

JUXTAPOSITION OF RIGHT TO SELF-DETERMINATION AND TERRORISM UNDER INTERNATIONAL LAW

ⁱFarzanah Selamat, ^{i,*}Hendun Abd Rahman Shah and ⁱNorfadhilah Mohamad Ali

ⁱFaculty of Syariah and Law, Universiti Sains Islam Malaysia (USIM), 71800, Nilai, Negeri Sembilan, Malaysia

*(Corresponding author) e-mail: hendun@usim.edu.my

DOI: <https://doi.org/10.33102/mjssl.vol11no2.396>

ABSTRACT

The right to self-determination is one of the *jus cogens* laws under international law, which denotes the legal right of people to decide their political, economic, and social affairs within the borders of a territory. This right essentially grants the people, to some extent a legal right to use force in exercising their right to self-determination. The national liberation movements (NLMs) for example, whose rights and struggle for independence have long been recognised by international law, in many instances have been conflated with the act of terrorism. One of the reasons is the absence of a universally accepted definition of terrorism. This paper aims to investigate how the conflation of NLMs as terrorists has affected the exercise of the right to self-determination. The study analyses relevant legal laws and juristic opinions on the issues at hand using a qualitative approach via library-based methodology. The result of this study reveals that, despite having provisions for countering international terrorism, due to the absence of a universally accepted definition of terrorism, the current international counterterrorism law is influenced by state municipal laws as the crime of terrorism is outside the jurisdiction of the International Criminal Court. Some states used their liberal power to define and designate NLMs as terrorist organisations which have allowed them to misuse municipal law against such movements. In short, whilst the use of force in exercising the right to self-determination is governed by international humanitarian law, the lack of a universally accepted definition of terrorism enables States to label NLMs as terrorists, criminalising the liberation movement as a whole.

Keywords: *right to self-determination, terrorism, National Liberation Movements*

How to cite (APA 6th Style):

Selamat, Farzanah, Abd Rahman Shah, H. and Mohamad Ali, Norfadhilah (2023). Juxtaposition of right to self-determination and terrorism under international law. *Malaysian Journal of Syariah and Law*, 11(1), 187-201. <https://doi.org/10.33102/mjssl.vol11no2.396>

Introduction

Many states have various long-established methods to counter the threat of terrorism as part of their national law. Because some of the responsible organisations were organised outside of state territorial authority, as in the case of Daesh, states have taken steps to designate such organisations as terrorist organisations in order to curtail potential terrorist activities within their borders. However, by extending the designation of terrorist organisations to foreign organisations, it extends terrorism law beyond the jurisdiction of municipal law. Without a universally accepted definition of terrorism, it has been documented that some states have used their terrorism laws to criminalise people who are exercising their right to self-determination by designating them as terrorists, as is currently happening to Uyghurs in China (Davis, 2019). States' frequent practise of classifying violent activities by their adversaries as terrorist and extremist acts has allowed them to unilaterally target those whom they define as "terrorists" in military operations or any recourse chosen in countering terrorism (Saul, 2006). This includes national liberation or revolutionary movements that may have legitimate claims to fight for self-determination (Moeckli, 2008).

It is argued that the absence of a universally accepted definition of terrorism and the inherent sovereign power of states to enact anti-terrorism legislation will allow the conflation of terrorism and NLMs, which will make prosecution against them at the municipal level a possibility. This will be devoid of any protection provided by the Third Geneva Convention under international humanitarian law. Thus, it is important to distinguish between terrorist acts and acts of terror, as the treaty was not intended to legalise any acts of terror committed by parties, regardless of their justification. Its primary goal was to establish the applicable law that would govern the acts performed. To achieve the goal of investigating how the conflation of NLMs with terrorists has affected the exercise of the right to self-determination, this paper begins by describing common features of existing definitions of terrorism before exploring international legal provisions on the right to self-determination, including to what extent the use of force in exercising the right to self-determination (*jus ad bellum*) is permitted under international law. The paper then explores the possibility of prosecuting terrorism under international humanitarian law as a war crime. It finally provides an outlook on the impact of terrorism on the practice of self-determination before concluding by noting that, due to the lack of a universally accepted definition of what constitutes terrorism, states are enabled to criminalise the entire liberation movement by designating the NLMs as terrorist organisations.

Methodology and Research Design

The study employs qualitative research on the subject matter using library-based methodology to analyse relevant legal provisions and juristic opinions. It analyses and contrasts the different definitions of "terrorism" used and highlights the common features shared and the absence of the critical element that is of practical importance. Additionally, it examines the provisions outlining the right to self-determination and the use of force for that purpose. The study then explores the possibility of prosecuting terrorism as a war crime in accordance with international humanitarian law. Finally, the impact of designing NLMs as terrorist organisations on various self-determination struggles is investigated. The cases chosen are based on the legality of the claim to the right to self-determination, the existence of actions to intimidate civilian populations by the NLMs, the maturity of the case's legal development, the extent of jurisprudential and scholarly discussion on the matter, the existence of international legal authority opinions or judgments on the conflict, and the intervention of the UN, any state of the UN Security Council Permanent Members, or any international legal alliances.

Analysing the Existing Definitions of Terrorism

Legal scholars who focus on terrorism have previously looked for a universal definition. There are numerous definitions of terrorism in use today. Since the term's inception, there have been more than a hundred definitions of terrorism (Laqueur, 1999). Nevertheless, the disagreement over a common definition of the term has not yet been resolved despite the fact that the entire world is unified in the battle against terrorism. The various positions, opinions, and political interests of States serve as the primary obstacle to a universal definition of the term (Maras, 2013).

