop these criteria by relying on historical developments in comparative law, international legal theory and practice.

The third reason is that when the laws of war and human rights law progressively evolved in the 20th century, the right of revolution was not incorporated in international treaty law. This paper concludes that the right of

8. Terrorism expert Walter Laqueur has counted over a hundred definitions of terrorism. *See* WALTER LAQUEUR, *THE NEW TERRORISM: FANATICISM AND THE ARMS OF MASS DESTRUCTION* 5 (2000).

revolution is distinct from laws of war and human rights law. Instead, it should be viewed as an inherent *sui generis* right and as a general principle of law.

Contemporary international law incorporates one aspect of the right of revolution under the right of self-determination, which permits the use of force against colonial domination, alien occupation and racist regimes. However, the right of self-determination does not cover other situations involving entrapped nations suffering severe oppression by their governments.

One such situation is presently taking place in Syria under the regime of President Bashar al-Assad. In February 2012, according to Navi Pillay, the U.N. High Commissioner for Human Rights, the overall death toll exceeded 5,400 people (including civilians and military personnel who refused to shoot civilians), more than 18,000 were arbitrarily held in detention, 25,000 became refugees, and 70,000 were internally displaced—which indicates “that crimes against humanity are likely to have been committed.”⁹ President Assad introduced, then attempted to justify these oppressive measures by arguing that “[n]o political dialogue or political activity can succeed while there are armed terrorist groups operating and spreading chaos and instability.”¹⁰ In September 2012, the *Syrian Observatory for Human Rights* claimed that 30,000 people have been killed since the beginning of the uprising,¹¹ and UNHCR estimated that over 500,000 people have fled to neighboring countries.¹²

The situation in Syria will be used in Part II to examine the conditions under which the use of force could be justified in overthrowing an oppressive government. This is important because a revolution against oppression cannot always justify the crimes committed in the name of the oppressed people. A good example is the murder of Muammar al-Gaddafi after his regime was already overthrown. Would it have made a difference if he had been assassinated in February 2011 when his forces killed 500–700 protesters?¹³

If future international practice follows the ruling of the Special Tribunal for Lebanon, recognizing terrorism as a crime under international law, it is essential to determine its limits: at what point does terrorism end and justified freedom fighting begin? Finding an answer to this question motivated the creation of this Article.

9. Navi Pillay, U.N. High Commissioner for Human Rights, Briefing to the General Assembly [Syria] (Feb. 13, 2012), *available at* <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11820&LangID=E>.

10. Kareem Fahim, *No Talks With Syria Opposition, Leader Tells U.N. Envoy*, N.Y. TIMES, Mar. 10, 2012, *available at* <http://www.nytimes.com/2012/03/11/world/middleeast/no-talks-with-syria-opposition-groups-leader-tells-un-envoy.html>.

11. Dominic Evans, *Three Hundred Killed in Single Day in Syria, Group Says*, REUTERS, Sep. 27, 2012, *available at* <http://www.reuters.com/article/2012/09/27/us-syria-crisis-toll-idUSBRE88Q0B120120927>. However, there are no official reports by U.N. bodies confirming this, nor has the U.N. given a recent alternative estimation.

12. U.N., SYRIA REGIONAL RESPONSE PLAN 9 (2nd rev., Sep. 2012), *available at* <http://www.unhcr.org/cgi-bin/texis/vtx/home/opedocPDFViewer.html?docid=5062c7429&query=syria%20regional%20response%20plan>.

13. See Marlise Simons & Neil MacFarquhar, *Hague Court Seeks Warrants for Libyan Officials*, N.Y. TIMES, May 4, 2011, <http://www.nytimes.com/2011/05/05/world/africa/05nations.html>.

I. THE PROCESS OF CRIMINALIZATION OF TERRORISM IN INTERNATIONAL LAW

The history of terrorism is as old as the use of violence to influence political affairs. Terrorist acts have been criminalized for centuries under domestic laws as murder, battery, arson, etc. However, the process of criminalization of terrorism in international law started in the nineteenth century and went through three phases: (1) the Introduction of Political Crimes (1800s – 1890s), (2) Anti-Anarchist Initiatives (1890s – 1920s), and (3) Draft Conventions on Terrorism (1930s – present). The final stage of the last period is the Global War on Terror, which began in 2001 as a reaction to the September 11 terrorist attacks. In the last decade, the international practice of dealing with terrorism intensified significantly, more than ever in its history.

In order to evaluate whether there is sufficient evidence of international practice to support the conclusion that a new international custom has evolved, criminalizing terrorism, it is also necessary to define in the following chapters the standards of the principle of legality and of international customary law. International law has never been rigidly positivistic—it has always affirmed flexibility in assessing both of these standards. Therefore, where law is not clear, a policy decision takes place. Such decisions are only limited by the legitimate objectives of international criminal justice. Later in this Article, it will be argued that deterrence is the main objective, which is why it is necessary to hold trials of terrorists before the international courts.

A. From Political Crimes to Terrorism

The international debate on what is today called “terrorism” started about two centuries ago when European countries contemplated how to handle foreign fugitives who had committed political crimes. In 1833, Austria, Prussia and Russia signed treaties establishing extradition for individuals who had either allegedly committed crimes of high treason and *lèse-majesté*, conspired against the safety of the throne and the government, or participated in revolt.¹⁴ This was, however, just an example of a treaty signed by reactionary powers. On the other hand, the new post-revolutionary regimes favored the idea of non-extradition because they wanted to support revolutionary acts against oppressive regimes in other countries. For example, the French Constitution of 1793 granted asylum to foreigners exiled “for the cause of liberty.”¹⁵ The countries who praised individual liberty as the basis of their political life drafted treaties between 1815 and 1860, which stipulated the principle of non-extradition of political criminals.¹⁶

The major practical problem of these treaties was defining the term “political crime”. In the notable case of the unsuccessful assassination of the emperor Napoleon III in 1854, the Belgian court refused the extradition of the two assassins to France because they were recognized as political criminals.¹⁷ This

14. LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE, VOL. I: PEACE 391 (1905).

15. 1793 CONST. 120 (Fr.). See also OPPENHEIM, *supra* note 14, at 390.

16. See OPPENHEIM, *supra* note 14, at 392.

17. *Id.* at 394.

lead to an amendment of the Belgian extradition law in 1856 introducing the so-called *attentat clause*, which stipulated that “murder of the head of a foreign Government or of a member of his family should not be considered a political crime.”¹⁸ Lassa Oppenheim, one of the founders of the modern discipline of international law, criticized the clause, arguing that “exceptional cases of murder of heads of States from political motives or for political purposes might occur which do not deserve extradition.”¹⁹ These exceptional cases will be included in Part II as either justifications or excuses for such acts.

The need for stronger international cooperation in fighting against politically motivated violence evolved within the anti-anarchist initiative at the end of nineteenth century when the Russian and German governments initiated an International Anti-Anarchist Conference, which took place in Rome in 1898.²⁰ Again, one of the crucial issues of the Conference was to formulate a definition of “anarchist act”. Finally, the Conference defined “anarchist act” as an act having as its aim “the destruction through violent means of all social organization,”²¹ a definition that emphasizes the specific destructive political intent of the actor. The Rome Conference was followed by negotiations on the improvement of police cooperation, which ended in 1904 when the majority of European countries signed the *Secret Protocol for the International War on Anarchism* in St. Petersburg.²² The *Secret Protocol’s* purpose was to specify the procedure of expulsion, engender interpolice cooperation and create anti-anarchist offices.²³ Numerous killings performed by anarchists inspired these efforts.²⁴ The assassination of Archduke Franz Ferdinand triggered the Second World War, and all the cooperation initiatives ceased. Another assassination, that of Yugoslav King Alexander I of Yugoslavia, reawakened the need for international instruments in fighting terrorism. The result was the League of Nations' 1937 *Convention for the prevention and punishment of Terrorism*,²⁵ which attracted 24 signatories.²⁶ The *Convention* defined acts of terrorism as “criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.”²⁷ This is in fact the so-called *chapeau*

18. *Id.*

19. *Id.* at 399.

20. Richard B. Jensen, *The International Anti-Anarchist Conference of 1898 and the Origins of Interpol*, 16 J. CONTEMP. HIST. 323, 323 (1981).

21. *Id.* at 327.

22. *See id.* at 337.

23. *Id.*

24. In only few years, the anarchists have killed many political leaders. Some of them included the prime minister of Spain Antonio Cánovas del Castillo, French president Marie François Sadi Carnot, Austrian Empress Elisabeth and American president William McKinley. For general information about anarchist assassinations in the decade of anarchist activism, see 1 EMMA GOLDMAN, A DOCUMENTARY HISTORY OF THE AMERICAN YEARS 55, 79, 471 (Candace Falk et al. eds., 2003).

25. Convention for the Prevention and Punishment of Terrorism, Nov. 16, 1937, League of Nations Doc. C.546.M.383.1937.V (1938), 19 LEAGUE OF NATIONS O.J. 23 (1938) [hereinafter 1937 Convention].

26. *See* BIANCHI & NAQVI, *supra* note 5, at 266 n.339.

27. 1937 Convention, *supra* note 25, art. 1(2).

element²⁸ of terrorism which unambiguously establishes a specific intent element and whose purpose is to differentiate terrorism from ordinary crimes such as murder, battery, etc. The “criminal acts” were specified in Article 2 of the *1937 Convention* and included the following willfully committed acts:

- (1) acts causing death, grievous bodily harm or loss of liberty to certain protected persons (heads of state with their wives or husbands, persons charged with public functions when the act is directed against them in their public capacity);
- (2) the destruction of, or damage to, public property or property with a public purpose;
- (3) acts calculated to endanger the lives of members of the public;
- (4) any attempt to commit an offence falling within the foregoing provisions;
- (5) the manufacture, obtaining, possession, or supplying of arms, ammunition, explosives or harmful substances with the view to the commission of an offence falling within this Article.²⁹

The *1937 Convention* is clear that all of these acts constitute terrorism only if committed with specific intent indicated in Article 1. However, should a political motive, such as the intent to create a state of terror in the minds of some persons, constitute a more severe offence than it normally would (e.g., murder)? Motives are usually relevant for the determination of aggravated crimes in civil law countries like Germany.³⁰ However, even in the United States, motives sometimes indirectly result in aggravated crimes.³¹ All relevant theories of punishment justify this view. Retributivists would say that a defendant with a bad motive deserves a harsher punishment because he is more blameworthy. Utilitarians would argue that perpetrators with evil motives are more dangerous to society and need to be deterred with a harsher punishment.

Even though there is no agreed definition of terrorism, many conventions regulate specific acts of terrorism. After the Second World War and the foundation of the United Nations, the first initiative was to draft a convention that would provide criminal law protection to the civil aircrafts in flight. The outcome of this process was the *1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft*.³² Two additional conventions aiming to provide aircraft security

28. *Chapeau* is a French term (signifying a “hat”) depicting elements of a crime, usually placed at the beginning of its definition, which are common to all acts enlisted under the *chapeau*. See Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 420 (2001) (“[C]rimes under international law have two sets of independent elements. The first set, called the chapeau, justifies international jurisdiction over the defendants’ acts transforming murder, for example, into a crime against humanity.”).

29. 1937 Convention, *supra* note 25, art. 2.

30. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 326-28 (1978).

31. See e.g. *People v. Anderson*, 447 P.2d 942, 953 (1968) (stating that motive is relevant to determine premeditation for first degree murder).

32. See *Convention on Offences and Certain Other Acts Committed On Board Aircraft*, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.

followed.³³ The next international treaty in this area was the 1973 *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons*,³⁴ which provided criminal law protection to a certain category of persons—primarily heads of state, prime ministers and ministers of foreign affairs—who had been perpetually targeted by terrorists in the past.

While the foregoing conventions criminalized some typical terrorist acts, the 1979 *International Convention Against the Taking of Hostages*³⁵ went further. The *Hostage-Taking Convention* introduced criminal prohibitions on taking hostages with the purpose of coercing a state or an international organization (political motive).³⁶ Additionally, the convention took an additional step and criminalized taking hostages with the purpose of coercing any person to do or abstain from doing something, including cases in which such person has no official authority.³⁷ For example, kidnapping a child in order to coerce the parents to pay the ransom in return for the child, which clearly has nothing to do with terrorism, would fall into the latter category.

The subsequent international treaty was the 1980 *Convention on the Physical Protection of Nuclear Material*,³⁸ which provided criminal sanctions for various forms of obtaining, possessing, distributing and threatening to involve nuclear materials. After that, the 1988 *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*³⁹ expanded the list of punishable offences by including certain violent acts committed at international airports. The same year, two more international treaties were adopted in order to provide criminal law protection of maritime objects from attacks.⁴⁰ Then, the 1991 *Convention on the Marking of Plastic Explosives for the Purpose of Detection*⁴¹ prohibited acts related to unmarked plastic explosives.

As is evident even from the titles of these international documents, it seems like the drafters went to great lengths to avoid the employment of the word “terrorism” in any of the prohibited acts. There are two plausible explanations for this hesitation. First, the drafters just did not want to undertake the burden of defining terrorism. A second possibility is that they also wanted to prohibit some acts that were not by nature terrorist acts (such as taking hostages by coercing

33. See Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105. See also Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177.

34. See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

35. See International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11081, 1316 U.N.T.S. 205 [hereinafter Hostage-Taking Convention].

36. *Id.*, at. 1(1).

37. *Id.*

38. See Convention on the physical protection of nuclear material, Mar. 3, 1980, 1456 U.N.T.S. 101.

39. See Protocol for the suppression of unlawful acts of violence at airports serving international civil aviation, Feb. 24, 1988, 1589 U.N.T.S. 474.

40. See Convention for the suppression of unlawful acts against the safety of maritime navigation, Mar. 10, 1988, 1678 U.N.T.S. 222. See also Protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf, Mar. 10, 1988 1678 U.N.T.S. 374.

41. Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 2122 U.N.T.S. 374.

private persons without any public or political effect). Of course, however, one could also explain the absence of the word “terrorism” by arguing that these conventions were not initially true terrorist conventions, but rather meant to criminalize particularly dangerous transnational offences.

Nevertheless, things have changed, and recent conventions now include the term “terrorism” extensively. First among this new wave was the 1997 *International Convention for the Suppression of Terrorist Bombings*,⁴² which created a regime of universal jurisdiction over the use of explosives and other lethal devices in certain public places. This was followed by the 1999 *International Convention for the Suppression of the Financing of Terrorism*,⁴³ which is particularly significant in that it “converted” the crimes from the previous conventions into terrorist offences by listing them in its Annex.⁴⁴ However, neither convention contained the political motive requirement which would distinguish terrorism from classical criminal offences. The 2005 *International Convention for the Suppression of Acts of Nuclear Terrorism*⁴⁵ took a substantial step in that direction by introducing the same political motive standard as the one in the *Hostage-Taking Convention*.⁴⁶

When comparing the 1937 *Convention* with the *Draft Comprehensive Convention on International Terrorism*,⁴⁷ one cannot identify significant differences because the material elements and the political motive are basically the same. According to Article 2 of the *Draft Comprehensive Convention on International Terrorism*, any person commits such an offence if he “by any means, unlawfully and intentionally, causes:

- (a) Death or serious bodily injury to any person; or
- (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
- (c) Damage to property, places, facilities, or systems referred to in paragraph 1(b) of this article, resulting or likely to result in major economic loss,

42. See *International Convention for the Suppression of Terrorist Bombings*, Dec. 15, 1997 2149 U.N.T.S. 256.

43. See *International Convention for the Suppression of the Financing of Terrorism*, Dec. 9, 1999, 2178 U.N.T.S. 197.

44. *Id.* at Annex.

45. *International Convention for the Suppression of Acts of Nuclear Terrorism*, Apr. 13, 2005, 2445 U.N.T.S. 137.

46. *Id.* at art. 2, ¶ 1(b)(iii) (“intent to *compel* a natural or legal person, an *international organization or a State*”) (emphasis added). See also *Hostage-Taking Convention*, *supra* note 35, at art. 1, ¶ 1 (intent “to *compel* a third party, namely, a *State, an international intergovernmental organization, a natural or a juridical person, or a group of persons*”) (emphasis added). However, as it can be seen from these quotations, both of these conventions do not restrict themselves to political motives.

47. *Report of the Ad Hoc Committee established by G.A. Res. 51/210 of 17 December 1996*, Jan. 28–Feb. 1, 2002, U.N. Doc. A/57/37/GAOR, 57th Sess., Supp. No. 37.

when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.”⁴⁸

This definition sufficiently covers the most important acts of terrorism. Whatever acts this definition leaves out are included within conventional transnational crimes. It is not necessary to criminalize under international law all of the acts defined in the previously mentioned terrorist conventions because international criminal law should only punish the most serious crimes.⁴⁹ In Part II, it will be shown that the next step is to deal with defenses to terrorism: determining when, in spite of the fact that a crime meets the requirements of the definition of terrorism under international law, the perpetrator’s act should be justified or excused.

B. Contemporary Views on the Principle of Legality

The discussion of whether terrorism is a crime under international law should be linked to the theoretical discussion about the principle of legality, which encompasses the idea that there is no crime without law. In order to realize whether a specific crime has developed within the scope of customary international law, we must first determine which standards of the legality principle need to be met.

The two opposing views on the principle of legality are legal positivism and natural law. If we applied a positivistic approach to the principle of legality, such as the one by John Austin⁵⁰, the standard would be so high that it could not be met by customary law at all. Namely, only a precisely defined crime of terrorism, expressively marked as a crime under international law, codified in an international treaty, ratified by all UN Member States, would provide true satisfaction of the strict legality principle, often articulated in the Latin phrase *nullum crimen sine lege* (“no crime without statute”).⁵¹

48. *Id.* at art. 2.