Despite the lack of a universal definition, the UN has made an effort to exclude acts committed in the course of exercising the right to self-determination from the definition of terrorism. As a distinguishing factor, states emphasised the justification for the action rather than the act itself. This is reflected in the resolutions passed by the UN General Assembly, which distinguish between terrorism and people's battles for their right to self-determination. In particular, the preamble of the 1985 resolution on Measures to Prevent International Terrorism specifically reaffirmed "the legitimacy of their struggle, in particular, the struggle of national liberation movements... under colonial and racist regimes and other forms of alien domination," suggesting the notion to exclude armed operations of NLMs from acts of terrorism (Vyver, 2010). However, this perception was altered as a result of *Achille Lauro's* 1985 hijacking (Blocher, 2011). Since then, every resolution on terrorism has denounced the crime regardless of who perpetrated it, as in the 1994 UN General Assembly Resolution 49/60.

In the earlier discussion to decide on a widely accepted definition for the term terrorism, the UN General Assembly had taken into consideration a draft that was developed from a proposal by India in 1996. Due to Member State disagreements, the draft was never implemented (Rupérez, 2007). The grounds for rejecting some definitions were mostly based on the overlapping of meanings intended to be used for a "terrorist" and "national liberties movement" or "armed revolutionaries" (Maras, 2013). They were defined quite similarly. The political and social makeup of the state is one of the elements contributing to the existence of different definitions (Rupérez, 2007). One of the key considerations for the state in defining terrorism is its general perspective on foreign relations.

A significant number of the UN Member States refused to recognise any recourse to the use of violence, regardless of the justification or situation. The Secretary-General, the Security Council, and the General Assembly had all reiterated this view in remarks and documents from the UN as in the Summit Declaration 2005. The remaining Member States maintained that in certain situations, such as the struggle against foreign occupation and while exercising the right to self-determination, the use of force and violence should not constitute terrorism.

It is argued that in order to develop a credible, widely accepted definition of terrorism, it is necessary to study the various definitions of terrorism and terrorist acts in use. One of the earliest definitions dates back to before the formation of the United Nations. The League of Nations drafted a convention for the prevention and punishment of terrorism in 1937. According to the draft, terrorism is defined as:

"...all criminal acts directed against a State and intended or circulated to create a state of terror in the minds of particular persons or organisation of persons or the general public".

Even though the convention had never come into existence, this definition was used as a guide in subsequent discussions on terrorism at the UN (Rupérez, 2007).

Terrorism was not expressly defined in UNGA Resolution 49/60, "Measures to Eliminate International Terrorism", which was adopted in December 1994. The resolution did note that the act of inciting a state of terror was not justified by considerations of a political, philosophical, ideological, racial, ethnic, religious, or any other character that might be invoked. While the 1999 Convention to Combat the Financing of Terrorism states the following definition:

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

Following the War on Terror, terrorism was simply defined by the UN Security Council (UNSC) Resolution 1566 in 2004:

“...criminal acts... committed with the intent to cause death or serious bodily injury... with the purpose to provoke a state of terror... intimidate a population or compel a government or an international organization”.

Using the powers provided under article 25 and article 48 of the UN Charter, the UN Security Council bind the state members to adhere to this definition.

With further reference to the definitions found in the 1999 and UNSC 1566 Resolutions, the High-Level Panel on Threats, Challenges, and Change of the UN Secretary-General in the 2004 Report had proposed that terrorism be defined as any act:

“...intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a government or an international organization to do or abstain from doing any act”.

With the addition of the parties directly impacted by the act, the High-Level Panel also emphasised two issues in its search for a consensus definition, namely that the definition should encompass states' use of armed forces against civilians that was concluded to be far stronger than in the case of non-state, suggesting the notion of state-sponsored terrorism, and that it should not supersede the right of resistance of those living under foreign occupation. Both of the issues generated intense controversy among the state members, particularly among those whose acts come within the criteria and the occupiers with their allies.

It must be stressed that the definition presented in such a resolution does not apply to all state members and is only intended to serve as a general persuasive tool. It won't become enforceable unless it is included in state law. The simple definition by the UN Security Council has broadened the scope of counterterrorism, implying its inclusion of NLMs exercising their right to self-determination. Therefore, it is essential that the phrase have a universal definition that is accepted by all state members to ensure all rights are protected.

On the regional ground, terrorism was defined in Article 1(2) of the Arab Convention for the Suppression of Terrorism, which was ratified by the League of Arab States in 1998, as follows:

“...any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty, or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize national resources”.

It must be highlighted that among the States that adopted this definition is Palestine, as it was recorded at the time, which is known in the international community then as the Occupied Territories.

Following the tragedy of September 11, 2001, the European Union provided the following definition of terrorism offences for governmental and legal reasons in Article 1 of the Framework Decision on Combating Terrorism (2002):

“certain criminal offences ... largely of serious offences against persons and property which : given their nature or context, may seriously damage a country or an international organization where committed with the aim of: seriously intimidating a population; or unduly compelling a Government or international organization to perform or abstain from performing any act; or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization”.

There are now multiple legal definitions of "terrorism" and "terrorist act" at the state level. In the United States, the term "international" was used together with the term "terrorism" and was defined as follows in Title 18 of the United States Code:

“activities that involve violent acts... that are a violation of the criminal laws of the United States or of any State and... appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping;”.

However, Section 130B (2) and (3) of the Penal Code in Malaysia defines terrorism as:

“an act or threat of action...(b)...done or...made with the intention of advancing a political, religious, or ideological cause; and... intended or may reasonably regarded as being intended to- intimidate the public.... or influence or compel the Government of Malaysia....to do or refrain from doing any act”.

The Malaysian Penal Code underlined further that a terrorist act must be intended to kill the intended victims. If not, it will be classified as terrorism in accordance with the exemption provision.

On a larger scale, it can be seen that the most common element of definitions of terrorism is a form of activity that was used to intimidate, compel, or coerce individuals to submit to their desires. The difference is about "the degree of danger" needed for an action to be classified as a terrorist act, despite the fact that the definitions, outlined above, all agree that there must be some element of danger in the action. The majority of definitions define "the degree of danger" in a more liberal and general manner. By focusing the definitions on the perpetrators' actions and intention to create terror, fulfilling the criminal element of *actus reus* and *mens rea*, a practical definition of terrorism can be created (Blocher, 2011-2012). The definitions mainly concentrated on the elements of the perpetrators' actions and intentions and did not touch on the justification of such acts to distinguish the identity of the perpetrators.

In essence, by avoiding justification of the act, as in struggling for self-determination, a universally accepted definition of the term "terrorism" can possibly be constructed. However, this broad definition muddled the applicable law governing acts of terror committed by NLMs. This is further emphasised in cases where movements were designed as terrorist organisations by states in order to enforce municipal terrorism law rather than international humanitarian law.

The International Legal Provisions on The Right to Self-Determination

The right to self-determination is the right for an organisation of people to freely determine and control their political, economic, or socio-cultural future. Since the signing of the Treaty of Versailles and the founding of the League of Nations, it has been a part of the international law lexicon (Ijezie, 2013). Initially, self-determination was only recognised as a political ideal, or "an imperative principle of action," during the League of Nations (Dersso, 2012). The 28th President of the United States (US), Woodrow Wilson, is credited for introducing the idea of the right to self-determination to international law for the first time in his 14-point statement and his renowned speech on the subject.

The United Nations initially created the right as an instrument for its decolonization campaign after the end of World War I. Self-determination obtained the status of an international legal principle right under international law with its insertion in Article 1(2) and Article 55 of the United Nations Charter (UN Charter) in 1945, which was the first international legal document to do so (Dersso, 2012; Shaw, 2017). The legal status of self-determination as a principle under international law was further reaffirmed by the following UN General Assembly resolutions.

In 1960, the principle of the right to self-determination was accepted as a right of peoples in Article 2 of UN General Assembly Resolution 1514, the Declaration on the Granting of Independence to Colonial Countries and Peoples (Colonial Declaration). The right was also extended beyond the concept of decolonisation with its inclusion of circumstances not limited to colonisation to be part of circumstances where self-determination can be claimed in Article 1.

Following that, in 1970, the UNGA Resolution 2621, Programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, a special commemorative session on the tenth anniversary of the Colonial Declaration 1960, further reaffirmed the status of self-determination with the addition that “alien subjugation is a serious impediment to the maintenance of peace”. In the same year, with the adoption of UNGA Resolution 2625, the Declaration on Principles of International Law Concerning Friendly Relations, with “the duty to respect the right in accordance to the Charter” by every state member is stressed and highlighted, the right of peoples to self-determination was again reaffirmed.

Despite having no mention in the Universal Declaration of Human Rights (UDHR), the status of self-determination as a legal right under international law was strengthened with its insertion in Common Article 1 of the two International Covenants on Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Right (ICESCR), in 1976. The insertion can be concluded to be an initiative to bind and acknowledge the legal obligation of self-determination of peoples as a universal right by the international community (Cristescu, 1981).

The two covenants, together with the UDHR, make up what is commonly known as the International Bill of Human Rights. The covenants also provide the much-needed definition of the right to self-determination which is the right for people to able ‘to freely determine their political status and freely pursue their economic, social and cultural development.’ In the view of the international community, this is the most probable and plausible method of elevating the idea of self-determination from a political promise to an enforceable universal legal right. This is significant, even though State Members have the option whether to sign and ratify the Covenants, thus submitting themselves to this binding legal duty or not.

In addition to the provisions mentioned above, the right to self-determination was also outlined in a number of other regional legal instruments, such as the African Charter of Human and Peoples Rights, adopted in 1981; the Charter of Paris for a New Europe, adopted in 1994; and the Arab Charter of Human Rights, adopted in 2004. In addition, the Cairo Declaration on Human Rights in Islam, adopted by the Organization of Islamic Cooperation (OIC) in 1990, recognised the right to self-determination with the insertion of “peoples suffering from colonialism have the full right to freedom and self-determination” in its article 11(b).

Due to the exhortatory nature of the aforementioned UN or regional organisation treaties and resolutions, state members have a choice to sign and ratify the mentioned documents, thus having the option of submitting themselves to the legal obligation created by the right. The fact that self-determination was included at an earlier point in the development of the International Bill of Human Rights demonstrates the international community's clear commitment to recognise it as a right and that it was not an afterthought. The following regional legal instruments that recognised peoples' right to self-determination solidify it as customary law under international law (Sabbagh, 2021). This is further reaffirmed in the advisory opinion of the case of the *Chagos Archipelago* in 1965, where the International Court of Justice (ICJ) considered the right to self-determination as a customary norm and has an *erga omnes* obligation. Thus, it can be concluded that the right to self-determination held a customary law status under international law.