49. This is *expressis verbis* stated in the preamble of the Rome Statute of the International Criminal Court: “[T]he most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”. See Rome Statute of the International Criminal Court, pmbl., U.N. Doc. A/CONF.18-9 (July 17, 1998) [hereinafter Rome Statute]. The same “formula” is repeated in Article 5: “The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.” *Id.* at art. 5, ¶ 1. See also Andreas Zimmermann, *Jurisdiction, Admissibility and Applicable Law*, in COMMENTARY OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 129, 133 (Otto Triffterer ed., 2d ed. 2008). In the jurisprudence of civil law countries, this is called the *ultima ratio* principle. See Nils Jareborg, *Criminalization as Last Resort (Ultima Ratio)*, 2 OHIO ST. J. CRIM. L. 521 (2004).

50. See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 185 (1832) (in case of an innocuous or even a beneficial act which is punishable by death, the court has to apply the law as it is).

51. This phrase was coined in 1801 by Paul Johann Anselm Feuerbach, a notable German scholar, judge and codifier. The Latin word “*lex*” means “statute” (i.e. an act passed by the legislator), although it is often mistranslated as “law”. The Latin word for law is *ius*. See MARKUS D. DUBBER & MARK G. KELMAN, AMERICAN CRIMINAL LAW: CASES, STATUTES, AND COMMENTS 106-07 (2d ed. 2009).

On the other hand, under theories of natural law, which afford greater flexibility, it would be sufficient to prove that international practice shows that terrorism represents such a threat and damage to the international community; it would be forbidden as such and punishable under international law. This is how crimes against humanity were introduced in the Nuremberg trials after the Second World War. The only legal ground for prosecuting crimes against humanity was in fact the Martens clause from the preamble to the 1907 Hague Convention No. IV, which declared the right to protection on the basis of the “principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”⁵² Furthermore, one must not forget that the Hague Conventions of 1907 had the purpose of establishing only state responsibility, while the criminal liability of individuals was still in the hands of domestic laws. In other words, the Nuremberg trials converted a mere declaration of protection according to the laws of humanity into a crime with punishment. However, the drafters of the Nuremberg Charter of the International Military Tribunal had hesitations. The consequence was a jurisdictional restriction—the inability to prosecute solely on charges of crimes against humanity.⁵³ This limitation, however, did not alter the substantive legal effect: a criminal conviction and a criminal punishment for crimes against humanity were applied as being a part of international law.⁵⁴

The two concepts are analogous to the opposing individualistic and collectivistic approaches to international justice.⁵⁵ Individualistic scholars believe that it is more important to protect individuals from the arbitrariness of public power (*favor rei*), while collectivist scholars would rather emphasize the interests of the international community in allowing the punishment of any crime that would represent a grievous breach of fundamental values of that community (*favor societatis*).⁵⁶ Those who favor direct utilitarianism⁵⁷ would also support the latter approach—by punishing the perpetrator, the international community simultaneously sends an immediate message that such acts are intolerable and provides satisfaction to the victims. On the other hand, the individualist concept is based on indirect utilitarianism, which would more likely abstain from punishing

52. Hague Convention IV-Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 3277, 205 Consol. T.S. 277. The Nuremberg judgment did not address the issue whether crimes against humanity constituted a new category of international crimes. Namely, the defense counsel did not complain about the retroactive application of these crimes as these, probably, as Cassese explains, because they “felt that such offences as murder, extermination, or persecution constituted breaches of law in most countries of the world and in any case had been committed by Nazi authorities on a very large scale.” CASSESE, *supra* note 2, at 105.

53. See Charter of the International Military Tribunal, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 280, art. 6(c) (jurisdictional requirement was that the crime was committed “in execution of or in connection with any other crime within jurisdiction of the Tribunal”).

54. Moreover, two of the defendants, Julius Streicher and Baldur von Schirach, were convicted only for crimes against humanity. See YVES BEIGBEDER, *JUDGING WAR CRIMINALS: THE POLITICS OF INTERNATIONAL JUSTICE* 36-38 (1999).

55. See CASSESE, *supra* note 2, at 38

56. *Id.*

57. For explanation of direct and indirect utilitarianism, see generally JONATHAN WOLF, *AN INTRODUCTION TO POLITICAL PHILOSOPHY* 130-31 (1996).

one terrorist in order to prevent the arbitrariness of international powers in the determination of international crimes.

By recalling Nazi-Germany's abolition of the principle of legality through an amendment to the Criminal code in 1935⁵⁸ that enabled convictions and punishments on the basis of "the people's healthy sentiment" (*nach dem gesunden Volksempfinden*),⁵⁹ one can agree with the argument about the dangers of allowing discretion supported by the collectivistic approach. A similar provision can be found in the 1922 Criminal Code of Russian Soviet Federative Socialist Republic, designed to provide protection from crimes and "socially dangerous elements" (*obshtestvenno opasnyi elementy*).⁶⁰ The slippery slope argument against collectivism also seems quite rational, especially when linking the flexible principle of legality to the concept of *Feindstrafrecht* ("Criminal Law for the Enemy") developed by the contemporary German legal scholar Günther Jakobs.⁶¹ Although this theory has been largely criticized, it exists in practice; a recent example is the American Guantanamo Bay detention camp established during the Global War on Terror⁶². Nevertheless, keeping in mind that the system of human rights and international humanitarian law has reached such a high level of protection, it is unlikely that the ideas of National Socialism or any other totalitarian regime could again attract any substantial support.

Introducing a hypothetical case is useful in illustrating the practical effects of each theoretical concept. To avoid an unrealistic theoretical debate, the cases are related to recent events.

Case No. 1. Suppose that the Islamic Emirate of Afghanistan, which existed between 1996 and 2001, under the Taliban regime's policies, enacted a law legalizing any attack against the United States. After that, the terrorist attacks of September 11 occurred, and many persons responsible for these attacks were later hiding in Afghanistan. Following the NATO intervention, the new Afghani Government arrested some of the perpetrators and put them on trial. What should be the outcome of these trials?

In finding the right solution, the Afghan court has four options: (1) to acquit the defendants by applying the Afghan law in force at the time of the criminal conduct; (2) to convict them for multiple-murder charges according to the statutory provisions for murder which remained unchanged; (3) to convict them by applying

58. STRAFGESETZBUCH [STGB] [PENAL CODE], May 15, 1871, RGBL. 127, as amended by GESETZ ZUR ÄNDERUNG DES STRAFGESETZBUCHES, June 28, 1935, RGBL. 839, § 2.

59. *Id.*

60. Ugolovnyi Kodeks Rossiiskoi Sovetskoi Federativnoi Sotsialisticheskoi Respubliki 272 [Criminal Code of Russian Soviet Federative Socialist Republic], June 1, 1922, SOBRANIE UZAKONENY I RASPORYAZHENY RABOCHE-KRESTYANSKOGO PRAVITELSTVA.

61. See Günther Jakobs, *Kriminalisierung im Vorfeld einer Rechtsgutverletzung*, 97 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 751, 783-85 (1985).

62. Some authors have even provided controversial justifications for the so-called "enemy status". Karl Chang argued that a violation of the international law of neutrality triggers an "enemy status", which in his opinion expands the legal limits of military detention in comparison with combatant status. See Karl S. Chang, *Enemy Status and Military Detention in the War Against Al-Qaeda*, 47 TEX. INT'L L.J. 1, 73 (2011). However Chang's arguments have been extensively criticized. See Rebecca Ingber, *Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda*, 47 TEX. INT'L L.J. 75, 78 (2011); Kevin Jon Heller, *The Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda, and It's a Good Thing, Too: A Response to Chang*, 47 TEX. INT'L L.J. 115, 141 (2011).

the international law of crime against humanity; or (4) to convict them by enforcing the new Afghan law retroactively with an explanation that terrorism has become a crime under international law⁶³ and that the new law only prescribes the punishment for what has already been criminalized.

If the judge decided to take the first option, which is in fact the strict positivistic approach, the deep feeling of injustice within the international community would be an inevitable consequence. Interestingly, one of the central figures of legal positivism, Hans Kelsen, admitted his inability to explain the term “justice”.⁶⁴ In spite of that, his theoretical views changed under the influence of the horrors of Nazi-regime during the Second World War, where the German soldiers acted in accordance with the positive law while killing the Jews. Namely, in his first years in the United States, being a Jew himself who escaped from Europe, Kelsen realized the disadvantages of strict positivism and wrote the following passage in 1943:

The principle forbidding the enactment of norms with retroactive force as a rule of positive national law is not without many exceptions. Its basis is the moral idea that it is not just to make an individual responsible for an act if he, when performing the act, did not and could not know that his act constituted a wrong. If, however, the act was at the moment of its performance morally, albeit not legally wrong, a law attaching *ex post facto* a sanction to the act is retroactive only from a legal, not from a moral point of view . . . Morally they were responsible for the violation of international law at the moment when they performed the acts constituting a wrong not only from a moral but also from a legal point of view. The treaty only transforms their moral into a legal responsibility. The principle forbidding *ex post facto* laws is—in all reason—not applicable to such a treaty.⁶⁵

After the Second World War, as a reaction to legal positivism, a new school of natural law evolved in Germany, lead by Gustav Radbruch. In 1946 he developed his famous maxim, later called *Radbruch's formula*. It says that the conflict between justice (*Gerechtigkeit*) and legal certainty (*Rechtssicherheit*) should be solved in favor of the latter, even in cases where it is unjust in terms of content and purpose, but not in cases where the discrepancy between the positive law and justice is so unbearable that the statute, being the “erroneous law”, has to make way for justice.⁶⁶ Since its publication, the Federal Constitutional Court of Germany

63. Only for this illustration is it necessary to ignore the fact that terrorism was not a crime under international law at that time. Namely, the September 11 attacks are the cause of practice that led to its recognition.

64. HANS KELSEN, WAS IST GERECHTIGKEIT? 52 (2006) (“In fact, I do not know and I am unable to tell, what is justice—the absolute justice—that wonderful dream of humanity.”).

65. HANS KELSEN, WHAT IS JUSTICE?: COLLECTED ESSAYS 24 (1957) (“And, indeed, I do not know, and I cannot say what justice is, the absolute justice for which mankind is longing.”).

66. Gustav Radbruch, *Gesetzliches Unrecht und Übergesetzliches Recht*, 1 SÜDDEUTSCHE JURISTEN-ZEITUNG 105, 107 (1946).

applied Radbruch's formula in a variety of cases, and it has influenced many authors while rethinking the legality principle.⁶⁷

From the perspective of the defendant, it is more important to be aware that his conduct is prohibited than to be informed about the punishment.⁶⁸ In *Case No. 1*, terrorists knew that their acts were not punishable in Afghanistan, but certainly also knew that the September 11 attacks are the so-called *mala in se* (wrongs in themselves) and that they are prohibited by all civilized nations in the world. However, it is also necessary to observe the counterargument to this assertion. Terrorists belonging to radical religious fundamentalist groups believe in the concept of Holy War,⁶⁹ which provides a religious justification for their acts. However, even radical religious fundamentalists know that only a small minority of believers support their interpretation of religion. For instance, Jihadists know that other Muslims do not think that Jihad requires them to kill innocent civilians for the sake of Islam. Therefore, not only would a negligence standard be fulfilled, but also a knowledge standard: awareness that acts of terrorism are prohibited in the world community. The "Martens-Clause-inspired" provisions, such as the one in Article 7 § 2 of the European Convention of Human Rights allowing trial and punishment for conduct that was criminal *tempore criminis* "according to the general principles of law recognised by civilised nations",⁷⁰ demonstrate that the international community wishes to ensure punishment for perpetrators of this group of crimes.

In spite of the fact that the Rome Statute accepts a strict legality principle,⁷¹ it is important to keep in mind that the Rome Statute does not codify the entire international criminal law.⁷² Thus, the Rome Statute contains no obstacles in the prosecution of someone for terrorism according to customary international law; however, such prosecution would not be possible before the International Criminal

67. See e.g. CASSESE, *supra* note 3, at 36. There is a brilliant discussion on the matter between H.L.A. Hart and Lon L. Fuller. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 616-29 (1958) (defending the positivist approach while criticizing the German courts application of Radbruch's formula). See also Lon L. Fuller, *Positivism and Fidelity to Law – a reply to Professor Hart*, 71 HARV. L. REV. 630, 648-72 (1958) (defending the German courts' decisions following Radbruch's formula as the only way to restore the respect for law and justice).

68. Cf. Kai Ambos, *Nulla poena sine lege*, in *International Criminal Law*, in SENTENCING AND SANCTIONING IN SUPRANATIONAL CRIMINAL LAW 17, 32 (Roelof Haveman & Olaoluwa Olusanya eds., 2006). Even in civil law countries, which admit mistake of law as a defense, according to the majority opinion, an actor can be held criminally responsible even if he does not know that his act is punishable, but knows that his act is prohibited. See CLAUS ROXIN, STRAFRECHT: ALLGEMEINER TEIL 932 (4th ed. 2006).

69. For example, Jihadists see their struggle as a just war legitimated by a religious ideology called *jihadism*. BASSAM TIBI, ISLAMISM AND ISLAM 142 (2012).

70. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4 1950, 213 U.N.T.S. 221, art. 7(2), (entered into force Sept. 3, 1953).

71. See Rome Statute, *supra* note 49, art. 22-24 (reciting the non-retroactivities principles of *nullum crimen sine lege* and *nulla poena sine lege*). From a policy perspective, adopting a strict legality principle enhances the credibility and legitimacy of the ICC. See Ambos, *supra* note 68, at 33.

72. Even the Rome Statute itself contains a provision which points this out: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute." Rome Statute, *supra* note 51, art. 10. It also explicitly presumes that a conduct can be characterized "as criminal under international law independently of this Statute." *Id.* at art. 22(3).

Court (ICC) at this point. Nevertheless, this does not mean that in present time bringing terrorists before the ICC is completely precluded. Certain terrorist acts are already punishable as crimes against humanity,⁷³ war crimes,⁷⁴ and genocide⁷⁵. It is also very likely that prosecutions for terrorist acts constituting crimes of aggression⁷⁶ will be possible in future.

From this analysis of theoretical approaches to the principle of legality, three important conclusions can be inferred. First, observing the period from the Nuremberg trials to the enforcement of the Rome statute, there are plausible arguments to support the idea that there is a historical shift from the doctrine of substantive justice to the doctrine establishing the principle of legality.⁷⁷ Second, comparing the Rome Statute with the statutes of contemporary ad-hoc criminal tribunals, it is evident that strict legality principles (*nullum crimen sine lege* and *nulla poena sine lege*) are still not accepted in customary international law, but instead a more flexible principle applies: *nullum crimen sine iure*.⁷⁸ This means that it is not necessary that the crime is described in a statute (*lex*); it can be applied from other sources of international law, as well. Third, the customary international law does not include the principle *nulla poena sine lege*,⁷⁹ so the penalty does not have to be determined at all.

C. What is Customary International Law?

In order to examine the recognition of terrorism in international law, it is necessary to address the question of what customary international law is, for this is the most problematic issue. Simma and Alston speak of an “identity crisis of customary international law”.⁸⁰ The STL's decision demonstrates that such crisis exists. “The Statute of the International Court of Justice defines international custom as “evidence of a general practice accepted as law.”⁸¹ The legal doctrine identifies two elements of customary international law: (1) international practice as a material element and (2) *opinio juris sive necessitatis* as a subjective element.⁸²

However, this definition of international custom does not really work the way it had initially been imagined. Two opposing tendencies in interpreting international custom have emerged: *coutume sage* (wise custom) and *coutume*

73. CASSESE, *supra* note 2, at 175-77; BIANCHI & NAQVI, *supra* note 5, at 247-56.

74. CASSESE, *supra* note 2, at 171-75; BIANCHI & NAQVI, *supra* note 5, at 209-47.

75. BIANCHI & NAQVI, *supra* note 5, at 257-60.

76. BIANCHI & NAQVI, *supra* note 5, at 261-63.

77. See CASSESE, *supra* note 2, at 10.

78. M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 202 (2003). See also Stefan Glaser, *La Methode d'Interpretation en Droit International Penal*, 9 RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 757, 766 (1966).

79. BASSIOUNI, *supra* note 78, at 201.

80. Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. OF INT'L L. 82, 88 (1988-1989).

81. Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, U.N.T.S. 993.

82. See V. D. DEGAN, SOURCES OF INTERNATIONAL LAW 143-44 (1997). The first one who represented this dualistic view on customary law was François Geny, a French legal scholar, who applied this doctrine to French civil law. See FRANÇOIS GÉNY: METHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF 356-65. (2d ed. 1954).

savage (wild custom).⁸³ The traditional approach favors the *coutume sage*, which emphasizes states' behavior throughout a certain period of time. However, nowadays the mainstream position resorts to a progressive theory of customary law, which is "more or less stripped of the traditional practice requirement".⁸⁴ Thus, it is getting closer to *coutume savage* theory, which allows customs to emerge "wildly", establishing an instant *opinio juris* (e.g., U.N. General Assembly's proclamation of a certain rule).⁸⁵ Under this concept, states that do not wish to be bound by such rule would have to protest.⁸⁶ However, in order to understand the contemporary approach to customary international law, it is necessary to review some of the previous developments in this area.

In his famous metaphor on the formation of a path across a common, Pitt Cobbet illustrated the process of the establishment of a customary international rule.⁸⁷ This is how it goes. At first, each walker pursues his own course. Gradually, the majority follows some particular route that defines an unclear track, and finally it shapes a path, habitually followed by all who pass that way.⁸⁸ Adding the *opinio juris* element to this, the walkers have to realize that the path has become the only way, because taking any other way would be a breach of the customary rule. As an alternative to the *opinio juris* approach, some scholars, like Strupp and Anzilotti, presented a voluntaristic concept in which at minimum *tacitus consensus* (silent agreement) was required.⁸⁹ Using Cobbet's metaphor, this would mean that some of the walkers suggest a certain path and ask all the others to agree (or at least not to disagree).