The Use of Force in Exercising the Right to Self-Determination (Jus ad Bellum)

There is no specific legal provision in place to date that addresses the methods by which the right to self-determination may be exercised. The provision in the 1993 Vienna Declaration, however, that the right can be exercised in "any legitimate action," was further reaffirmed in the Fiftieth Anniversary Declaration in 1995. This notion is reaffirmed by the ICJ in the *Chagos* Advisory Opinion, which held that customary national law does not impose a specific mechanism for the implementation of the right to self-determination. Despite the legal gaps, there are many real circumstances that can be used as examples to determine the legitimate action allowed by international law that can be used to exercise the right to self-determination. To start, it is crucial to distinguish and categorise the right to self-determination. There are two types of the right to self-determination: internal self-determination and external self-determination (Pentassuglia, 2017).

The systematic inclusion of all organisations in the national democratic process in a way that preserves their cultural identity and development on an equal footing with the majority population is known as internal self-determination (Hilpold, 2017). The most prevalent sort of this self-determination is that of an autonomous region, which is politically and economically connected to the state yet independent economically (Ijezie, 2013).

In contrast, external self-determination typically manifests as independence, complete secession, secession from the existing state, or self-government. People can exercise their right to external self-determination in a variety of ways, including by voting, diplomatic relations, and—perhaps the most contentious—the use of force (Ijezie, 2013). This type of self-determination typically takes the shape of measures that may grant majority aspirations but are inimical to the sovereignty and territorial integrity of the existing state. The States typically do not look favourably upon this kind of absolute independence since they may view it as a way to contest their sovereignty and often lead to violence (Ahrens, 2004).

With regard to the use of force in exercising external self-determination, as mentioned before, the international community frown upon any use of force no matter the purpose. Generally, as provided in UN Charter Article 2(4), the general rule of international law prohibits the use of force. All Member States had agreed to use this guiding principle in any way that was at odds with United Nations law (Jan, 2011).

However, the UN Charter explicitly provides two exceptions from this general rule in Articles 39, 40, and 51: the right to individual or collective self-defence, and military action approved by the UNSC. Individuals and States are permitted to use military forces in the course of exercising their right to self-defence, in particular, against any armed attacks. Despite not explicitly stating that the right may only be exercised in the event of an actual attack, Article 51's use of the phrase "if an armed attack occurs" severely restricts the scope of self-defence to a response to an actual armed attack (Jan, 2011). In this sense, it can be said that the article permits the use of force by those wishing to exercise their right to self-determination as long as they are subject to an armed attack by the sovereign or occupying power (Melzer, 2008). Additionally, in the report by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Cristescu, A., in 1981 on the right to self-determination, the use of force by colonial peoples is not a violation of Article 2, paragraph 4 if it is instigated by colonial Powers in an effort to prevent colonised peoples from exercising their right to self-determination (Cristescu, 1981).

Nonetheless, some scholars are of the view that Article 2, paragraph 4 is not applicable towards people exercising their right to self-determination as it involves non-state actors (Goodrich, Hambro, & Simons, 1969; Gray, 2018; Yau, 2018). The usage of the term "All Members..." in this provision indicates that the UN State Members were the intended recipient, as is indicated by the Article's ordinary meaning as opposed to any non-state actors. In reference to its *travaux preparatory*, it can be concluded that the discussion on Article 2, paragraph 4 was not intended to have universal application at the time it was drafted by referring to the terms "against the territorial integrity or political independence of any

state," which were added as an assurance to the smaller States by the major powers as discussed previously (Yau, 2018). In reference to the case of *Nicaragua*, the court reaffirmed the non-applicability of Article 2, paragraph 4 on the non-state actor by ruling that the referenced principle of territorial integrity in Article 2, paragraph 4 applies to relationships between States.

Since Article 2, paragraph 4 was determined to not apply to non-State actors, the issue at hand was whether using force was ever permitted as one of the people's legal options for achieving their right to self-determination. This is crucial as according to the Terrorism and Human Rights report by the Inter-American Commission on Human Rights, "the defining feature of combatant status is the right to directly participate in hostilities; i.e., combatants have a licence to kill or wound enemy combatants and destroy other enemy military objectives."

As a matter of fact, the use of force as a legal method in the struggle for self-determination beyond decolonization is not expressly forbidden by international law. The language used in the numerous international declarations drafted to reaffirm the right to self-determination was leaning toward "any legitimate action" when the right to self-determination was addressed generally like it was in the 1993 Vienna Declaration and the Fifty-Year Declaration as opposed to the explicit use of the term "use of force" in addressing the exercise of self-determination in the colonial context.

In relation to the *Lotus* Judgement, the lack of a prohibition rendered the need to establish a permissive rule superfluous. Making any action, absent a clear prohibition, be regarded as permissible and legal (Yau, 2018). However, with regard to the struggle for self-determination, permission, or authorization to use force does not entail a legal right to do so (Cassese, 1995). On the contrary, as previously stated in *Chagos* Advisory Opinion, the ICJ reaffirmed that under customary national law, the right to self-determination does not always require a specific mechanism for its implementation making the use of force one of the available actions should the need arises. Due to this inclusion, people who engage in armed conflict in order to exercise their right to self-determination will be considered legitimate combatants, and international humanitarian law will apply to the conflict (Varko, 2005). This is in accordance with the following clause from Article 4A (2) of the Third Geneva Convention that includes organised resistance movements in its definition of a combatant:

"...members of other militias and volunteer corps, including those of organised resistance movements, belonging to a party to the armed conflict can also have combatant status..."

Additionally, the UNGA Resolution 3103 (XXVIII) in 1973, Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes, which has declared that all armed conflicts involving a struggle against "colonial and alien domination and racist regimes" to have an international character, supports the inclusion of armed conflict in the struggle for self-determination as part of international armed conflicts. This declaration was reaffirmed with the inclusion of wars for national liberation in Additional Protocol I in defining an international armed conflict. In particular, the Additional Protocol I stated in Article 1 that armed conflicts involving the exercise of people's right to self-determination are included by the 1949 Geneva Conventions' Common Article 2 definition of international armed conflict.

It can be concluded that a liberation armed force's identification as a combatant authorises it to legitimately kill and injure its foes. As a result, it is acceptable to use force to exercise the people's right to self-determination. Further to reinstate, that the legality of the use of force by the peoples to exercise their right to self-determination does not negate the prohibition on the killing of civilians. Thus, there should be no confusion about the legality of the use of force and the participation of peoples in an armed conflict as lawful combatants and the illegality of killing innocent civilians under international humanitarian law.

Terrorism in International Humanitarian Law

The struggle for independence does not preclude the likelihood that the NLMs may commit that fall within the definition of an act of terrorism. In the legality of the use of force in exercising self-determination under international humanitarian law, if force was used in a way that was counter to the goal of exercising self-determination, the use of force may become unlawful (Yau, 2018). In regulating this, international humanitarian law, as opposed to international or municipal terrorism laws, should apply even if parties committed an act of terror. The purpose of international humanitarian law is to be a system that permits both the legalisation of murder and averts needless suffering and fatalities among non-combatants in an armed conflict (Coffin, 2014). Thus, an act of terror committed by the combatants in a time of war should be under the jurisdiction of international humanitarian law and not terrorism law.

In actuality, the Geneva Conventions and Additional Protocols' list of numerous war crimes includes acts of terror albeit a brief mention. In Article 51 paragraph 2 of the Additional Protocol I, an act of terror was briefly mentioned under the article providing the protection of the civilian population. Despite having elaborate binding international Conventions and protocols related to the prevention and suppression of terrorism, with the inclusion of Article 51 of the Additional Protocol I, the international terrorism law and municipal terrorism law should not apply in an armed conflict. Furthermore, most of the conventions stated above have a special exception clause of the non-applicability of the conventions in relation to the military and times of war. For example, in the 1997 Terrorist Bombing Convention, an explicit exception clause was included to exclude any activities of armed forces that are governed by international humanitarian law.

This is because the aim of terrorism law is to prevent and suppress the act from happening at all which is a direct contrast to international humanitarian law. The international humanitarian law acknowledges the possibility of casualties among civilians or non-combatants in an armed conflict and aims to lessen the impact on them in the time of war. However, due to the absence of an agreed universal definition of terrorism, the implementation of counterterrorism policies has been a real concern where some of the policies held a real risk of being improperly applied to certain organisations or individuals who are perceived as somehow linked to terrorism because of religion, ethnicity, national origin, or political affiliation. The United Nations High Commissioner for Refugees (UNCHR) has raised this issue of concern, particularly with regard to the detrimental effects of various counterterrorism policies on refugees and asylum seekers. The UNSC was also consistent in this aspect where it has explicitly stated that States' counterterrorism policies must comply with all their obligations under international law, particularly international human rights, refugee, and humanitarian law.

However, although it has been stated consistently that terrorism law and counterterrorism policies are not applicable in the time of war, the absence of an agreed definition of terrorist acts has brought up another issue. Due to this absence of a universal definition of terrorism, terrorism cannot be established as an international crime in the sense of *delicta juris gentium*, crimes that shock a nation's conscience and address specific criminal accountability. These people might be non-State actors or acting on behalf of a State. There has been discussion to include terrorism as one of the crimes within the jurisdiction of the International Criminal Court (ICC), during the negotiation of the Rome Statute, but due to the lack of a universally agreed definition of the term, it was not included. As of that, the ICC has no jurisdiction to try the matter. This has been highlighted when the Rome Conference on the International Criminal Court noted that "no generally acceptable definition of the crimes of terrorism and drug crimes could be agreed upon for the inclusion, within the jurisdiction of the Court" was a regrettable matter. Thus, making any prosecutions of the crimes of terrorism by the NLMs, that have been designated as terrorist organisations, are outside the jurisdiction of the International Criminal Court.

In establishing terrorism as a war crime, the lack of provision in the Rome Statute made terrorism was also unable to be included as a war crime or a crime against humanity (Vyver, 2010). In spite of that, in reference to the Statutes of the International Criminal Tribunal for Rwanda and the Statute of the Special Court for Sierra Leone, although the Rome Statute did not include terrorism as a war crime, terrorism can be established as such with its inclusion as a special subcategory of war crimes governed

by International Humanitarian Law in its provisions. However, it must be highlighted that both statutes did not address terrorism as a general crime.