If we apply this metaphor to terrorism, it leads us to an interesting conclusion. Terrorism has been discussed "among walkers" numerous times, and one can agree that there is a path of the international crime of terrorism. However, this path is still discontinuous, similar to the one of crime against humanity at the time of the Nuremberg trials. Nevertheless, today there is much more evidence of international practice dealing with terrorism than was the case with the crimes against humanity, in addition to higher legal standards in international criminal law. In other words, one can say that they have developed different levels of practice, but the relation between the practice and the required standards is the same.

According to the STL's Decision, a number of treaties, UN resolutions, and the legislative and judicial practice of states⁹⁰ indicate that an international custom on

83. Simma & Alston, *supra* note 80, at 88.

84. *Id.* at 107. See also THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 99 (1989) ("continuing process, in which *opinio juris* appears to have greater weight than state practice, is more interesting than [a] static picture").

85. *Id.* at 89.

86. For example, one may argue that Geneva Protocol I has become a generally binding rule of customary international law, with the exception of countries like Israel that have persistently objected to the formation of such rule. See Antonio Cassese, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, 3 UCLA PAC. BASIN L.J. 55, 71 (1984).

87. PITT COBBET, CASES AND OPINIONS ON INTERNATIONAL LAW 5-6 (3d ed. 1909).

88. *Id.*

89. See DEGAN, *supra* note 2, at 149.

90. STL's Decision, *supra* note 1, ¶¶ 88-89 (international and multilateral instruments), ¶ 92 (UN Security Council's resolutions), ¶¶ 93-97 (national legislation), ¶¶ 99-100 (national case law).

the crime of terrorism has emerged.⁹¹ The Appeals Chamber asserts that there is “a settled practice concerning the punishment of acts of terrorism,” which is the “evidence of a belief of States that the punishment of terrorism responds to a social necessity (*opinio necessitatis*) and is hence rendered obligatory by the existence of a rule requiring it (*opinion juris*)”.⁹² Based on these arguments, the Chamber has rightly concluded that there is a customary rule outlawing terrorism. However, a mere prohibition does not necessarily indicate the existence of an international crime of terrorism.

D. Substantive Elements of International Crimes

In order to evaluate terrorism’s status in international law, it is also necessary to examine the elements of international crimes. In theory, there are two types of elements: (i) formal elements (*actus reus* and *mens rea*) and (ii) substantive elements (i.e., the ones that reflect the essence of the crime and reason for its existence). The latter are the elements that lead to the creation of international crimes, as they set the criteria that need to be met before we can recognize them as such. These substantive elements will be the subject of the observations in the following paragraphs.

The first to address this problem was M. Cherif Bassiouni, who identified two alternative elements: (i) a given act or conduct must contain an international element, *i.e.* it constitutes an offense against the world community *delicto jus gentium*, or (ii) a given act or conduct must contain a transnational element, *i.e.* its commission affects the interests of more than one state.⁹³ However, such doctrinal basis is not very useful as it also covered transnational crimes.⁹⁴

The substantive elements of international crimes according to the criteria set by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case are the following: (i) the violation must be an infringement of a rule of international law; (ii) the violated rule must be a part of international customary or treaty law; (iii) the violation must be serious in such a way that it breaches important values and involves grave consequences for the victim; and (iv) the violation must entail individual criminal responsibility.⁹⁵

Suprisingly, the STL’s Decision does not even mention the September 11 attacks, which have substantially contributed to the institution of anti-terrorism measures that have wrought “a radical revolution in legal theory and practice unparalleled in modern times”. Steven W. Becker & Davor Derencinovic, *Foreword* to INTERNATIONAL TERRORISM: THE FUTURE UNCHAINED? vii, vii (Steven W. Becker & Davor Derencinovic eds, 2008).

91. *Id.* at ¶ 85.

92. *Id.* at ¶ 102.

93. M. Cherif Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 CASE W. RES. J. INT’L. L. 27, 28–29 (1983).

94. The same can be said regarding his latest view on the matter. See BASSIOUNI, *supra* note 78, at 114-15.

95. Prosecutor v. Tadic, Case No. IT-94-1-Abis ICTY, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 94 (Oct. 2, 1995). [hereinafter Tadic Interlocutory Appeal Decision].

However, this list has been debated in the literature. It seems more persuasive now that modern international criminal law has established the following four substantive elements of international crimes.

First, there has to be a violation of international law.⁹⁶ A sign of such violation can be seen in breach of either conventional or international customary law, which implicitly or explicitly establishes that a given act is a crime under international criminal law.⁹⁷

Second, the violated rules of international law must have the purpose of protecting values important to the international community.⁹⁸ The protected values of the international community are primarily “peace, security and well-being of the world”.⁹⁹ Today terrorism is considered to be a greater threat to international peace and security than any other crime.

Third, there has to be a universal interest in repressing these crimes.¹⁰⁰ The universal interest exists when effective prosecution, ensured by “taking measures at the national level and by enhancing international cooperation.”¹⁰¹ The Global War on Terror in the past decade has ensured that terrorists cannot go unpunished, either by prosecution before military commissions¹⁰², national courts¹⁰³, or by retaliation, as in the case of Osama bin Laden. There are two common indicators of the universal interest in prosecution. First, the law allows prosecutions of their perpetrators by any state (universal jurisdiction) or at least the rule *aut dedere aut judicare* is applicable.¹⁰⁴ The latter provision appears in all UN anti-terrorism conventions.¹⁰⁵ Second, functional immunity is in principle not an obstacle for prosecution.¹⁰⁶ Terrorist acts are not exempt from immunity under international law, although there are states that have already enacted such exceptions.¹⁰⁷

96. See CASSESE, *supra* note 2, at 11. See also Ambos, *supra* note 5, at 670.

97. Bassiouni, *supra* note 93, at 28. CASSESE, *supra* note 2, at 11.

98. See CASSESE, *supra* note 2, at 11. See also BASSIOUNI, *supra* note 78, at 114-15. See also Ambos, *supra* note 5, at 670.

99. Rome Statute, *supra* note 49, pmbl. See also GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 27-29 (2005).

100. See CASSESE, *supra* note 2, at 11.

101. Rome Statute, *supra* note 49, pmbl.

102. One of the first charges for terrorism under the controversial Military Commissions Act of 2006 were taken against David Matthew Hicks, an Australian citizen who pleaded guilty to one charge of providing material support to terrorism. See AE002 Continuation to Military Comm'n's Form 458 (charge sheet) United States v. Hicks, Feb. 2, 2007, available at <http://www.defense.gov/news/d20070301hicks.pdf>. See also William Glaberson, *Plea of Guilty from Detainee in Guantánamo*, N.Y. TIMES, Mar 27, 2007, available at http://www.nytimes.com/2007/03/27/washington/27gitmo.html?_r=1&oref=slogin.

103. See, e.g., *infra* note 122.

104. For discussion about the relation between the pure universal jurisdiction and *aut dedere aut judicare* rule, see Maja Munivrana Vajda, *A Lack of Universally Accepted Definition of Terrorism: An Obstacle to the Exercise of Universal Jurisdiction*, in INTERNATIONAL TERRORISM: THE FUTURE UNCHAINED? 133, 137 (Steven W. Becker & Davor Derencinovic eds., 2008) (arguing that *aut dedere aut judicare* clause legitimizes the exercise of the so-called conditional universal jurisdiction).

105. *Id.*

106. See CASSESE, *supra* note 2, at 12.

107. See, e.g., 28 U.S.C. § 1605A (2006) (Terrorism exception to the jurisdictional immunity of a foreign state).

Fourth, an international crime should have a contextual element¹⁰⁸—this is the key for distinguishing regular domestic law crimes, such as murder or battery, from international crimes. It also distinguishes international crimes from transnational crimes and other conduct prohibited under international law (e.g., torture). When codified, the contextual elements are usually indicated under the *chapeau* of the definitions of crimes.¹⁰⁹ Contextual elements can also be found in definitions of terrorism. Pursuant to Article 2 of the Draft Comprehensive Convention on International Terrorism,¹¹⁰ the purpose of terrorist conduct, “by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.”¹¹¹ This is what George Fletcher calls the “theatrical aspect” of terrorism because it cannot survive without publicity.¹¹² The STL’s Decision also recognizes this element by requiring the intent to spread fear among the population or coerce a national or international authority to do something, or to refrain from doing it.¹¹³

Terrorism satisfies all of the above-mentioned criteria. However, one remaining criterion deserves attention. Kai Ambos, a German legal scholar, claims that terrorism does not satisfy the last criteria mentioned in the *Tadić* case, that the violation of international law must entail individual criminal responsibility.¹¹⁴ Notwithstanding the criticism directed at the fourth *Tadić* condition in part of the literature,¹¹⁵ this last condition is already implicitly included in the requirement that the rules of international law must express universal interest in repressing such crime. Namely, even in the *Tadić* case, ICTY’s Appeals Chamber does not suggest that there would have to be explicit provisions about individual responsibility for an international crime independent of any criminalization in domestic criminal law.¹¹⁶ By setting a rigid standard of that type, it would be practically impossible to infer from international practice that a crime has evolved in international customary law. Therefore, an implicit establishment of individual responsibility is sufficient.

E. Terrorism and the Objectives of International Criminal Justice

After eliminating the option to acquit the terrorists, we are still left with the dilemma of which crime the Afghan court should convict them. One could argue that the law which legalized attacks against the United States was vague and then

108. WERLE, *supra* note 99, at 29.

109. For genocide it is the intent to destroy a protected group in whole or in part, for crimes against humanity it is the widespread or systematic attack against a civilian population, for war crimes it is the context of an armed conflict and for crime of aggression it is the use of organized violence as such. *See id.*

110. Rep. of the Ad Hoc Comm., Jan. 28–Feb. 1, 2002, U.N. Doc. A/57/37, GAOR, 57th Sess., Supp. No. 37 (2002).

111. *Id.*

112. George Fletcher, *The Indefinable Concept of Terrorism*, 4 J. INT’L CRIM. JUST. 894, 909 (2006).

113. STL’s Decision, *supra* note 1, ¶ 85.

114. Ambos, *supra* note 5, at 670.

115. *See* Sandesh Sivakumaran, *Re-envisioning the International Law of Internal Armed Conflict*, 22 EUR. J. INT’L L. 219, 229 (2011).

116. *Cf.* Ambos, *supra* note 5, at 670.

apply the statutory provisions for murder. However, some would say that such legal qualification would not sufficiently express the social condemnation¹¹⁷ of the crime and, more importantly, provide the desired deterrence effect. Even in cases of convictions for everyday crimes it makes a difference. Suppose someone is convicted for murder instead of manslaughter—although the penalty imposed might be the same, the social condemnation is comparably higher if someone is marked as a murderer. Thus, the same argument is relevant for crimes against humanity and terrorism in comparison to (regular) homicide. There is more interest on a national and international level in deterring killings amounting to terrorism or crimes against humanity than regular domestic murders.

On the other hand, if international law did not recognize terrorism as a crime, someone might diminish the credibility of conviction by arguing that terrorism is still just a political crime.¹¹⁸ Namely, the past experiences with political crimes in absolutist and totalitarian regimes have demonstrated dubious procedures, which nowadays can be perceived as persecutions of people who are not criminals, but freedom fighters. Furthermore, limiting terrorism prosecutions to national jurisdictions might be perceived incorrectly by the public; there is also a real danger that defendants might be deprived of their right to a fair trial, especially when prosecuted in the targeted country. On the other hand, it is also likely that in the country that benefited from the terrorist attack, terrorists would be tried in fictive procedures, perhaps with symbolic sentences, in order to secure them “safe havens” from real prosecutions. These arguments provide support not only for the recognition of terrorism as a crime under international law, but also for the need to introduce it as a crime under the complementary jurisdiction of the ICC.¹¹⁹

The recent killing of Osama bin Laden demonstrates the shortcomings of international law in terms of putting high-ranked terrorists on trial for the crimes they committed. Instead, what happened in the case of Bin Laden was an act of retaliation for the victims of the September 11 attacks, which some may perceive as “justice”, as President Obama suggested in his statement following the execution. This is, however, very far from achieving the true objectives of international criminal justice, especially securing a fair trial.¹²⁰

Regardless, even with the recognition of terrorism in international law, crimes against humanity continue to be the more serious offences. These international crimes contain certain elements that are also usually characteristic of terrorism (systematic, widespread, political context, directed at civilian populations, etc.), so it is obvious that certain overlaps exist between them. A substantial number of authors claim that the September 11 terrorist attacks constitute a crime against

117. As a strong opponent of retributivism, I will not discuss retributivist arguments for criminalization of terrorism, although they are perhaps even more persuasive in this respect than any other theory of punishment.

118. See *supra* Fahim, note 10, at 394 and accompanying text.

119. It has been stated that the Assembly of States Parties to the Rome Statute could later include the crime of terrorism within the jurisdiction of ICC. Final Act of the United Nations Diplomatic Conference, June 15-July 17, 1998, *Final Act of the Plenipotentiaries on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF.183/10 (July 17, 1998).

120. For discussion about the goals of international criminal law and especially on the contemporary tensions among the goals, see Mirjan Damaška, *What Is the Point of International Criminal Justice*, 83 CHL.-KENT L. REV. 329, 331–35 (2008).

humanity,¹²¹ although the courts that dealt with this case never shared this opinion.¹²² As many circumstances of the attack remained confidential for security reasons, it is difficult to judge whether these terrorist attacks were in fact crimes against humanity.

There are also other general deterrence arguments that need to be considered when assessing the crime of terrorism under international law. First, there has been disappointment regarding the deterrent effect of international criminal law because initial failures¹²³ dampened optimism on this front.¹²⁴ However, there is no doubt that general deterrence “is still assigned a prominent place in discussions about the goals of international punishment.”¹²⁵ Providing a credible threat of prosecution¹²⁶ is certainly one of the crucial preconditions for achieving this goal. It is also important to recognize that deterrence is effective only if the risk of detection and punishment is not too low and if the penalty is adequately publicized.¹²⁷ International criminal justice is more publicized than any domestic trial, so there is no doubt that the latter precondition is satisfied. However, the chances of detection and punishment are still not high enough, and there are often various political obstacles (e.g. impunity of citizens of major powers such as United States, Russia and China; lack of cooperation of some countries providing “safe havens” to criminals, etc.).

Furthermore, for effective deterrence, the potential offenders must be rational, as sanctions and enforcement “may reduce crimes that reflect rational choices, but they are unlikely to have an impact on irrational offenders.”¹²⁸ It is not plausible to

121. See Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 994 n.222 (2001); See also Geoffrey Robertson, *America Could Settle This Score Without Spilling the Blood Across Afghanistan*, THE TIMES (LONDON), Sept. 18, 2001 (declaring that the terrorist attacks of September 11th, 2001 should be declared a crime against humanity). See also M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT'L L.J. 83, 101 (2002). But see William A. Schabas, *Is Terrorism a Crime Against Humanity?*, in 8 INT'L PEACEKEEPING: Y.B. OF INT'L PEACE OPERATIONS 255 (2004).

122. One of the reasons may be that the United States, unlike other countries, did not have a domestic statute on crimes against humanity at the time of September 11 attacks. However, trials for crimes against humanity did not occur in countries that have it in their statutory law. See, e.g., Oberlandesgericht Hamburg [OLG] [Higher Regional Court of Hamburg], Jan. 8, 2007, (German case of Mounir al-Motassadeq who was found guilty for accessory in 246 counts of murder, which is the number of victims in the planes, and for being a member of a terrorist organization), available at <http://openjur.de/u/31993-7-1-06.html>.

123. Perhaps the most notable example is the genocide in Srebrenica, which was committed in 1995 by the Bosnian Serbs in spite of the fact that International Criminal Tribunal for the Former Yugoslavia was already established two years before and that first indictments have already been issued against Bosnian Serbs.

124. See Damaška, *supra* note 1200, at 339; see also GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 294–95 (2002)(stressing that deterrence has limited success, especially in cases of weak tribunals like ICTY).

125. Damaška, *supra* note 120, at 339.

126. That is, a series of successful international criminal courts “that became so much an expected part of international affairs that no potential mass murderer could confidently say that he would avoid punishment.” BASS, *supra* note 124, at 295.

127. Andrew Ashworth, *Deterrence*, in *PRINCIPLED SENTENCING: READINGS ON THEORY & POLICY* 44, 49 (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998).

128. Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 65 (2002).

expect rational choices to be made by low-ranked terrorists who are direct perpetrators of terrorist attacks— especially in cases involving suicide bombers. However, such terrorists are not the typical targeted group for exercising international criminal justice. The leaders of terrorist organizations, as Osama bin Laden was, are in most cases very rational individuals—they use religious or ideological indoctrination to gain power over people, thus obtaining the financial support and the manpower to execute the attacks they order. In many cases, terrorists are obviously undeterrable fanatics, but there is no evidence that there are more irrational individuals among the heads of terrorist organizations than of other criminal organizations.

There is one argument, trivial at first sight, but potentially very important, which concerns the possible amendment of the Rome Statute introducing the crime of terrorism.¹²⁹ Namely, the major powers today are not so much afraid of being attacked by another country or that their populations might become victims of genocide or crimes against humanity. What worries the major powers, especially the United States, is that another horrific terrorist attack might happen. Keeping that in mind, introducing terrorism as a crime under the Rome Statute could be useful to attract the major powers to become State Parties.