Despite missing the common element of terrorism which is an act aimed to intimidate or compel an individual or government to adhere to the party's wishes, the crime of terrorism can still be prosecuted in ICC as a war crime by establishing the crime based on the elements under Article 8, the crime of aggression, of the Rome Statute without the reliance on the term terrorism itself (Muhammadin, 2015). This departure from the explicit provisions of Article 8 was not, however, seen to be used, as discussions of terrorist acts by NLMs usually ended with their designation as a terrorist organisation by the state with which they are in conflict.

An Outlook on the Impact of Terrorism on the Practise of Self-Determination

In the history of the struggle for self-determination, various cases where the use of force was used improperly, and war crimes were committed resulted in a different manner. Whilst some manage to attain their independence and face the consequence of their action afterwards, some of the struggles resulted in failure. One of the key similarities that can be seen is the effect of the designation of the peoples as terrorists and the acquiescence of the international community on such designation. To illustrate this, several cases were examined to compare how the designation or allegation of terrorist acts on NLMs affects the result of the peoples' struggle for self-determination. In the listed cases, the use of force has been used improperly by both parties, the state or occupation force and the national liberation movement of the people.

For the first instance, the case of East Timor's self-determination is examined. In this case, the people of East Timor were colonised by Indonesia after Portugal relinquished its physical control over the territory (Kadir, 2015). The occupation, which was marked by brutality, terror, and the systematic degradation of East Timorese cultural life was condemned by the international community as being illegal (Simpson, 1994). This is because, despite being colonised by Portugal previously, East Timor has been declared as a non-self-governing territory with Portugal as the Administering Power and was at the edge of establishing itself as an independent state (Elliott, 1978). The conflicting views by the peoples of those who favoured independence, notably Frente Revolucionario de Timor Leste Independente (FRETILIN), and those who advocated for integration with Indonesia, Associação Popular Democratica Timorese (ADOPETI), had caused a civil war to break out. It was during this conflict that Indonesia intervened militarily (Kadir, 2015). With continuous opposition from the international community to Indonesia's occupation and its assistance for East Timorese to choose their nation's fate in a referendum, East Timor attained its independence on 20th May 2002 as the Democratic Republic of Timor-Leste (Fan, 2007).

Despite military violence acted out by both parties in the civil war and by the occupation forces, no allegation of terrorism has been raised. In this case, although the dispute revolved around the right to self-determination of the peoples of East Timor, the people themselves are not directly involved in the decision-making process aside from the referendum. Despite being the primary self-determination movement in the armed conflict, FRETILIN is not particularly organised in its active role in the creation of the Democratic Republic of Timor-Leste as a state. This is further demonstrated by the UN's ongoing assistance to their country and peacebuilding efforts through the United Nations Mission of Support in East Timor (UNMISSET) and later the United Nations Office in Timor Leste (UNOTIL) (Fan, 2007).

With regard to the serious transgression of international humanitarian law during the conflict, the Commission for Reception, Truth, and Reconciliation, established by the UN Transitional Administration in East Timor (UNTAET), was an independent truth commission mandated to investigate human rights violations committed during the 1974–1999 conflict and to recommend further measures to address the needs of victims. The Commission's recommendations were complemented by a Serious Crimes Unit (SCU), a prosecutorial body within the UN mission in East Timor, and the Special Panel for Serious Crimes was authorised to investigate and prosecute the most serious offenders. The commission's findings not only blamed the Indonesian occupation for the deaths of East Timorese, but the commission also blamed the FRETILIN for various war crimes, which include killing civilians whose families supported the factions who are in favour of integrating with Indonesia (Darcy, 2019);

Ismail, 2014). The SCU was dissolved in 2005, but to investigate offences committed, the Security Council chose to reopen the serious crime process in 2006 with the prosecution power in the hands of the East Timorese prosecutor general. However, with the establishment of the Commission of Truth and Friendship between the governments of Timor Leste and Indonesia in 2008, the two governments forfeit pursuing the judicial process in favour of promoting bilateral relations and friendship in reconciliation (Strating, 2014).

Another case where illegal use of force was used but the peoples managed to attain independence was the case of Kosovo. Formerly part of Serbia as an autonomous province, Kosovo unilaterally declare their independence after Serbia revoked its autonomy and took draconian steps against the Kosovar Albanians. Following the declaration, the Kosovar Albanians, under the banner of the Kosovo Liberation Army (KLA), after exhausting non-violence means, made various armed organisation attacks to seek their self-determination (Charney, 2001). In retaliation, the Serbian government implemented repressive measures and policies, such as ethnic cleansing, which sparked a severe refugee crisis (Recent International Advisory Opinion, 2010). There were casualties among civilians as the hostilities raged on caused by both parties.

With the Račak massacre as a turning point in January 1999, the North Atlantic Treaty Organization (NATO) decided to militarily intervene (Anderson, 2015). The intervention, which also led the Serbian military to escalate their ethnic cleansing campaign, manage to end the armed conflict in June of the same year (Recent International Advisory Opinion, 2010). Following that, the UNSC adopted resolution 1244, which created a new status for Kosovo of having completely separate administrative, political and security arrangements despite remaining within Yugoslavia. On 17 February 2008, Kosovo attained its independence by way of a unilateral declaration with the recognition of various states, including the United States, Britain, France, and Germany.

A point to be highlighted in this case was that none of the parties involved declared a state of war in the entirety of the conflict. The Serbian government was consistent in its belief that the conflict was an act of terrorism, and it has the authority to resolve "an internal Yugoslav affair" no matter how harsh the repercussions (Obradović, 2000). Whilst, the KLA, most likely due to a lack of legal knowledge, also failed to declare a state of war. It was with the intervention of NATO that the international armed conflict was able to be established. Despite having an obvious transgression of international humanitarian law, the issue raised by the international community on the independence of Kosovo solely lies in the legality of its unilateral declaration. This later led to a request for an advisory opinion from the International Court of Justice on the matter by the UNGA, of which declared that the declaration "did not violate any applicable rule of international law." Despite the constant designation of KLA as a terrorist organisation by the Serbians, this matter was not discussed. It was the establishment of the Kosovo Specialist Chambers & Specialist Prosecutor's Office by the European Union in the Kosovo court system that is later responsible to try all the transgressions committed during the conflict, notably war crimes and crimes against humanity, with no mention of any crime of terrorism.

In contrast to the cases above, the following two cases, where improper use of force are used by the peoples in their struggle for self-determination have led them to be designated as terrorist organisations by the international community, thus producing a different outcome.

The first case was of Chechnya, a territory that are occupied by imperial Russia in 1864. The Chechens, the peoples of Chechnya, despite being under Russian rule for half a century, have never accepted the Russian rule. With the collapse of imperial Russia during the 1917 Bolshevik Revolution, the people of Chechnya tried to secede and form a federation together with the other Russian mini-mountain-states (Ahrens, 2004). It was later reconquered by the Soviets in 1921 and thousands of Chechens were forcibly deported to concentration camps on the groundless justification of Nazi-Chechen cooperation (Anderson, 2015). About 22-23% of the entire population of Chechnya died due to this repercussion (Ahrens, 2004).

Chechnya again attempted to secede with the collapse of the Soviet Union in 1991 by unilaterally proclaiming the independence of the Chechen Republic. However, the inability of the newly elected President to run a government led Chechnya to become the centre of criminal activity of exceptional proportions (Charney, 2001). 1994, the new Russian government began a full-scale invasion to retake

the territory which failed (Ahrens, 2004). The Kasavyurt Agreement was signed by a new Chechen leader, Aslan Maskhadov, with Moscow in 1996, that pledged the abstention from the use of force by both parties and to accept the right to self-determination of the people of Chechnya. In 1999, a series of bombs went off in Moscow, which was maintained by Russia to be an act of terrorism by the Chechens have given Russia justification for starting a new invasion, ending with Russia's victory in 2000 (Anderson, 2015). In an allegedly "rigged" referendum in March 2003, Chechnya was later reaffirmed as being a part of Russia with the acquiescence of the international community (Ahrens, 2004).

In the case of Chechnya, although there was no formal designation of the Chechen party as a terrorist organisation during the conflict, the reinvasion of Russia on the ground that the Chechens has committed an act of terrorism can be deemed that the Russians no longer acknowledge the Chechen as the National Liberation Army but instead a terrorist organisation. The silence of the international community on this particular matter can be seen as an acquiescence that a designation of the National Liberation Army as a terrorist organisation will negate their whole right to self-determination and the use of force. This is because, in accordance with the Montevideo Convention on the definition of a state, the international recognition of NLMs can be seen as a component of the implementation of the rights of peoples to choose their own political system (Mbuzukongira & Sahinkuye, 2018).

This is further reaffirmed by the case of Palestine, where the territory was occupied by Israel following the realisation of the 1917 Balfour Declaration. The peoples of Palestine, following the 1915-1916 McMahon-Hussein Correspondence, along with the other Arabs, were initially promised independence by the British in exchange for the Arabs' help in revolting against the Ottoman Empire during World War I. Following through with the Correspondence, after the fall of the Ottoman Empire, the Arabs, including Palestine, were divided according to the Mandates of the League of Nations in 1923 to ease the transition of their self-determination (Akzin, 1939).

However, due to the 1917 Balfour Declaration, where the Palestinian territory was promised to the Jews to become their national home in exchange for their economic support in the World War, an independent Palestinian State following the Mandate failed to be realised (Loevy, 2016). Jewish immigrants, driven by sympathy for the suffering they endured during the Nazi regime and resolved to make Palestine their home, immigrated there with the help of the United States (Leonard, 1949). Using the 1922 Churchill White Paper Policy to interpret the Declaration, despite being declared to be inconsistent with the interpretation of the Mandate by the Permanent Mandates Commission, the Jewish Zionist maintained that the Declaration was a formal form of recognition to the Jewish as people, defined under international law, of the whole territory under the Palestine Mandate (Akzin, 1939). This was faced with strong opposition from the people of Palestine. A joint Anglo-American Committee of Inquiry was sent to Palestine in 1946 to assess the situation and look for a potential solution to ending the conflict as a result of the growing instability and competing claims to the region made by Palestinian and Jewish immigrants which failed. Turning to the UNGA for a solution, the 1947 UN Partition Plan for Palestine was established which recommended an independent Arab and Jewish states while the City of Jerusalem, where the Holy Places, sacred to three world religions, Islam, Christianity, and Jews, will be protected by a Special International Regime. The plan was rejected by the Arab States bordering Palestine and the Palestinian Arabs who saw the UNGA plan as a betrayal of the international community (Beinin & Hajjar, 2001).