Since it has been argued that acquittal should be a solution to hypothetical Case No. 1 because supporters of substantive justice, and even some positivists, would reject it by applying the principle articulated in Radbruch's formula,¹³⁰ the most coherent explanation for conviction of these terrorists is to recognize terrorism as an international crime. The main features of this view are: (1) adequate social condemnation (terrorism is more than an ordinary crime such as murder, but distinct from crimes against humanity and other international crimes), (2) avoiding retaliations through extrajudicial killings, (3) deterrence effect of punishing terrorism as an international crime is greater than merely as a crime under national law, (4) ensuring an international forum with a fair trial for terrorists, and (5) a valuable contribution to the international law (recognition of terrorism as a crime under international law may lead to its inclusion in the Rome Statute). The next step is to discuss the possible defenses to terrorism under international law: determining when, in spite of the fact that certain conduct meets the requirements of the definition of terrorism, the perpetrator's act should be justified or excused.

II. CHALLENGING DEFINITIONS: TERRORISTS V. FREEDOM FIGHTERS

Michael Walzer said that "terrorism" is used most often to describe revolutionary violence.¹³¹ Distinguishing terrorists from liberation movements has indeed been the major obstacle in defining terrorism for almost a century. Medieval

129. There have been attempts to do so, but the disputes over the definition of terrorism have been a major obstacle. However, after introducing crime of aggression in the latest amendments of the Rome Statute, it is plausible to expect that terrorism will be the next crime introduced in the Statute. See Angela Hare, *A New Forum for the Prosecution of Terrorists: Exploring the Possibility of the Addition of Terrorism to the Rome Statute's Jurisdiction*, 8 *LOY. U. CHI. INT'L L. REV.* 95, 103-04 (2010-2011).

130. See Radbruch, *supra* note 66.

131. MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 197 (4th ed. 2006).

scholasticism, influenced by Aristotle, has defined terms by using the following formula: *definition fiat per genus proximum et differentiam specificam*. The *genus proximum* (the proximal generic term) of terrorism is two-sided: extremism and violent crime. The first refers to the ideological background of terrorist acts, being in greatest contradiction with the governing ideology (in case of non-state terrorism) or with the opposing ideology (in case of state terrorism). Second, terrorism is a type of violent crime because it involves the use of destructive means to achieve certain ideological goals. Of course, this characterization is consistent even in cases where violence has not occurred (e.g. placing a bomb which did not explode).

Anyway, it seems that the *genus proximum* part of the definition is not useful in distinguishing terrorists from freedom fighters, as they both use extremism and violence to achieve their goals. Thus, the key to finding a solution to our problem lies in *diferentia specifica*, which refers to the description of the term, which differentiates it from all other terms. This is precisely the puzzle that really bothers contemporary scholars and the international community: what is the difference between acts of terrorism and acts of lawful struggles for freedom?

Terrorism, like any other crime, can be described in light of a common law dichotomy of *offences v. defenses*, which has been unambiguously adopted in international criminal law. This means to observe the *actus reus* and *mens rea* elements of crimes separately from the available defenses that can be raised as justifications or excuses. Due to the complexity of this issue, it is better to think of an example first and explain the relevant concepts by trying to find a best solution to the case problem.

Case No. 2. Imagine that a member of the Free Syrian Army, which is run by the exiled Syrian National Council (located in Turkey), kills the Syrian president Bashar al-Assad in order to prevent further killings of civilians, already exceeding 5,400. It is clear that such a case would satisfy the definition of terrorism promulgated in the STL's Decision:¹³² an act of killing with the intent to coerce a national government to step down, involving a transnational element (acts are directed by the Syrian National Council in Turkey). The possible solutions to this problem are in fact justifications or excuses for allegedly terrorist acts: (1) right of revolution, (2) self-defense, (3) necessity, and (4) combatant status. Since the first is the most important for defining the limits of terrorist acts, and simultaneously the most controversial, it requires more attention than the other three.

A. The Right of Revolution

Looking back in history, the right of revolution has emerged simultaneously, both in Western and Eastern legal tradition. Schools of natural law and social contract have largely contributed to the affirmation of the right of revolution in international law, while it has independently developed in Chinese and Islamic law. The powerful influence of these major legal traditions in the world has led to

132. STL's Decision, *supra* note 1, at ¶ 85.

explicit or implicit recognition of this right in constitutional laws worldwide. The right of revolution has developed into a general principle of law, being an “inherent right of a people to cast out its rulers, change its polity, or effect radical reforms in its system of government or institutions, by force or general uprising, when the legal and constitutional methods of making such changes have proved inadequate or are so obstructed as to be unavailable.”¹³³

1. The Right of Revolution in the Western Legal Tradition

The discussion about the right of revolution¹³⁴ against tyrants dates back to Plato. In his book *Politeia*, one of the dialogues with Socrates brings about the conclusion that when people are unable to expel the tyrant or get him condemned to death by a public accusation, their usual method is to conspire to assassinate him.¹³⁵ The latter is exactly what happened to Julius Caesar, who, according to Cicero, in order to gain the “sovereign power which by a depraved imagination he had conceived in his fancy, trod underfoot all laws of gods and men.”¹³⁶ Cicero justified the acts of those who killed this tyrant.¹³⁷ In his *Annals*, Tacitus reports about Tiberius, another Roman tyrant, whose rule was so obnoxious that at one point people used to say that even a war is better than a miserable peace.¹³⁸ The rise of Christianity led to wide acceptance of Biblical narratives, which indicate that it is justified to kill an oppressive tyrant.¹³⁹ John of Salisbury, a 12th century scholastic philosopher, argued that “it is not only permitted, but it is also equitable and just to slay tyrants.”¹⁴⁰ In the 13th century, Thomas Aquinas raised the case of Caesar’s

133. BLACK’S LAW DICTIONARY 1439 (9th ed. 2009).

134. Different terms are used to depict the same right: right of revolution, right to resist, right of resistance, right to rebel, right of rebellion. The latter two may lead to misunderstanding because there has been a distinction between rebels, insurgents and belligerents under the laws of war, *see infra* note 286 and accompanying text. The expressions based on the Medieval Latin term *jus resistendi* are perhaps the most appropriate, *see infra* note 1433 and accompanying text. However, the term “right of revolution” prevails in literature. *See, e.g.*, Gerald Sumida, *The Right of Revolution: Implications for International Law and Order*, in *POWER AND LAW: AMERICAN DILEMMA IN WORLD AFFAIRS* 130 (Charles A. Barker ed., 1971).

135. 2 THE DIALOGUES OF PLATO: THE REPUBLIC 340 (B. Jowett trans., 1914). This is also the first use of proportionality principle in discussing the right of revolution.

136. MARCUS TULLIUS CICERO, *DE OFFICIIS*, bk. I, at 27 (Walter Miller trans., photo. reprint 1928) (1913).

137. “But if anyone kills a tyrant ... he has not laden his soul with guilt, has he? The Roman People, at all events, are not of that opinion; for of all glorious deeds they hold such an one to be the most noble.” *Id.* at 19. This is one of the examples of Cicero’s concept of natural law, which influenced the theory of natural law for many centuries to come, up through the era of the American Revolution.

138. TACITUS, *THE ANNALS* 237 (William Francis Allen ed., Ginn & Co. 1899) (“*Miseram pacem vel bello bene mutari.*”).

139. Perhaps the most influential among them was the story of Judith who seduced and then beheaded Holofernes in order to save her people from oppression. It influenced not only medieval scholars, such as John of Salisbury, *see infra* note 140, but it has become a symbol of resistance in national literature of some countries. For example, Marco Marulo, a Croatian poet and humanist, wrote an epic poem *Judita*, a remake of the Biblical story published in 1521 in Venice (in Croatian). Today, this poem is considered to be a symbol of resistance against the Venetian hegemony as well as of Croatian historical struggle for liberty.

140. JOHN OF SALISBURY, *POLICRATICUS* 25 (Cary J. Nederman ed. & trans., 1990). His arguments are primarily based on Biblical references. *See id.* at 206–10 (“That by the authority of the

assassination to a principle that "one who liberates his country by killing a tyrant is to be praised and rewarded."¹⁴¹ At that time in England, the *Magna Carta* (1215) enabled the barons, in case of violation of some of its provisions, to seize the king's property and use all available means against him, minus harming the king, the queen and their children.¹⁴² Thus, killing a king or a member of his family was considered to be too excessive to protect one's fundamental rights. This particular right was later called *jus resistendi* (right of resistance) and also was present in some other medieval charters.¹⁴³

Juan de Mariana, a sixteenth century Spanish scholar, argued that when a monarch violates fundamental laws, attacks the liberties and privileges of his subjects, or tends to ruin the nation, the people may resist him.¹⁴⁴ This was not only Mariana's idea, but originated in the Spanish legal tradition of the Late Middle Ages, when people's attitude toward the sovereign depicted him as *primus inter pares* and, had he disobeyed the law, they had the right to disobey him.¹⁴⁵ Emerich de Vattel, one of the founders of modern international law, agreed with Mariana and developed this concept further by introducing an important criterion relevant for assessing the legitimate use of revolution - the principle of proportionality: "When mild and innocent remedies can be applied to the evil, there can be no reason for waiting until it becomes extreme."¹⁴⁶

In his famous work, *De jure belli ac pacis*, Hugo Grotius generally rejects the possibility of justifiable use of force against the sovereign,¹⁴⁷ but he is astonishingly inconsistent in his thoughts on the matter.¹⁴⁸ Namely, while interpreting the "Laws of God", he admits "tacit exceptions in cases of extreme necessity,"¹⁴⁹ yet notes that even in such extremity "the Person of the Sovereign must be spared."¹⁵⁰ Furthermore, he argues that "what one is not allowed to do himself, another may do for him."¹⁵¹ Thus, he introduces the possibility that another nation can invade in

divine book it is lawful and glorious to kill public tyrants, so long as the murderer is not obliged to the tyrant by fealty not otherwise lets justice or honour slip").

141. THOMAS AQUINAS, *SELECTED POLITICAL WRITINGS 185* (A. P. D'Entrèves ed., J. G. Dawson trans., 1959).

142. RALPH V. TURNER, *MAGNA CARTA: THROUGH THE AGES 235* (2003) (referring to Article 61 of the *Magna Carta*).

143. In Art. 31 of the Golden Bule of Andrew II. of Hungary (1222), which permitted the nobles to engage in protests or armed rebellions against the king who violates its provisions. See MARKO KOSTRENČIĆ, *NACRT HISTORIJE HRVATSKE DRŽAVE I HRVATSKOG PRAVA 208-09* (1956). *Sachsenspiegel*, the most important German law book of Middle Ages, asserts that "a man must resist his king and his judge, if he does wrong, and must hinder him in every way, even if he be his relative or feudal lord. And he does not thereby break his fealty." FRITZ KERN, *KINGSHIP AND LAW IN THE MIDDLE AGES 84* (S. B. Chrimes trans., 1956).

144. EMER DE VATTEL, *THE LAW OF NATIONS 18* (Joseph Chitty ed., 2001) (1834).

145. See Waldo Cutler Peebles, *Democratic Tendencies in the Spanish Literature of the Golden Age*, 15 *HISPANIA* 317, 321 (1932).

146. DE VATTEL, *supra* note 1444, at 20.

147. 1 HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE 356-72* (Jean Barbeyrac & Richard Tuck eds., 2005) (1738).

148. H. LAUTERPACHT, *AN INTERNATIONAL BILL OF THE RIGHTS OF MAN 43-44* (1945).

149. GROTIUS, *supra* note 1477, at 356.

150. *Id.* at 360.

151. 2 Hugo GROTIUS, *THE RIGHTS OF WAR AND PEACE 1162* (Jean Barbeyrac & Richard Tuck eds., 2005) (1738).

order to overthrow the tyrant, but does not recognize that right for the people who suffer his tyranny. Furthermore, he allows the “death penalty” to be used against the sovereign in states that have such type of a social contract according to which sovereigns are subordinate to the people.¹⁵² However, these inconsistencies are not so surprising if one takes into consideration that Grotius was at the time located in France as a fugitive from an eruption of Calvinistic intolerance in Holland,¹⁵³ and his patron became Louis XIII, an absolute monarch, to whom he dedicated his book with an extensive panegyric.¹⁵⁴ Therefore, judging Grotius’ attitude toward the idea of right of revolution by taking his statements out of the historical context is misleading. It is plausible to believe that Grotius left these inconsistencies on purpose in order to encourage the reader to read between the lines—just like Leonardo da Vinci had made deliberate errors in designs of his war machines, which are in such discrepancy with his brilliant engineering mind, that it is obvious he left these errors in order to prevent their misuse in future.

The French Revolution began in the domain of philosophy and political theory at the beginning of the 18th century as a new cultural movement that was later called the “Age of Enlightenment”. One of the major protagonists of the Enlightenment, Montesquieu, addresses the problem of an oppressive ruler in his *Persian Letters*: “[I]f a prince, very far from making his subjects live happy, endeavours to oppress and ruin them, the foundation of obedience ceases; nothing ties them, nothing attaches them to him, and they return to their natural liberty.”¹⁵⁵ Montesquieu explains that the unlimited power of a ruler cannot be lawful because it could never have been lawfully established.¹⁵⁶ He further elaborates that the people do not have unlimited power over themselves, and consequentially they could not have transferred such power to the ruler, “[f]or we cannot . . . give to another more power over us, than we have ourselves.”¹⁵⁷ John Locke’s theory of social contract obviously had an impact on Montesquieu’s writing. An analysis of the impact of this theory on the recognition of the right of revolution in international law continues in the forthcoming paragraphs.

One of the postulates of John Locke’s theory of social contract is the natural right of people to overthrow their leaders, if those leaders betray their historic rights.¹⁵⁸ The preconditions for exercising this right are, according to Locke, that “people are made miserable, and . . . exposed to the ill usage of arbitrary power . . .

152. GROTIUS, *supra* note 147, at 119.

153. LAUTERPACHT, *supra* note 148, at 43.

154. GROTIUS, *supra* note 147, at 71-73.

155. M. de Montesquieu, *Persian Letters, Letter CIV.*, in THE COMPLETE WORKS 378 (3rd ed. 1777), available at http://files.libertyfund.org/files/1338/0171-03_Bk.pdf.

156. *Id.* Montesquieu studied Roman law, which probably influenced him in developing this idea. Namely, there is a famous maxim, known as *Regula Catoniana*, supporting his view: *quod initio vitiosum est non potest tractu temporis convalescere* (what is void from the beginning cannot become valid by lapse of time). DIG. 50.17.29 (Paulus, 8 Ad Sabinum).

157. Montesquieu, *supra* note 155, at 378. Another principle of Roman law, accepted in contemporary international law, states the same: *nemo plus iuris ad alium transferre potest quam ipse habet* (no one can transfer to another any greater right than he himself has). DIG. 50.17.54 (Ulpian, Ad Edictum 46). See also DEGAN, *supra* note 822, at 79.

158. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION, 199–209 (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

. [and] generally ill-treated . . . [through] a long train of abuses, prevarications, and artifices.”¹⁵⁹ He says that this happens either when: (1) the authority has changed contrary to the people’s will, or (2) the authority acts contrary to the end for which it was constituted.¹⁶⁰ In both cases, the social contract between the people and the authority is violated, and thus the authority is the one that rebels against the constitutional order that leads back to the initial state of war.¹⁶¹ Therefore, the people have the right to fight to “put the rule into such hands which may secure them the ends for which government was at first erected.”¹⁶²

Jeremy Bentham generally opposed the idea of natural law and natural rights and thus influenced the foundation of the school of legal positivism, but he did not reject the permissibility of resistance against the government. According to him, a man is allowed “to enter into measures of resistance; when, according to the best calculation he is able to make, the probable mischiefs of resistance (speaking with respect to the community in general) appear less to him than the probable mischiefs of submission.”¹⁶³ This particular utilitarian approach seems consistent with the school of natural law because if an oppressive regime minimized the happiness of the people, a reasonable calculation would be that any change achieved by the revolution should increase their happiness.

John Locke’s theory of social contract was the cornerstone of the ideology behind the American Revolution. It influenced the recognition of the right of revolution in the preamble of the Declaration of Independence (1776): “whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government.”¹⁶⁴ The majority of American State constitutions later adopted the same or similar provisions on the right of revolution.¹⁶⁵ This right has also been admitted in the case law of United States courts.¹⁶⁶ Moreover, the case law has developed the principle of proportionality in the use of revolutionary force—violence is considered to be the ultimate means to overthrow the government.¹⁶⁷

159. *Id.* at 199.

160. *Id.* at 200.

161. *Id.*

162. *Id.* at 199.

163. JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 215 (F.C. Montague ed., photo. reprint 2001) (1891).

164. THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

165. See ALA. CONST. art. I, § 2; ARK. CONST. art. II, § 1; COLO. CONST. art. II, § 2; CONN. CONST. art. I, § 2; DEL. CONST. pmbl.; KY. CONST. § 4; IDAHO CONST. art. I, § 2; IND. CONST. art. 1, § 1; IOWA CONST. art. 1, § 2; ME. CONST. art. 1, § 2; MD. CONST. art. 1; MASS. CONST. pt. 1, art. 7; MINN. CONST. art. 1, § 1; MISS. CONST. art. 3, § 6; MO. CONST. art. 1, § 3; MONT. CONST. art. 2, § 2; NEV. CONST. art. 1, § 2; N.H. CONST. pt. 1, art. 10; N.J. CONST. art. 1, ¶ 2; N.C. CONST. art. I, § 3; N.D. CONST. art. 1, § 2; OHIO CONST. art. I, § 2; OKLA. CONST. art. 2, § 1 OR. CONST. art. I, § 1; PA. CONST. art. 1, § 2; R.I. CONST. art. 1, § 1; S.C. CONST. art. I, § 1; S.D. CONST. art. 6, § 26; TENN. CONST. art. 1, § 2; TEX. CONST. art. 1, § 2; UTAH CONST. art. 1, § 2; VT. CONST. ch. I, art. 7; VA. CONST. art. 1, § 3; W. VA. CONST. art. 3, § 3; WYO. CONST. art. 1, § 1.

166. See Jordan J. Paust, *The Human Right to Revolution*, HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 445, 447–48 (Richard Pierre Claude & Burns H. Weston eds., 3d ed. 2006).

167. *Dennis v. United States*, 341 U.S. 494, 501 (1951) (“Whatever theoretical merit there may be to the argument that there is a ‘right’ to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change.”).

After the Hungarian revolutionary leader Lajos Kossuth asked for American support in the Hungarian fight for freedom, the United States responded in 1852 with *Resolutions in Behalf of Hungarian Freedom*, written by Lincoln's committee: "That it is the right of any people, sufficiently numerous for national independence, to throw off, to revolutionize, their existing form of government, and to establish such other in its stead as they may choose."¹⁶⁸ Lincoln consequentially emphasized the right to revolution as soon as he became a United States President: "This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right of amending, or their revolutionary right to dismember or overthrow it."¹⁶⁹ Furthermore, in 1923, Secretary of State Charles Evans Hughes gave an unambiguous statement on behalf of the United States: "We recognize the right of revolution..."¹⁷⁰ United States foreign policy has had a crucial historical role in establishing the right of revolution in international law. It is perhaps the most important political value that was ever made in America and exported throughout the world. Even in the time of the Cold War, when the CIA hunted revolutionaries like Che Guevara in Bolivia, and McCarthyist persecutions took place in the United States, the Supreme Court Justice Black said:

Since the beginning of history there have been governments that have engaged in practices against the people so bad, so cruel, so unjust and so destructive of the individual dignity of men and women that the 'right of revolution' was all the people had left to free themselves. As simple illustrations, one government almost 2,000 years ago burned Christians upon fiery crosses and another government, during this very century, burned Jews in crematories. I venture the suggestion that there are countless multitudes in this country, and all over the world, who would join [the] belief in the right of the people to resist by force tyrannical governments like those.¹⁷¹

The twentieth century saw the rise and fall of various Marxist revolutions (from the October Revolution of 1917 to the disestablishment of the Warsaw Pact in 1990). Marxists argue that there is only one true revolution: a social revolution. In his Preface to the *Critique of Political Economy*, Karl Marx defines social revolution as a radical transformation of the whole superstructure of society arising from a change in its economic foundations.¹⁷² According to Marx, a social revolution does not consist merely of overthrowing a government, but implies an ideological transformation of society as a whole.¹⁷³ But the major problem was how

168. 2 Abraham Lincoln, *Resolutions in Behalf of Hungarian Freedom*, in THE COLLECTED WORKS OF ABRAHAM LINCOLN, Vol. II, 115 (Roy P. Basler ed., 1953).

169. Abraham Lincoln, *First Inaugural Address (March 4, 1861)*, in LINCOLN'S STORIES AND SPEECHES 212 (Edward F. Allen ed., 1900).

170. GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW, VOL. 1, 177 (1940).

171. *In re Anastaplo*, 366 U.S. 82, 113 (1961) (Black, J., dissenting).

172. KARL MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY 12 (N. I. Stone trans., 1904) (1859).

173. *Id.*

to achieve such transformation? At the beginning of the 20th century, there was a large debate between Marxists whether terrorism is an acceptable way of carrying out a revolution. In his book *Terrorism and Communism*, Marxist theoretician Karl Kautsky criticized the October Revolution of 1917 for taking on “forms of barbarity” and for bringing the “bloody terrorism” with it.¹⁷⁴ Kautsky argued that Bolsheviks’ recourse to terrorism was “unfaithful to the principles of the sanctity of human life, which they themselves openly proclaimed.”¹⁷⁵ In response to Kautsky’s critique, Leon Trotsky justified the “Red Terror” by making a comparison with examples of self-defense¹⁷⁶ and concluded the following: “To make the individual sacred we must destroy the social order which crucifies him. And this problem can only be solved by blood and iron.”¹⁷⁷ Unfortunately, Trotsky failed to provide criteria under which revolutionary terrorism is permissible in order to prevent the unlimited Red Terror during the Russian Civil War (1917 – 1923) that began with the October Revolution.

These historical developments have led to the inclusion of the right of revolution in many modern European constitutions. According to the preamble of the French Constitution,¹⁷⁸ an integral part of the Constitution is the *Declaration of the Rights of Man and of the Citizen*, which contains the right of resistance to oppression in Article 2.¹⁷⁹

After the Second World War, one of the demands that the Allies imposed on Germany was to pass emergency laws. However, because the memories of the Nazi regime’s misuse of emergency laws were still fresh, the German Basic Law (1949)¹⁸⁰ did not at first include any provisions about crises such as *putsch* attempts or attacks. This was left for later because the most difficult task was to ensure that the new emergency provisions would never be misused again. In other words, the question that bothered the drafters was: *Quis custodiet ipsos custodes?* Who should control the government with great powers enabled by the emergency laws? The logical answer was the people themselves. This is why the right of revolution (*Widerstandrecht*)¹⁸¹ was incorporated in 1968 into the Basic Law: “All Germans have the right to resist anyone seeking to abolish this constitutional order, if no

174. KARL KAUTSKY, *TERRORISM AND COMMUNISM: A CONTRIBUTION TO THE NATURAL HISTORY OF REVOLUTION*, ch. I (W. H. Kerridge trans., 1919), available at <http://www.marxists.org/archive/kautsky/1919/terrcomm>.

175. *Id.* at ch. VIII.

176. “When a murderer raises his knife over a child, may one kill the murderer to save the child? . . . May one kill the murderer to save oneself? Is an insurrection of oppressed slaves against their masters permissible? Is it permissible to purchase one’s freedom at the cost of the life of one’s jailers?” LEON TROTSKY, *DICTATORSHIP VS. DEMOCRACY (TERRORISM AND COMMUNISM): A REPLY TO KARL KAUTSKY* 62 (1922).

177. *Id.* at 63.

178. 1958 CONST. pmb.

179. DÉCLARATION DES DROITS DE L’HOMME ET DU CITOYEN [DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN], Aug. 26, 1789, art. 2.

180. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG][BASIC LAW], May 23, 1949, BGBL. I.

181. See KLAUS PETERS, *WIDERSTANDSRECHT UND HUMANITÄRE INTERVENTION* 185 n.898 (2005).

other remedy is available".¹⁸² In order to prevent people's abuses in exercising their right of revolution, the Basic Law links this right to the *ultima ratio* requirement¹⁸³ of the principle of proportionality.

Another example is Article 120, Section 4 of the Greek Constitution (1975), which provides the right to resist a violent abolition of the Constitution.¹⁸⁴ Even in states that do not have a constitutional provision on the right of revolution, the right of revolution still exists as unwritten law because it is considered to be "one of the pillars of Western civilization."¹⁸⁵

2. The Right of Revolution in Eastern Legal Traditions and Africa

Independently from its development in the Western world, the right of revolution is also rooted in Chinese legal history through the Confucian concept of the "Mandate of Heaven" (*tianming*). Everyone who has even basic knowledge about Confucianism will know that the core of this school of thought is the belief that human beings are teachable and that they can be reformed. Therefore, in case of an oppressive tyrant, Confucians would suggest trying to reform the ruler first, but if that proves to be ineffective, he needs to be overthrown and replaced by someone who would truly benefit the people. In this way, the Mandate of Heaven doctrine repeatedly influenced rebellions in Chinese history by giving "instant legitimacy upon successful rebel leaders."¹⁸⁶ The *Book of History*, an old Chinese classic, states: "Heaven loves the people; and the Sovereign must obey Heaven."¹⁸⁷ When the sovereign no longer governs the state for the welfare of the people, they have the right to revolt against him and dethrone him.¹⁸⁸

In earlier Islamic legal thought, jurists defended tyranny over anarchy.¹⁸⁹ However, even then in part of Islamic theory there had been support for the right of revolution. According to early pre-Ghayba Shi'ism (i.e. before The Occultation), recognition of the injustice and illegitimacy of the ruler would lead to an active effort to overthrow him,¹⁹⁰ but the doctrine of the Ghayba period abandoned this approach.¹⁹¹ Zaydism, a Shi'a school of thought, allowed any "qualified candidate" to claim the Imamate by calling others to rise up in "military rebellion against an

182. Gesetz zur Ergänzung des Grundgesetzes [Law Amending Basic Law], June 24, 1968, BGBl. 709, § 1 ¶ 7.

183. See THEODOR MAUNZ, GÜNTER DÜRIG ET AL., GRUNDGESETZ: KOMMENTAR, BAND III (ART. 16–22), p. 338, Rn. 34 (Roman Herzog et al. eds., 6th ed. 2011).

184. 1975 SYNTAGMA [SYN.] [CONSTITUTION] 120 ¶ 4.

185. Sumida, *supra* note 134, at 130. Arthur Kaufmann says that the incorporation of the right to revolution into constitutional statutory law is a contradiction in itself because "it would be the fixture by statute of a right which by its nature can exist only above any statute." Arthur Kaufmann, *Small Scale Right to Resist*, 21 NEW ENG. L. REV. 571, 573 (1986).

186. ELIZABETH J. PERRY, CHALLENGING THE MANDATE OF HEAVEN: SOCIAL PROTEST AND STATE POWER IN CHINA, at ix (2002). See also Chung-Sho Lo, *Human Rights in the Chinese Tradition*, in HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS 185, 186–87 (UNESCO ed., 1949).

187. *Id.* at 186.

188. *Id.*

189. MAJID KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM, 13, 69 (2006).

190. Norman Calder, *Accommodation and Revolution in Imami Shi'i Jurisprudence: Khumayni and the Classical Tradition*, 18 MIDDLE E. STUD. 3, 3 (1982).

191. *Id.* at 4.

oppressive ruler.¹⁹² The Mu'tazili school of thought justified the use of armed resistance against an unjust ruler.¹⁹³ Another example are the Khawarij, who openly advocated the right and duty to revolt against a tyrant.¹⁹⁴ The leading scholar of the Islamic Golden Age, Ibn Sina, widely known by his Latinized name Avicenna, also accepted the right of rebellion.¹⁹⁵ This right was also exceptionally recognized in the Persian Medieval text *The Sea of Precious Virtue*.¹⁹⁶

Over time, these exceptional justifications of revolutionary acts have developed into a principle, recognized in many constitutions of Islamic countries. After the Algerian Revolutionary War (1954-1962), the Revolution was explicitly justified in the Algerian Constitution, and the values of the Revolution enjoy constitutional protection even today.¹⁹⁷ In 1979, the Iranian Revolution adopted this new perspective in the Islamic world. The Constitution of Iran expressly justifies the Revolution in overthrowing the previous despotic regime.¹⁹⁸ The concept of *Shura*, which obliges the ruler to consult with the people on public matters, played a key role in this process. *Shura* is considered to be one of the most important Islamic constitutional principles.¹⁹⁹ Furthermore, a considerable number of jurists in different schools of Islamic law have determined "the permissibility of removing the head of state from office if his acts seemed to be in violation of his official duties, or if he acted in an objectionable way which was considered immoral, oppressive, or an infringement of the Qur'an and Sunnah of the Prophet."²⁰⁰ The Constitution of Afghanistan acknowledges "the sacrifices and the historic struggles . . . and just resistance of all people of Afghanistan."²⁰¹

The Universal Islamic Declaration on Human Rights also recognizes the right of revolution: "Every individual and every people has the inalienable right to freedom . . . and shall be entitled to struggle by all available means against any infringement or abrogation of this right; and every oppressed individual or people has a legitimate claim to the support of other individuals and/or peoples in such a struggle."²⁰² This document was presented in a conference held at UNESCO,²⁰³ adding to it a United Nations imprimatur.

192. NAJAM HAIDER, *THE ORIGINS OF THE SHI'A: IDENTITY, RITUAL, AND SACRED SPACE IN EIGHTH-CENTURY KUFA* 17 (2011).

193. ANTHONY BLACK, *THE HISTORY OF ISLAMIC POLITICAL THOUGHT* 27 (2d ed. 2001). A prominent Mu'tazalite, al-Jahiz, held that a tyrant should be deposed when injustice becomes so widespread that the elite begin to gather in groups acknowledging that war is their only hope. *Id.* at 29-30. See also MOHAMED S. EL-AWA, *ON THE POLITICAL SYSTEM OF THE ISLAMIC STATE* 60 (1980).

194. See Calder, *supra* note 1900, at 14. See also EL-AWA, *supra* note 193, at 60.

195. BLACK, *supra* note 1933, at 75.

196. *THE SEA OF PRECIOUS VIRTUES* 120 (Julie Scott Mesiami ed. & trans. 1991) (Sunnis allow rebellion against the king if he "commands some impiety, or something that is contrary to the Law or an innovation").

197. See CONSTITUTION DE LA RÉPUBLIQUE ALGÉRIENNE DÉMOCRATIQUE ET POPULAIRE, pmb., art. 9, available at http://confinder.richmond.edu/admin/docs/local_algeria.pdf.

198. QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONST. OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1989] pmb., available at <http://www.iranchamber.com/government/laws/constitution.php>.

199. EL-AWA, *supra* note 1933, at 86-89.

200. *Id.* at 115-16.

201. CONST. OF THE ISLAMIC REPUBLIC OF AFG. (2004), pmb., available at http://www.law.yale.edu/rcw/rcw/jurisdictions/assc/afghanistan/Afghan_Const_Eng.doc.

202. Universal Islamic Declaration on Human Rights, 21 DHUL QAIDAH 1401, art. 2 (Sept. 19, 1981), available at <http://www.alhewar.com/ISLAMDECL.html>.

The Arab Spring, which began in December 2010, clearly reflects the contemporary viewpoint regarding the right of revolution in the Islamic world. The new Egyptian Constitution emphasizes that the sovereignty belongs solely to the people and that they shall exercise and protect their sovereignty.²⁰⁴ Although there is no clarification about which means can be used to protect people's sovereignty, it is not difficult to conclude that the use of force would be justified if other methods failed. The new Libyan Constitution, adopted for the transitional stage, acknowledges the legitimacy of the Revolution in the Libyan people's struggle for freedom, dignity and restoration of all the rights looted by the Al-Gaddafi's regime.²⁰⁵

Finally, the right of revolution is recognized in the African Charter on Human and Peoples' Rights: "[O]ppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community."²⁰⁶ The commentators suggest that this right is subject to the following conditions: (1) existing oppression; (2) substantial violations of the rule of law (serious or massive violations of human rights); (3) alien nature of oppression; (4) lack of people's freely given consent to oppression; and (5) resort to revolution is permissible only in the event of failure of available legal means.²⁰⁷

3. The Right of Revolution as a General Principle of Law

Perhaps the most important evidence of acceptance of the right of revolution as a principle of law is the third paragraph of the preamble to the *Universal Declaration of Human Rights (UDHR)*,²⁰⁸ which contains a proclamation that "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."²⁰⁹ According to this provision, rebellion has a character of *ultima ratio* action. The initial commentary to the UDHR describes the right to revolution as an instrument "by which men might set up a government in conformity with justice if the fundamental principles of justice and the basic human rights are violated in such fashion as to permit no redress by recourse to peaceful means."²¹⁰

203. See JACQUES WAARDENBURG, *ISLAM: HISTORICAL, SOCIAL AND POLITICAL PERSPECTIVES* 171 (2002).

204. CONST. DECLARATION (2011), art. 3 (Egypt), available at http://www.cabinet.gov.eg/AboutEgypt/ConstitutionalDeclaration_e.pdf.

205. CONST. DECLARATION (2011), pmb. (Libya), available at http://portal.clinecenter.illinois.edu/REPOSITORYCACHE/114/w1R3bTIKEIG95H3MH5nvrSxchm9QLb8T6EK87RZQ9pfnC4py47DaBn9jLA742IFN3d70VnOYueW7t67gWXEs3XiVJJxM8n18U9Wi8vAoO7_24166.pdf.

206. Organization of African Unity, African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3, 21 I.L.M. 58 (June 27, 1981), entered into force Oct. 21, 1986.

207. See FATSAH OUGUERGOUZ, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS* 263–66 (2003).

208. Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. Doc A/810, (Dec. 10, 1948) [hereinafter UDHR].

209. *Id.* at pmb.

210. *The Grounds of an International Declaration of Human Rights*, in *HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS* 258, 264 (UNESCO ed., 1949). *Cf.* SAUL, *supra* note 5, at 83 (arguing that this recognition in the UDHR does not imply that a right of rebellion exists).

Regarding the international case law supporting the right to revolution, it is necessary to mention the *Tinoco* arbitration case.²¹¹ The facts of the case are placed in Costa Rica in the period between 1917 and 1919, when Federico Tinoco overthrew the Government of President Alfredo González. The new president established a new constitution, and during that time some agreements with British companies had been concluded. In 1919, Tinoco resigned and went into exile in Europe. A few years later, in 1922, the restored government passed laws nullifying the acts Tinoco had made, including the agreements with British companies. Great Britain brought this case to arbitration, which ruled as follows:

To hold that a government which establishes itself and maintains a peaceful administration, with the acquiescence of the people for a substantial period of time, does not become a *de facto* government unless it conforms to a previous constitution, would be to hold that within the rules of international law a revolution contrary to the fundamental law of the existing government cannot establish a new government. This cannot be, and is not, true.²¹²

Since this holding implies that there is no such thing as “illegal revolution”, *argumentum a contrario*, there is a right to revolution unless we would be willing to accept the doctrine of legal vacuum.²¹³

Many legal arguments support the existence of the right of revolution under international law. These arguments can be compiled into five major groups. The first group relies on the idea that if international law acknowledges the result of revolution in the form of revolutionary government as well as the state continuity, it must necessarily recognize the means leading to that result.²¹⁴ Second, the right of revolution is necessarily interrelated with the question of legitimacy of the new government in terms of the accepted standard of authority in international law.²¹⁵ Third, the right of self-determination implies the right of revolution as it includes the right of nations to choose their international political status.²¹⁶ The fourth group treats the right of revolution as one of the most important rights flowing from the state’s sovereignty and independence.²¹⁷ Fifth, the evolving responsibility to protect (R2P) also indicates the right of revolution—*argumentum a majori ad minus*—if the whole world is responsible for taking timely and decisive action to prevent and halt mass atrocities when a state is manifestly failing to protect its populations,²¹⁸ this even more strongly entitles that state’s people to take such action.