The 1948 Arab-Israeli War broke out at the same time the new state of Israel was established, further demonstrating that the Palestinians had never once agreed for the new state to be established on their territory (Said, 1989). In 1949, the State of Israel was subsequently admitted to the UN as its 59th member (Leonard, 1949). The situation in the region of Palestine was peculiarly disregarded in 1960 when the campaign to award independence to colonial nations and people got underway. In order to ease the tension between the parties, the land in the area was later further partitioned in 1968. Only after Palestine was accepted as a non-member observer state to the United Nations in 2012 was the State of Palestine recognised as a state in the eyes of the international community.

Israel has maintained their claim to the Palestinian territory as the people provided under international law thus viewing the struggle for self-determination by the people of Palestine to be unjustified and against international law. Thus, any military resistance made by the Palestinians was consistently

designed by Israel to be an act of terrorism and retaliated with heavy repercussions in the name of counterterrorism (Benoliel & Perry, 2010). The Palestine Liberation Organization (PLO), the organisation that was recognised by the UNGA as "the sole legitimate representative of the Palestinian people" in resolution 3210 (XXIX) in 1974, had been designated as a terrorist organisation by Israel in 1964 for its military action (Avgustin, 2020). The PLO later change their approach to self-determination to a peaceful means.

The designation of Palestinian resistance movements that used a military approach as terrorist organisations came to a standstill in 2006 when HAMAS (Islamic Resistance Movement) win the election as the representative government of the people of Palestine. HAMAS was one of the numerous Palestinian liberation movement organisations that had been labelled as terrorist organisations by Israel and its allies due to their consistent military approach (Aljamal, 2014). UN and the Quartet Members did not acknowledge the election's democratic result due to HAMAS refusal to submit to the views held by the Quartet that 'all members of a future Palestinian government must be committed to nonviolence, recognition of Israel, and acceptance of previous agreements and obligations, including the Roadmap...' (Library of Congress Washington DC Congressional Research Service, 2007; United Nations, 2006). In violation of the aforementioned commitment, HAMAS persisted in its fight for Palestine's complete independence (HAMAS Information Bureau, 2007).

The international community made the decision to ignore Hamas' position and reject including them in the "peace discussion." As the representative of the Palestinian people, the previous winning party, Fatah, was maintained by the UN. Following the outcome of the vote, the Quartet and Israel made the decision to stop providing humanitarian help to the Palestinians and impose economic sanctions on the newly elected government on the belief that the aid will be used to fund HAMAS alleged terrorism act (Library of Congress Washington DC Congressional Research Service, 2007; US Department of Treasury, 2006). As a result, legal restrictions were placed on the entry of aid, which made it more difficult to assist the Palestinians that had been suffering from the conflict.

Although the recent development of the struggle of the Palestinian people for self-determination has shown that the State of Palestine managed to attain a non-member state status of the UN from their previous non-member observer entity, the self-determination of the Palestinian people is far to be determined as successful. Despite being able to be a signatory to treaties with its new achieved status and being a member of the International Criminal Court with the ratification of its statute, the Palestinian plight for self-determination is yet to be realised with the continuance presence of Israel on its territory. The HAMAS military operation is still considered a terrorist act because the organisation was designated as a terrorist organisation by Israel and was used to justify the harsh repercussions committed against the Palestinians.

Admittedly, the struggle for self-determination has never been an easy journey. Nevertheless, these few examples have highlighted the impact of how designing NLMs as terrorist organisations has resulted in either an arduous struggle to legitimise their claims of exercising their right to self-determination or the end of the struggle altogether. With the lack of a universal definition of terrorism, the designation of NLMs as terrorist organisations has allowed states to apply municipal terrorism laws, which provide extensive measures to suppress the people's struggle in the name of counterterrorism.

Conclusion

Without a precise understanding of the phrase, the term "terrorism" has been discussed and used for an exceptionally long time in various international contexts. The term is typically understood to refer to a straightforward act of causing civil unrest and terror in order to compel particular parties to carry out the perpetrator's orders. The majority of states have a tendency to define terrorism from this perspective. Although there is some validity to this opinion, the definition as it stands can be interpreted broadly depending on the political and social perspectives of the respective states. States have a tendency to interpret the term "terrorism" in ways that advance their own national interests (Chadwick, 2012).

If the conflict remained local, such interpretation might not cause any issues. However, in the event that the conflict reached an international level and implicated a state's sovereignty, the UNSC's general definition, which is left open-ended, would present a significant legal problem. Thus, the lack of a

consensus definition of the term "terrorism" is a significant concern. One way to look at this is that it criminalised people for exercising their rights, such as the right to self-determination, in a legal manner. The situations in Chechnya and Palestine, where people's inherent rights were restricted and constrained, should serve as a catalyst for reflection on how the international community failed to uphold and protect those rights. The High-Level Panel's recommendation ought to have been taken into account in searching for a universal definition of the term "terrorism." The former UN Secretary-General advocated for this in his Madrid address (Annan, 2005).

Although terrorism can be prosecuted as a war crime in the ICC, the court lacks jurisdiction to hear such cases due to the lack of explicit mention of the term in the Rome Statute. The lack of an agreed-upon definition of the term will also pose a legal problem for the court in deciding the matter. Thus, by designing a NLM as a terrorist organisation, aside from being able to criminalise the movement, the state will also be able to complicate the legal options available to the movement. The designation will justify the state's resort to counterterrorism measures to eradicate the whole movement itself, which will be a direct contradiction to the purpose of the United Nations. In the end, it comes back to the objectives of the United Nations, which are to ensure the peace and security of the world and ensure that humans have equal rights and self-determination.

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