211. *Tinoco Case* (Gr. Brit. v. Costa Rica), I. R. Int’l Arb. Awards 369 (1923), also available at 18 AMJ. INT’L L. 147 (1924).

212. *Id.* at 154.

213. See KRYSZYNA MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 56 (2d ed. 1968).

214. *Id.* at 57.

215. Paust, *supra* note 166, at 448.

216. *Id.*

217. AMOS S. HERSHEY, *THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW* 146–47 (1921).

218. The use of force is guided by the proportionality principle—after other (peaceful) measures prove to be ineffective—and includes protection from genocide, war crimes, ethnic cleansing and crimes

When it comes to determining the legal nature of the right of revolution, there are generally three ways to deal this issue. The first is based on the idea that the right of revolution should be treated as a human right.²¹⁹ However, such standpoint faces difficulties in application of that right, because it does not provide us with information concerning which source of international law should be applied. Instead, it raises another question: what is the main source of international human rights law?²²⁰ Thus, a second standpoint seems more applicable in practice: the right to revolt against tyranny should be treated as a principle of international law.²²¹ Furthermore, the fact that the general principles of law are considered to be a modern version of the natural law²²² firmly supports this idea. The third way of thinking about the legal source of the right of revolution is to say that it exists in international customary law. Although there are plausible arguments to support this view—after all, the history of mankind is filled with revolutions—it seems superfluous to prove a customary rule if there is already a principle of law on the same issue. However, as principles are often too general to be easily implemented in individual cases, customary law can serve to establish exact criteria for the application of the right of revolution.

Surprisingly, in spite of these evident developments that lead to the establishment of the right to revolution, the idea that there is such right under international law is unambiguously represented only in part of the literature.²²³ Contemporary treatises and textbooks on international law do not mention that such a right exists.²²⁴ Nevertheless, such an argument can also be inferred from

against humanity. See U.N. G.A., 60th Sess., 2005 World Summit Outcome, G.A. Res. 60/1, A/Res./60/1 ¶ 139 (Sept. 20, 2005). This was reaffirmed by the UN Security Council, S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006). See also U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, ¶¶ 62-65, U.N. Doc. A/63/677 (Jan. 12, 2009) (focusing on the practical problems of use of force in situations relating to R2P); President of the G.A., *Concept note on the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity*, at 5, U.N. Doc. A/63/958 (Sept. 9, 2009) (stressing that veto and the lack of UN Security Council reform are real obstacles to effective action); U.N. Secretary-General, *Early warning, assessment and the responsibility to protect: Rep. of the Secretary-General*, ¶¶ 18-19, U.N. Doc. A/64/864 (July 14, 2010) (introducing measures for an effective early warning); U.N. Secretary-General, *The role of regional and subregional arrangements in implementing the responsibility to protect: Rep. of the Secretary-General*, ¶¶ 30-37, U.N. Doc. A/65/877-S/2011/393 (June 28, 2011) (emphasizing the importance of (sub)regional organizations for implementing R2P) [hereinafter U.N. Documents].

219. Paust, *supra* note 166, at 445–52. See also *Final Document: Conclusions and Recommendations*, in *INTERNATIONAL TERRORISM AND POLITICAL CRIMES* xi, xxi (M. Cherif Bassiouni ed., 1975).

220. For a general discussion about the sources of human rights law, see Simma & Alston, *supra* note 800.

221. ELLERY C. STOWELL, *INTERVENTION IN INTERNATIONAL LAW* 354 (1921).

222. LAUTERPACHT, *supra* note 148, at 42.

223. *Id.* at 42–46; Sumida, *supra* note 134, at 134; MAREK, *supra* note 213, at 56–57; TI-CHIANG CHEN, *THE INTERNATIONAL LAW OF RECOGNITION: WITH SPECIAL REFERENCE TO PRACTICE IN GREAT BRITAIN AND THE UNITED STATES* 336 (L.C. Green ed., 1951); Paust, *supra* note 166, at 448–49; Bassiouni, *supra* note 93, at xxi.

224. Right to revolution used to be a chapter of one of the leading American textbooks on international law *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY* (Myres S. McDougal & W. Michael Reisman eds., 1981), as parts of Gerald Sumida's article (*supra* note 134) used to be integrated in it. However, a book which can be considered

statements made by commentators who do not explicitly recognize this right. For example, Michael Reisman stated the following:

[I]nsistence on non-violence and deference to all established institutions in a global system with many injustices can be tantamount to confirmation and reinforcement of those injustices. In certain circumstances, violence may be the last appeal or the first expression of demand of a group or unorganized stratum for some measure of human dignity.²²⁵

In this statement, Reisman argues that, in certain cases, groups or unorganized stratum have the right to employ violence to fight against injustice and protect human dignity. This is exactly what the right of revolution is about.

It is obvious that previously mentioned historic attempts to determine the content of the right of revolution have some differences. For instance, the Magna Carta's concept of *jus resistendi* would not allow the assassination of the current President of Syria, Bashar al-Assad,²²⁶ but the Hungarian Golden Bule of 1222²²⁷ would. German Basic Law would permit such an act, unless there are more lenient and equally efficient means to stop the killings (*ultima ratio* requirement). Be that as it may, the cited proclamation in the UDHR, the theory of social contract and natural law, as well as the developments in comparative constitutional law, provide enough evidence that the right of revolution is in fact a general principle of law. However, in order to overcome the foregoing historical differences, in the following chapter, criteria shall be provided that reflect the common characteristics of the right of revolution in international law.

4. Criteria for the Use of Revolutionary Force

It is surprising that even in the part of international law literature that acknowledges the right of revolution there is no systematic discussion about the criteria that determine the elements for the use of revolutionary force. Based on the analysis of the historical foundations and developments of this general principle of law, the following conditions regarding the use of force in furtherance of revolution are considered to be relevant:

- (1) The majority of the citizens support the use of force,²²⁸ or at least the revolutionaries have to honestly and reasonably believe that the majority would agree to it if they knew the relevant circumstances;

to be its successor does not mention it. See INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE (W. Michael Reisman et al. eds., 2004).

225. W. Michael Reisman, *Private Armies in a Global War System: Prologue to Decision*, 14 VA. J. INT'L L. 1, 32-33 (1973).

226. However, even Magna Carta's approach indicates a proportionality character: killing a king or a member of his family was obviously considered to be too excessive to protect the fundamental rights.

227. See KOSTRENIĆ, *supra* note 1433, at 208-09.

228. See Paust, *supra* note 1666, at 447 ("[T]he right of revolution is in the nation as a whole and is not a right of some minority. . . ."). The Marxist philosophy, which provided the ideological

- (2) Use of force must be the last resort and not excessive in relation to the concrete advantage anticipated;²²⁹
- (3) The cause of use of force has to be the government's oppression in form of substantial violations²³⁰ of the constitution²³¹ or of the fundamental human rights;²³²
- (4) The use of force has to be directed against the oppressive government.²³³

In the forthcoming paragraphs, each of these requirements will be elaborated and their purpose demonstrated.

The first condition is the *principle of democracy*, which is based on the idea of the sovereignty of the people. Namely, in contemporary international law, what counts is the people's sovereignty and not a metaphysical abstraction called the state,²³⁴ which means that people have the right to determine their own political destiny. However, this does not imply that the revolution has to institute a democracy—the people can establish any form of government they desire.

The principle of democracy includes two elements: (a) citizenship and (b) majority support. The citizenship requirement is derived from the idea that only a national is entitled, as a party to the social contract of a certain state, to react to the government's oppression. However, in the past, there have been many cases of adventurists or cosmopolites who went to other countries to support and take part

background for many revolutions of the past century, also supports this view. See JOHN SOMERVILLE, *THE PHILOSOPHY OF MARXISM* 124–25 (1967) (“[T]he predominant weight and content of Marxist philosophy is explicitly against the undertaking of any violent revolution which is opposed by the majority, and which is not likely to enlist the support of the masses. In other words, there must be convincing evidence that the majority are in support of so drastic a step, and that they are prepared to face the dangers involved in their active cooperation in carrying it out.”).

229. *But see* UDHR, *supra* note 208, at pmbl. (*argumentum e contrario*, if a man is compelled, he can have recourse, as a last resort, to rebellion against tyranny and oppression). See also DE VATTEL, *supra* note 1444, at 20 (“When mild and innocent remedies can be applied to the evil, there can be no reason for waiting until it becomes extreme.”); Tony Honoré, *The Right to Rebel*, 8 OXFORD J. LEGAL STUD. 34, 46 (1988) (The right of rebellion should be conditioned on the exhaustion of nonviolent remedies); Paust, *supra* note 1666, at 451 (“permissible uses of force are conditioned generally by the principles of necessity and proportionality”); Kaufmann, *supra* note 1855, at 574 (resistance is the ultimate ratio and must be proportional).

230. See Honoré, *supra* note 229, at 51 (“[S]tate's breach of duty must be *weighty, crucial and severe*.”). See also Kaufmann, *supra* note 185, at 574 (“Resistance . . . requires a “*crass abuse of sovereign power*. . . .”).

231. This is sometimes even explicitly provisioned in constitutions. See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 20 (4) (Ger.), as amended. See also 1975 Σύνταγμα [SYN.] [CONSTITUTION] art. 120 (4) (Greece).

232. UDHR, *supra* note 208, pmbl. (prescribing that the rebellion is used in defense of human rights). See also, HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS, *supra* note 210, at 264; Tran Van Minh, *Sanctions juridiques et politiques des violations des droits de l'homme*, in DROITS DE L'HOMME: DROITS DES PEUPLES 67, 97 (Alain Fenet ed., 1982).

233. See Paust, *supra* note 166, at 449; see also Nicholas N. Kittrie, *Patriots and Terrorists: Reconciling Human Rights With World Order*, 13 CASE W. RES. J. INT'L L. 291, 304–05 (1981) (although referring to such conducts as “acts of self-defense” or “acts of resistance” without distinguishing them).

234. W. Michael Reisman, *Haiti and the Validity of International Action*, 89 AM. J. INT'L L. 82, 83 (1995).

in revolutionary movements (e.g. French volunteers during the American Revolution). In modern times, a humanitarian intervention has a similar role. As transfers of rights are governed by the Roman law doctrine *nemo plus iuris ad alium transferre potest quam ipse habet* (no one can transfer to another any greater right than he himself has), the use of force by foreigners would be legitimate only if the citizens themselves were entitled to such acts. In other words, revolutionary acts of foreign volunteers are to be judged through evaluation of the same four conditions.

However, insistence solely on actual majority support would sometimes lead to the same injustices that the right of revolution was designed to suppress. For example, if a Jewish person had assassinated Hitler in Germany during the Second World War, whom the majority of German citizens supported due to misleading Nazi propaganda, it would be wrong to conclude that such assassination would have been unlawful.²³⁵ This is something that Marxists call “false consciousness”, a thesis that in capitalist societies, due to the deceptive official ideology, the proletariat is sometimes unaware of the need of revolution.²³⁶ The only way to avoid condemnation is to provide an alternative condition: an honest and reasonable belief that the majority would support the revolutionary act of force, if they were informed about the relevant circumstances. Since they had been misled by Hitler’s propaganda, the large majority of Germans were not aware of what was really happening.

This certainly requires a good insight to properly judge the situation before starting a revolution.²³⁷ However, if it turns out that revolutionaries had a false belief (*i.e.* the majority would not support them even if they knew the circumstances), their actions could not be justified, but should be excused because their behavior was honest and reasonable.²³⁸

The *principle of proportionality* is the second requirement. Under this principle, if there is a more lenient way to overthrow an oppressive government, it

235. The only problem with the justifying effect of the right of revolution is that the “victim” of the assassination would not have the right of self-defense as such defense can be used only to avert “an imminent or actual unlawful attack on the life of the person or another person.” CASSESE, *supra* note 3, at 259. For general information about justifications and excuses in international criminal law, see *id.* at 255-58. However, in a case where Hitler had killed his assassin, who was about to shoot him, his act should be excused because it was not blameworthy. *Cf.* Honoré, *supra* note 229, at 48 (justifying both assassination of Hitler and his self-defense).

236. “Ideology is a process accomplished by the so-called thinker consciously, indeed, but with a false consciousness. The real motives impelling him remain unknown to him, otherwise it would not be an ideological process at all. Hence he imagines false or apparent motives.” Letter from Friedrich Engels to Franz Mehring (July 14, 1893), in MARX AND ENGELS CORRESPONDENCE (Donna Torr trans., 1968), available at http://www.marxists.org/archive/marx/works/1893/letters/93_07_14.htm.

237. Kaufmann, *supra* note 1855, at 575. In addition to this, Kaufmann asserts that a revolutionary needs to be convinced that he is acting in the interests of the common welfare. *Id.* There is nothing wrong with these criteria, but opens a problem of determining what “common welfare” is. On the other hand, a requirement that a revolutionary has to be convinced that the majority supports him (or would support him if they knew the state of facts) is much more concrete in that sense.

238. In terms of German legal theory, this situation would be classified as a mistake of facts underlying a justification (*Erlaubnistatbestandsirrtum*). The legal consequences of this error, according to the dominant “limited theory of culpability” (*eingeschränkte Schuldtheorie*), are the same as in case of regular mistake of fact (*Tatbestandsirrtum*): exculpation or responsibility for negligence. See ROXIN, *supra* note 68, at 623–24.

should be undertaken first. The right of revolution should be conditioned on the exhaustion of nonviolent remedies, e.g. constitutional methods, recourse to the legal system, political propaganda, peaceful protests, civil disobedience, passive resistance, etc.²³⁹ However, such means have to be effective. In February 2012, President Assad organized a constitutional referendum for the Syrian people. The referendum resulted in amending the Syrian Constitution in a way that Assad's one-party dictatorship would be abolished, but in two years when the next elections take place. This was clearly an attempt to deceive the Syrian people and the international community that Assad has democratic intentions, but there was no reason to believe him, as the atrocities had not ceased.²⁴⁰

In principle, the right of revolution cannot be used in true democratic political systems because free elections exist to change the government. Nevertheless, even in true democracies one can imagine a situation where the mandate of the government is too long to wait for new elections to overthrow the government that has become oppressive. Furthermore, considering the evolving responsibility to protect, seeking international assistance should also be taken into account; in order to provide protection to populations, the international community can use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the U.N. Charter. However, its ineffectiveness in many cases proves that the use of revolutionary force will be indispensable "as long as the international community lacks the means for the effective, worldwide enforcement of fundamental human rights."²⁴¹

The principle of proportionality implies not only when force can be used, but also determines its content. In practical terms, this means primarily that an oppressor should not be killed if he could be captured without any additional risks. Syrian rebels have already detained members of the government's forces, but Human Rights Watch reports abuses that Syrian rebels have committed against captured persons, including tortures and executions.²⁴²

The third condition is the *principle of just cause*. Arthur Kaufmann, a prominent German legal philosopher of the 20th century, said that "[t]he essence of justice is resistance against injustice."²⁴³ The cause of revolution is just when the oppression consists either of substantial violations of the constitution or of the fundamental human rights, or both. International law has no competence to discuss violations of domestic constitutions that are not breaches of international law at the same time. However, as argued before, the right of revolution is not only a part of international law; rather, it is a general principle of law applicable to all legal systems.

239. *Id.* at 46. This includes the use of measures under Chapters VI and VIII of the U.N. Charter, but not the use of force under Chapter VII. Since the people themselves are primarily entitled to fight for their freedom, it would be an unreasonable burden to require them to wait for foreign military intervention first.

240. See Neil MacFarquhar, *U.N. Leader Says Assad Must Shift Syria's Course*, N.Y. TIMES, Mar. 13, 2012, <http://www.nytimes.com/2012/03/14/world/middleeast/un-chief-ban-ki-moon-says-assad-must-shift-syrias-course.html>.

241. Kittrie, *supra* note 233, at 305.

242. *Syria: Armed Opposition Groups Committing Abuses*, HUMAN RIGHTS WATCH, Mar. 20, 2012, <http://www.hrw.org/news/2012/03/20/syria-armed-opposition-groups-committing-abuses>.

243. Kaufmann, *supra* note 1855, at 571.

But what constitutes a substantial violation? Generally, it means the oppression needs to be perpetual—one isolated violent act against the people would be insufficient.²⁴⁴ However, it is also possible that even a single government action could constitute such a severe harm to the people that it alone would justify the revolutionary use of force. In any case, use of force against the government is permissible in cases of genocide, crimes against humanity and war crimes, as for these even the international community has the responsibility to protect.²⁴⁵ When the period of oppression ends—permanently, not just temporarily²⁴⁶—the right of revolution ceases, and all forms of retaliation are prohibited. This means that the killing of Muammar al-Gaddafi after his regime was already overthrown is an unambiguous example of murder.

The last requirement is the *principle of distinction* (or discrimination), which means that the use of force must be directed at the people in power to stop the oppression, as well as the people who implement the oppression, typically either the police or the army. In other words, in times of oppression, people have the right, as a last resort, to use force against people of political and military power at all levels, from the regular policeman or soldier to the head of state. In the case of Syria, lawful targets are also the so-called *shabeeha*, government's unofficial armed forces.²⁴⁷

Unlike similar provisions in the laws of war, collateral civilian casualties are absolutely prohibited.²⁴⁸ The zero civilian casualties rule is also a feature that distinguishes the right of revolution from necessity, which sometimes tolerates innocent casualties (e.g. in the case of shooting an attacker in self-defense, but the bullet kills an innocent victim behind him). Namely, revolutionary force can be solely directed at the individuals who actively participate in the oppressive regime.²⁴⁹ In the historical development of this right, no exceptions to this rule have evolved. To permit civilian casualties in pursuit of revolutionary acts would mean to allow terrorism because, as Michael Walzer has rightly observed, “[r]andomness is the crucial feature of terrorist activities.”²⁵⁰ Thus, throwing a bomb to kill Hitler would be justified within the scope of the right of revolution, but not if the bomb would kill civilians around him.²⁵¹ In that case, the assassinator would have to wait

244. Tran Van Minh observes that the right of revolution presupposes violations so massive and grave that they are regarded as an attack on the people as a human community. Tran Van Minh, *supra* note 232, at 97.

245. *See supra*, U.N. Documents, note 218.

246. In practice, today this could only happen when the government resigns or a *coup d'état* occurs.

247. *See* HUMAN RIGHTS WATCH, “WE LIVE AS IN WAR:” CRACKDOWN ON PROTESTERS IN THE GOVERNORATE OF HOMS 14 n.20 (2011).

248. *See* Kittrie, *supra* note 233, at 304–05 (arguing that all deliberate or careless harm to innocent parties should be avoided).

249. Of course, if the attack was unintentionally directed to civilians, such mistake of facts underlying a justification can in some cases excuse the perpetrator. *See supra*, ROXIN, note 70. However, the threshold for granting an excuse must not be lower than an honest and reasonable belief that the attack would have zero civilian victims.

250. WALZER, *supra* note 1311, at 197. Algerian revolutionaries contaminated their just fight for freedom in 1950s by killing French at random (e.g. bombing a milk bar where French teenagers were drinking and dancing). *See id.* at 205.

251. Of course, there are other ways to avoid the punishment in this case (pardon, amnesty etc.).

for another opportunity to perform the attack or use a different weapon in order to avoid killing civilians.

In March 2012, Syrian rebels assassinated two senior military officials of the Syrian Army.²⁵² The Syrian state news agency reported this attack “saying that ‘four terrorists driving a car’ opened fire on two army colonels, ‘while they were heading to their job,’ killing them.”²⁵³ One could not imagine a more perfect example of exercising the use of force under the right of revolution. On the other hand, Human Rights Watch has received reports that the Syrian rebels have also committed kidnappings and executions of civilians,²⁵⁴ which are obvious terrorist activities that need to be investigated and condemned. After this revolution, Syria will face a post-conflict transition, and it is essential for peace and reconciliation to avoid the attribution of collective guilt by convicting the individuals responsible for the crimes committed.

There are also strong utilitarian arguments supporting the principle of distinction. Permitting civilian casualties lowers the chances of final success in overthrowing the regime, as people will not give support to anybody who is responsible for killing civilians—they will be marked as terrorists instead. Furthermore, revolutionaries who are ready to use terrorism as a means of fighting their oppressors are likely to become oppressors themselves once they seize power. Many regimes of Marxist revolutions failed primarily because they were too oppressive (e.g. Pol Pot’s Khmer Rouge regime in Cambodia, Mengistu Haile Mariam’s “Red Terror” in Ethiopia, Nicolae Ceaușescu’s regime in Romania etc.) and the people responded with democratic revolutions, particularly in the 1990s. Therefore, Syrian rebels “need to make it clear that they envision a Syria that turns the page on Assad-era violations and welcomes all . . . without discrimination.”²⁵⁵

Arthur Kaufmann mentions another requirement that deserves our attention. He argues that there has to be a reasonable hope for a revolution’s success because “resistance which appears at the outset completely hopeless and therefore meaningless is not legitimate.”²⁵⁶ The inclusion of this criterion is fundamentally wrong. Justifications are never made dependent on the success of the act, nor on the subjective perceptions of success. Imagine five armed people attacking one person in order to kidnap her while she has a gun with only one bullet, and she shoots one of them. Nobody can deny her the right to act in self-defense, regardless of the fact that there is no reasonable hope that she will succeed in averting their attack. Perhaps at first sight, a utilitarian approach would suggest that her act was illegitimate because she unnecessarily wasted one man’s life although she would be kidnapped afterwards anyway. However, such a view is not correct because by killing one of the kidnappers she improved her chances of escaping her kidnappers sometime in the future. The same can be said for starting a hopeless revolution. In Syria, President Assad does not want to step down, and currently his forces are

252. Anne Barnard, *Syrian Rebels Continue Assassination Campaign, Killing 2 Military Officials*, N.Y. TIMES, Mar. 29, 2012, <http://www.nytimes.com/2012/03/30/world/middleeast/aleppo-syria-attackers-kill-two-officers.html>.

253. *Id.*

254. Human Rights Watch, *supra* note 242.

255. *Id.*

256. Kaufmann, *supra* note 1855, at 575.

much stronger than the groups fighting his regime. Perhaps some would argue it was unreasonable to even start this revolution, but if they did not start a revolution, Assad would oppress Syrian people for decades. Thus, the success of the ongoing Syrian revolution is that Assad has lost his credibility before the international community, and now he faces a lot of pressure, which improves the chances that Syrian people will gain their freedom sometime in the future.

Of course, there are more imaginable requirements that can be added to this list. One more will be discussed because it strikes one of the major problems of revolutions: will the new government be better than the old one? Unfortunately, there is always a danger that the new regime will be equally or more oppressive than the predecessor: the Khmer Rouge Revolution in Cambodia established in 1975 the bloodiest regime in modern Asian history; the 1979 Iranian Revolution replaced one dictator (Shah Reza Pahlavi) with another (Ayatollah Khomeini); and the most recent example is the 2011 Revolution in Libya, which overthrew the oppressive regime of Colonel Gaddafi, but people still live in fear of militia violence. The prospect in Syria is also a period of insecurity that could turn into a new oppression if the Islamist extremists, such as the *al Nusra Front* (the main al Qaeda-linked group), would dominate the country once President Assad falls.²⁵⁷ If we added an additional requirement that a revolution was justified only if it established a government that eliminated oppression, these revolutions would have been illegitimate. The inadequacy of this requirement is that it determines *ex post facto* whether certain revolutionary acts are justified. Freedom fighters rise against oppression, that is their main motivation. Thus, making plans about the future regime may seem too remote to them. Furthermore, it is impossible to judge the success of the new government immediately after the revolution. It often takes years to make a proper evaluation of the outcome of the revolution, and it is uncommon to apply justifications depending on the outcome of an act. Imagine this situation: while a woman is being raped, a man approaches and kills the rapist, but afterwards he rapes the woman. The fact that he raped her afterwards does not make him a murderer because by killing the rapist he legitimately defended the woman, so the law makes him responsible only for rape. The same is with revolutions: the fact that revolutionaries, once they gain power, would cause equal or more oppression than the regime they were fighting against, should not make the revolution illegitimate – in that case, they will be only responsible for the oppression they committed afterwards.

A state is sometimes compared to a living organism.²⁵⁸ By applying this analogy, revolutions are like medical surgeries and so is their outcome: usually, it is going to get worse before it gets better. If the condition does not improve, the physician is not automatically responsible for medical malpractice if he acted in accordance with the medical rules.

257. “U.S. and European officials said they fear that the al Nusra Front, which has seized control of swaths of northern Syria, could dominate the country once Mr. Assad falls.” Adam Entous, Siobhan Gorman & Nour Malas, *CIA Expands Role in Syria Fight*, WALL ST. J., Mar. 22, 2013.

258. The analogy between a state and a living organism dates back to Plato and Hobbes, and it was later adopted by Herbert Spencer and other followers of the so-called Organic Theory of State. See Herbert Spencer, *The Social Organism*, in HERBERT SPENCER, *THE MAN VERSUS THE STATE: WITH SIX ESSAYS ON GOVERNMENT, SOCIETY, AND FREEDOM* 383, 388–94 (1981).

Regardless of the fact that the right of revolution is not included in the Rome Statute, this defense could be used in proceedings before the ICC because the Statute empowers the ICC to consider grounds for excluding criminal responsibility other than those referred to in the Statute.²⁵⁹

Sartre's quote from *Dirty Hands* at the beginning of this Article reveals the differences between terrorists and freedom fighters. It shows that the right of revolution is not an absolute right, but has its limits the same as almost any other right.²⁶⁰ As demonstrated in the foregoing paragraphs, these limits are guided by four principles: (1) principle of democracy, (2) principle of proportionality, (3) principle of just cause, and (4) principle of distinction.

B. Other Justifications and Excuses for Freedom Fighters

Since international law is not a structure of legal norms, as continental legal systems tend to be, but resembles the more pragmatic common law systems, the justifications and excuses are intertwining. This is also a consequence of historical facts that demonstrate their common origin in natural law: (1) the right of revolution has evolved from the natural right of self-defense;²⁶¹ (2) self-defense has been used to recognize a broader natural law: the law of necessity²⁶²; and (3) combatant status developed from all of the previously mentioned categories.²⁶³ In the forthcoming paragraphs, characteristics and legal requirements for the exonerating effects will be presented. These are the only ways to distinguish terrorist acts from legitimate fights for freedom.

1. Law of Self-defense

There are two types of self-defense in international law. One is self-defense in public international law,²⁶⁴ and the other is self-defense in international criminal law.²⁶⁵ With regard to the time of the attack in relation to the permissibility of

259. Rome Statute, *supra* note 49, art. 31(3).

260. The notable exceptions include the right to freedom from torture and from slavery, which are considered to be absolute human rights.

261. See LOCKE, *supra* note 15858, at 203. See also VATTEL, *supra* note 1444, at 22.

262. In ancient and medieval legal systems, the law of necessity existed in fragments – including various exceptions to legal sanctions, such as the law of self-defense, but without a generalized concept. After necessity developed into a separate justification, the law of self-defense remained a law of necessity. See *Logue v. Commonwealth*, 38 Pa. 265, 268 (1861); *Holmes v. United States*, 11 F.2d 569, 574 (D.C. Cir. 1926); *United States v. Peterson*, 483 F.2d 1222, 1229 (D.C. Cir. 1973). Cf. *Toops v. State*, 643 N.E.2d 387, 388 (Ind. Ct. App. 1994) (“The origins of the necessity defense are lost in antiquity.”).

263. Combatant status is generally rooted in necessity and self-defense: throughout history, wars of expansion were often used out of necessity (this was the only way to survive), while attacked populations acted in self-defense. Furthermore, the combatant status in connection with the right of self-determination has developed from the right of revolution (this is why the American Revolutionary War was never called a war for self-determination, because at that time this concept was unknown).

264. U.N. Charter art. 51.

265. Rome Statute, *supra* note 49, art. 31(1)(c). Self-defense in international criminal law is also considered to be a general principle of law and a part of customary international law. See *Prosecutor v.*

averting the attack, two types of attacks are distinguishable: actual and anticipative. Only the right to avert an actual attack is applicable to all cases, regardless of the fact of whether there is an attack within the state (internal attack) or against another state (international attack). On the other hand, the U.N. Charter seems to permit anticipatory self-defense, although many disagree on this.²⁶⁶ Namely, in case of an actual attack against another state, it would be too late for a defensive reaction and, in practical terms, this would require states to suffer damage before they could defend themselves. As Myres McDougall wrote, to impose on States the attitude of “sitting ducks” when confronted with an impending military attack could only make a mockery of the UN Charter’s main purpose of minimizing unauthorized use of force across State borders.²⁶⁷

However, even if we reject the permissibility of anticipatory self-defense, the desired purpose—in both internal and international attacks—can be achieved through the interpretation of the law of attempt. That is, the attacked person has the right of self-defense from the moment of an attempted unlawful act. There are three main doctrines that prevail in comparative law of attempts: substantial step, dangerous proximity and the last act theory. The first one is mainly present in jurisdictions influenced by the Model Penal Code²⁶⁸ and in the ICC Statute²⁶⁹ and is usually interpreted as prohibiting earlier stages of criminal activities than the other two theories.²⁷⁰ This means that a right of self-defense is triggered from the moment when certain preparatory acts become a substantial step for the commission of the unlawful attack. Namely, when an attack is attempted it cannot be considered as anticipated anymore.

It is possible in some cases that the doctrine of self-defense²⁷¹ could justify the assassination of the Syrian president. Two situations are distinguishable. First, there would have to be evidence that such an act would avert an immediate attack against civilians, and this would be possible only in extreme situations (e.g. assassinating him in the moment when he hands over a written order to start shooting at the protesters). The second situation, which is more plausible, is that there would have to be evidence that there is an ongoing attack (people are being

Kordić & Čerkez, Case No. IT-95-14/2-T, Judgment, ¶¶ 449, 451 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001).

266. See ANTONIO CASSESE, *INTERNATIONAL LAW* 358–61 (2d ed. 2005).

267. Myres S. McDougall, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT’L L. 597, 601 (1963).

268. See MODEL PENAL CODE § 5.01(1)(c) (Proposed Official Draft 1962).

269. Rome Statute *supra* note 49, art. 25(3)(f).

270. See *U.S. v. Yousef*, 327 F.3d 56 (2d Cir. 2003) (the defendant, while in the Philippines, took a substantial step toward damaging or destroying United States aircraft and placing a bomb on such aircraft, even though all the predicate acts occurred in the Philippines and no steps were directly connected to the United States or its aircraft). See also *U.S. v. Rahman*, 189 F.3d 88 (2d Cir. 1999) (the defendants took substantial steps toward bombing various targets in New York, where they recruited sufficient participants to carry out their plan, rented a house in which to build bombs, reconnoitered potential targets, purchased the necessary components for the bombs, attempted to find stolen cars in which to carry bombs, and obtained submachine gun to assist in carrying out the plan).

271. Of course, self-defense not only includes the defense of oneself, but also the defense of another. See GERHARD WERLE, *PRINCIPLES OF INTERNATIONAL CRIMINAL LAW* 141 (2005). See also *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-T, Judgment, ¶ 449 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001).

killed or tortured) and that killing the president would immediately stop such conduct. The problem with both situations is that it is unclear whether they are cases of self-defense or of necessity. Namely, if self-defense must be directed against the immediate attacker, its legal application would be excluded; instead, necessity would apply.

2. Law of Necessity

Necessity is defined in the Rome Statute as conduct resulting from a “threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.”²⁷²

One of the problems concerning necessity is that it is not clear whether it can be considered to be a part of customary international law in cases where someone is charged with killing another person or persons. The last famous international law case that dealt with the question of necessity, or, more precisely, duress,²⁷³ was the *Erdemović* case. However, the ICTY’s Appeals Chamber did not find a rule in international law on the question of duress as a defense to the killing of innocent persons,²⁷⁴ and the majority’s standpoint was that duress does not afford a complete defense to a charge of a crime against humanity or a war crime that involves the killing of innocent human beings.²⁷⁵ One can notice that there is a substantial difference between this ruling and our hypothetical case: Assad cannot be considered to be an “innocent person” because he is responsible for the killings of his own people. Therefore, the Appeals chamber did not rule out the possibility to apply a necessity (duress) defense in a case where the defendant killed a “non-innocent” person. Furthermore, under the Rome Statute, the necessity defense is available even for murder charges.²⁷⁶

While seeking support for the “lesser evil” defense under international criminal law, Gabriella Blum seems to be disappointed with the current definition of necessity defense in international criminal law.²⁷⁷ The reason for her disappointment is not the fact that the Rome Statute does not define necessity clearly as a choice of lesser evil, but primarily because it requires (for exoneration)

272. Rome Statute *supra* note 4949, art. 31(d).

273. Duress is essentially a special type of necessity and is often termed that way, both in national laws and international law. *Cf.* CASSESE, *supra* note 2, at 280–81 (arguing some important differences which distinguish these defenses, although the prescribed requirements are the same).

274. Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah ¶ 72 (Oct. 7, 1997).

275. *Id.* ¶¶ 88-89. *Cf.* Separate and Dissenting Opinion of Judge Cassese, ¶¶ 49-50 (arguing that in exceptional circumstances duress can be urged in defense to a charge of crimes against humanity or war crimes even in cases of killings).

276. Per Saland, *International Criminal Law Principles*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 189, 208 (Roy S. Lee ed., 1999).

277. See Gabriella Blum, *The Laws of War and the "Lesser Evil"*, 35 YALE J. INT'L L. 1, 14 (2010).

that the threat of harm be “imminent.”²⁷⁸ Instead, Blum proposes a humanitarian necessity justification “when an actor selects an illegal course of action because, in the circumstances, the prohibited approach would do less damage to the values IHL seeks to protect than would any licit alternative.”²⁷⁹ The argument that imminent threat can be interpreted in a way that would, at least, partially satisfy Blum’s proposal, and at the same time eliminate deficiencies of her highly utilitarian approach, will be provided.

Suppose that Assad temporarily stops the killings of the protesters, allowing them to surrender to the police in 24 hours, even though obviously they would be subjected to torture if they do so. If a member of the Free Syrian Army killed Assad during this period of time, this would not constitute an immediate attack necessary for the application of self-defense. Perhaps the doctrine of necessity would be another way-out from this situation.

In comparative law, there is a way to apply necessity in cases involving a temporary break of killings: by accepting a German concept of permanent necessity (*Dauernotstand*).²⁸⁰ This theory is based on the idea that the “threat” as an element of necessity could be permanent (*Dauergefahr*), as in the case of the wife who killed her husband (“the family tyrant”) while he was asleep because he has been abusing her for a long period of time and she wanted to stop his violence.²⁸¹ If permanent necessity is a defense to killing a “family tyrant”, for the same reasons it seems plausible to argue that it should be possible to apply it to the case of killing a “state tyrant”.²⁸² The German Penal Code’s definition of necessity also contains the element of imminent threat.²⁸³ Be that as it may, the concept of permanent necessity is yet to be developed in international law.²⁸⁴

3. Combatant Status

Finally, another way to deal with cases of assassination of an oppressive ruler is to identify whether the assassinator had the status of a combatant, which might justify the assassination of the president as being the head of military forces. In

278. *Id.*

279. *Id.*

280. For origins of this doctrine and general information, see generally Rudolf Ottmar Keller, *Der Dauernotstand im Strafrecht*, STRAFRECHTLICHE ABHANDLUNGEN, no. 340, 1934, at 1; ROXIN, *supra* note 68, at 733, 970.

281. Bundesgerichtshof [BGH] [Federal Court of Justice], May 25, 2003, 34 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2464, 2003.

282. After all, there is a long tradition of thinkers, starting from Confucius and Aristotle, supporting the idea that a state is in fact an enlarged family and that the same rules regulating the family are applicable to the state.

283. STRAFGESETZBUCH [StGB] [PENAL CODE], May 15, 1871, REICHSGESETZBLATT [RGBL.] 127, as amended, § 34.

284. For cases of killing “family tyrants,” American criminal law has developed the *battered woman syndrome* defense. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 318–19 (5th ed. 2009). Such concept is not applicable to “state tyrants.”

principle, under international laws of war this would not be possible because the combatant status can be admitted only in cases of international armed conflicts.²⁸⁵

But before we begin the discussion about the legal consequences of the distinction between international and non-international armed conflicts, it is necessary to provide a definition of an armed conflict. Although neither the Geneva Conventions nor their Additional Protocols explicitly defines it, the definition of an armed conflict can be found in the jurisprudence of the ICTY:

[A]n armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.²⁸⁶

The ICTY's definition precisely elucidates the potential actors of an armed conflict (States, governmental authorities, organized armed groups), as well as its temporal limits. Both terrorists and freedom fighters may form organized armed groups, which are, as interpreted by the ICC's Pre-Trial Chamber, "groups with some degree of organisation and the ability to plan and carry out sustained military operations."²⁸⁷ It is not required that an organized group controls part of a territory, nor that there is a responsible command. However, not every organized armed group will be able to afford its members a privileged combatant status. Let us briefly remind ourselves of the historical development of combatant status in non-international armed conflicts.

Before the Second World War, in non-international conflicts, three types of actors had been distinguishable: (1) rebels—representing a short and sporadic threat to authority exclusively governed by municipal law; (2) insurgents—armed fighters against the authority which are not recognized as belligerents; and (3) belligerents—recognized as such with the rights and obligations under international

285. This rule goes back to the 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land: Regulations Respecting the Laws and Customs of War on Land, Annex art. 3, Oct. 18, 1907, 205 Consol. T.S. 277 [hereinafter Hague Regulations].

286. Tadić Interlocutory Appeal Decision, *supra* note 95, ¶ 70. The ICC also accepted this definition. See Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, ¶ 533 (March 14, 2012). *But see* Marko Milanovic & Vidan Hadzi-Vidanovic, *A Taxonomy of Armed Conflict*, in RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW (Nigel White & Christian Henderson eds.) (forthcoming Aug. 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988915 (claiming that armed conflict cannot be defined generically).

287. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, ¶ 533 (March 14, 2012).

humanitarian law.²⁸⁸ Therefore, in this period only belligerents had a privileged combatant status. Even today, it is possible, although unlikely, that a state will decide to recognize its insurgents as belligerents and thus afford them a privileged combatant status.²⁸⁹

In countries that have ratified the 1977 Protocol I to the Geneva Conventions,²⁹⁰ there is an extension of the applicability of rules regarding international armed conflicts to situations that includes “armed 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.”²⁹¹ In addition to this, according to the same Protocol, members of the armed forces of a Party to a conflict are considered to be combatants even “if that Party is represented by a government or an authority not recognized by an adverse Party.”²⁹²

There is an overlap between the right of self-determination and the right of revolution, both arising from natural law. Nevertheless, there are some important differences. The right of self-determination can be used even when the State of colonial power is not being oppressive. On the other hand, in countries without colonial domination, alien occupation and racist regimes (e.g. in Syria, which is a Member Party to the Geneva Protocol I), such right would not be applicable because the state of facts does not evoke the right of self-determination. Finally, the laws of war govern the right of self-determination and the right of revolution is a *sui generis* right.²⁹³

Protocol II to the Geneva Conventions²⁹⁴ states that the Conventions shall not apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”²⁹⁵ This means that revolutionary use of force needs to be more than just a riot in order to be regarded as an armed conflict. If an assassination is an isolated use of violence, it is obvious that the laws of war will not apply.

It is also possible to obtain a privileged combatant status if the conflict is internationalized. This usually occurs during an armed conflict that at first sight

288. For historical background of this trichotomy, see ANTHONY CULLEN, *THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW* 7–23 (2010).

289. Although Croatia did not recognize insurgents from the self-proclaimed Republic of Serbian Krajina as belligerents during the War in Croatia (1991-1995), it did so implicitly after the War—in 1996 when it passed the Law on General Amnesty. The Law granted amnesty, *inter alia*, to the perpetrators of crimes committed in the course of the armed rebellion in Croatia—except to the perpetrators “of the most serious violations of humanitarian law” including “act of terrorism regulated by the provisions of the international law.” ZAKON O OPĆEM OPROSTU [LAW ON GENERAL AMNESTY] art. 1-3 (Oct. 5, 1996) (Croat.), available at <http://www.unhcr.org/refworld/docid/3ae6b4de2c.html>.

290. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted on June 8, 1977, 1125 U.N.T.S. 17512 [hereinafter Geneva Protocol I].

291. *Id.*, at art. 1 ¶ 4.

292. *Id.*, at art. 43 ¶ 1.

293. Observing the right of revolution through the *jus ad bellum* and *jus in bello* spectacles led some authors to wrong conclusions that the existence of such right is doubtful. See, e.g., SAUL, *supra* note 5, at 82–94.

294. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted on June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Geneva Protocol II].

295. *Id.*, at art. 1 ¶ 2. See also Rome Statute, *supra* note 49, art. 8(2)(d)-(f).

looks like a conflict between a state and a non-state actor, but a closer look reveals a conflict between two states.²⁹⁶ In the discussion about internationalized²⁹⁷ armed conflicts there are three distinguishable scenarios: (1) when a non-state actor manages to create a new state in the course of the conflict;²⁹⁸ (2) a case of a foreign state's intervention in support of a non-state actor against the state in which the conflict takes place;²⁹⁹ and (3) a situation of a foreign state intervening against a non-state actor without consent of the territorial state.³⁰⁰ Each of these scenarios will be analyzed in the forthcoming paragraphs.

First, to create a new state in the course of a conflict is in most cases very difficult to achieve. The problem of defining a state takes us back to the 1933 *Montevideo Convention on the Rights and Duties of States*,³⁰¹ which codified four constitutive elements arising in customary international law: (1) a permanent population; (2) a defined territory; (3) government; and (4) capacity to enter into relations with other states. However, it seems that by the end of the 20th century the threshold for a state in international law became lower. *The Badinter Arbitration Committee* referred in its Opinion No. 1 only to three constitutional elements of states: (1) population; (2) territory; and (3) organized political authority, which is characterized by sovereignty.³⁰² Furthermore, it emphasized that the recognition by other states is not a determinative factor of statehood, but has only a declaratory role,³⁰³ which makes the fourth *Montevideo* element inessential. However, at the same time, according to the prevailing opinion in the literature,³⁰⁴ the Chechen Wars in the 1990s did not have an international character, although the Chechen Republic of Ichkeria was a *de facto* state in the period of 1997-1999.

Second, the case of a foreign state's intervention in support of a non-state actor has been discussed in the judgment of the International Court of Justice (ICJ) in *Nicaragua v. United States*.³⁰⁵ The ICJ held the United States responsible for international law violations by supporting the *Contras* in their rebellion against the

296. See Milanovic & Hadzi-Vidanovic, *supra* note 2866, at 33-34. But see Robin Geib & Michael Siegrist, *Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?*, 93 INT'L REV. RED CROSS 11, 13-16 (2011) (using the term internationalized armed conflict as any non-international armed conflict in which there is a foreign intervention).

297. The term "internationalized" has a special meaning in the context of armed conflicts. See Milanovic & Hadzi-Vidanovic, *supra* note 286, at 34.

298. See Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 1, 14 (Elizabeth Wilmshurst ed., 2012). See also Milanovic & Hadzi-Vidanovic, *supra* note 286, at 34 (mentioning examples of dissolution of the former Yugoslavia and the possible emergence of Palestine as a state).

299. See Milanovic & Hadzi-Vidanovic, *supra* note 286, at 34-36.

300. See *id.* at 36-38 (providing examples of 2006 Israel/Hezbollah conflict in Lebanon and 2008 Colombia/FARC conflict in Ecuador).

301. Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

302. Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT'L L. 178 app. at 182 (1992).

303. *Id.*

304. See, e.g., MATTHEW EVANGELISTA, THE CHECHEN WARS: WILL RUSSIA GO THE WAY OF THE SOVIET UNION? 141-42 (2002); William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT'L L. 741, 754 (2005).

305. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

Nicaraguan government. The basis of the ICJ's ruling was that "it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."³⁰⁶ In other words, another State's action needs to pass an "effective control test"³⁰⁷ in order to convert a non-international armed conflict into an international one.

In the *Tadić* case, the ICTY Appeals Chamber departed from the ICJ's judgment, while upholding the "effective control test" only for acts performed by individuals engaged by a State and adding the broader "overall control test" for acts committed by organized and hierarchically structured groups.³⁰⁸ A State may exercise the required degree of control when it "has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group."³⁰⁹

In the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, although the ICJ rejected the ICTY's "overall control test" concerning the determination of the State's responsibility, it did not consider it appropriate to take a position on applicability of this test to determine whether or not an armed conflict is international.³¹⁰ The ICTY's decision is more convincing—in cases involving control over organized and hierarchically structured groups, the "effective control" standard is too high because leaders usually have only a broad-spectrum role in controlling these groups and give general directions that are insufficient to satisfy this test. Furthermore, the International Criminal Court has also adopted the "overall control" approach in the *Lubanga case*.³¹¹

In our hypothetical *Case No. 2*, the Free Syrian Army is being run by the exiled Syrian National Council (located in Turkey). This, however, would not have been sufficient to characterize the armed conflict as international. Namely, as mentioned before, such conflict can become internationalized if one or more states become involved by intervening on the side of a revolutionary group. For the same reasons the "war" between the U.S. and Al-Qaeda is a non-international armed conflict,³¹² but this may not remain so in the future as a third category of armed conflicts is evolving: transnational, cross-border or extra-state armed conflict.³¹³

306. *Id.* at 65, ¶ 115.

307. By such "effective control," the Court meant that the United States should have directed or enforced the perpetration of the acts contrary to international human rights and humanitarian law alleged by the applicant State. *Id.*

308. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, 38 I.L.M. 1518, 1541-42, ¶¶ 120, 124 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

309. *Id.* at 1544, ¶ 137.

310. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), 1996 I.C.J. 595, ¶¶ 402-04 (July 11).

311. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, ¶ 541 (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>.

312. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

313. See, e.g., Geoffrey Corn, *Making the Case for Conflict Bifurcation in Afghanistan: Transnational Armed Conflict, Al Qaida, and the Limits of the Associated Militia Concept*, 84 INT'L L. STUD. 181, 183-90 (2009); Roy S. Schöndorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?*, 37 N.Y.U. J. INT'L L. & POL. 1, 34-48 (2004); Milanovic & Hadzi-Vidanovic, *supra* note 286, at 43-51.

Third, the scenario of a foreign state intervening against a non-state actor without the consent or overall control of the territorial state is the most difficult to resolve. There are two distinguishable situations: (a) the non-state actor is under overall control of the territorial state or (b) the non-state actor is not controlled by the territorial state. The former situation is obviously a conflict between a foreign state and the territorial state, so the difficulty lies in the latter. The most recent examples are the 2006 Israeli intervention against Hezbollah in Lebanon (if we assume that Hezbollah was not controlled by Lebanon) and the 2008 Colombia intervention against FARC in Ecuador. There are three possible solutions to these cases: (i) one is to argue that there is a mixed conflict: international between the intervening and the territorial state, and non-international between the intervening state and the non-state actor;³¹⁴ (ii) second is to make the territorial state's consent, or lack thereof, have bearing on the matter;³¹⁵ and (iii) to seek for the interest of the territorial state. The solutions (i) and (ii) have already been presented in the literature so they do not need additional attention, but the solution (iii) needs further explanation. Namely, sometimes a state is forced to be "silent" or is incapable of consenting to foreign interventions, although it would benefit from it. Perhaps Pakistan does not want to explicitly consent to the U.S. drone attacks against Taliban on its territory because the consent might endanger Pakistan's security. In such cases, the benefit of the territorial state should be relevant for the evaluation of the conflict. This is just like having a patient without a family who is incapable of giving consent to a medical surgery – the decision on whether to perform the surgery will depend on the best interest of the patient.

To summarize, under the laws of war, it is possible to justify the use of force in furtherance of a revolution in the following three situations: (1) when a state recognizes its insurgents as combatants, (2) when people evoke their right of self-determination, and (3) when an armed conflict is internationalized.

CONCLUSION

The history of anti-terrorism laws is a history of struggles with definitions. Over the course of the eighteenth and nineteenth centuries, there had been unsuccessful attempts to define political crimes, which were followed by failures to find an appropriate definition of an "anarchist act" at the turn of the century. After anarchism ceased to be relevant for international peace and security, from the 1930s onwards repetitious efforts have been made to define terrorist acts, but a consensus among states even today cannot be reached.

314. See Milanovic & Hadzi-Vidanovic, *supra* note 286, at 36–37 (marking the 2006 Lebanon War as a mixed armed conflict: an international conflict between Israel and Lebanon and a cross-border non-international armed conflict between Israel and Hezbollah).

315. See *id.* at 37. (arguing that the lack of consent makes the conflict international in character). However, the authors have recognized the deficiencies of this approach when applied to U.S. military strikes against the Taliban in Pakistan. *Id.* A further problem of this view is that silence is sometimes treated as consent by applying the principle, "*Qui tacet consentire videtur si loqui debuisset ac potuisset*" [He who keeps silent is held to consent if he must and can speak]. See *Temple of Preah Vihear (Cambodia v. Thai.)*, 1962 I.C.J. 6, 23 (June 15).

The success of the STL's Decision is that it demonstrated that reaching a clear definition of what constitutes a terrorist act is not necessary for its criminalization under international law. As legal realists would point out, the recognition of terrorism as an international crime is not as much a matter of international law as it is a matter of policy. This has often been overlooked by those who would strongly support employing the strict legality principle over substantive justice. Once the door was opened for the crime of terrorism to become a true international crime, it does not seem that there will be a way back as anti-terrorist initiatives and practice are constantly developing.

The international community will have to wait for another amendment of the Rome Statute in order to witness first prosecutions for terrorism before the ICC, but it's just a matter of time before it adopts terrorism under its jurisdiction. Cases like the killing of al Qaeda leader Osama bin Laden in May 2011 are unambiguous evidence of such need. Nevertheless, even now terrorists can be prosecuted before the ICC if their acts amount to war crimes, crimes against humanity or genocide. Making high ranked terrorists submit to international justice would provide credibility to the ICC, which already suffers from accusations of being an "African Criminal Court".³¹⁶

Sartre's quote at the beginning of this Article demonstrates the differences between terrorists and freedom fighters. Terrorists are ready to destroy whatever is necessary to achieve their political goals. One innocent human life more or less does not make a difference to them. On the other hand, true freedom fighters are driven by just causes; their recourse to violence only occurs when there is no other way to fight oppression; their power comes from the people; and they have zero tolerance for civilian casualties. Sometimes terrorists fight for just causes, and they may have some other characteristics of freedom fighters, but as long as their hands are "dirty", they remain terrorists.

International law is able to explain these differences in legal terms. It has adopted a two-sided common law model of describing crimes: *offenses v. defenses*. The justifications that could be applied to allegedly terrorist acts are: self-defense, necessity, combatant status and right of revolution. In comparison with other defenses, the right of revolution seems to be the most important because the concept of permanent necessity is still not recognized in international law, which would leave us only with a self-defense or combatant status argument, both too narrow to deal with most of such situations. Therefore, terrorism and the right of revolution are in fact the two sides of the same coin. The principles which guide the permissibility to use force under the right of revolution are the following: principle of democracy, principle of proportionality, principle of just cause and principle of distinction.

As in the history of warfare there have never been wars without war crimes, in the history of revolutions there has never been revolutionary violence without terrorism. Syrian rebels are not an exception in this respect. On the one hand, they have lawfully used force to fight the Syrian army, *inter alia*, by assassinating two

316. See Kai Ambos, *Slow Wheels of Justice: The ICC's Disappointing Track Record*, SPIEGEL ONLINE, Dec. 14, 2011, <http://www.spiegel.de/international/world/slow-wheels-of-justice-the-icc-s-disappointing-track-record-a-803796.html>.

senior military officials. The same could be said in the hypothetical case of killing an oppressive tyrant like the Syrian president Bashar al-Assad or any other member of his oppressive regime under presented principles governing the right of revolution. On the other hand, the Syrian rebels have engaged in kidnappings and executions of civilians which cannot be tolerated and cannot be justified under any provision of international law.

Distinguishing revolutionary acts that are permissible from those acts that are not has two major purposes. First, to ensure that those who are responsible for crimes perpetrated in the course of revolutions face prosecutions. Second, to avoid the attribution of collective guilt in post-conflict societies by convicting the individuals responsible for the crimes. Only by addressing the reality of committed crimes and by punishing the guilty, is the birth of a healthy newborn society achievable.