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DISTINGUISHING JUSTICE: PROSECUTING ACT OF TERROR BY NATIONAL LIBERATION MOVEMENT AS A WAR CRIME

PENJELASAN KEADILAN: PENDAKWAAN KEGANASAN OLEH GERAKAN PEMBEBASAN NEGARA SEBAGAI JENAYAH PERANG

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ABSTRACT

Following the classification of war under international humanitarian law, national liberation wars are regarded as international armed conflicts and protected by the Geneva Convention. Nonetheless, some states' designation of these movements as terrorist organisations has left them vulnerable to prosecution under local and state laws due to the absence of a universally accepted definition of terrorism. This situation is made worse when members of national liberation movements violate the law and are designated as terrorists by the state. This paper aims to examine whether, as opposed to international terrorism law, the National Liberation Movement's acts of terror may be prosecuted as war crimes under international humanitarian law. The study analyses relevant legal laws and jurist opinions on the issues at hand using a qualitative approach via library-based methodology. This study reveals that prosecuting an act of terror by national liberation movements falls under international humanitarian law as international terrorism law does not apply. Furthermore, terrorism may be hard to prosecute under international law as it is not a crime that falls under the jurisdiction of the International Criminal Court (ICC) due to the absence of a universally accepted definition of terrorism. In short, by prosecuting acts of terror by national liberation movements as a war crime, the International Criminal Court will be able to exercise its jurisdiction over the acts.

Keywords: *National Liberation Movements, Militant, War Crimes, Terrorism*

Introduction

The National Liberation Movements' (NLMs) classification as a terrorist organisation was one of the major concerns surrounding the exercise of the right to self-determination. As in the case of Palestine, the designation has been utilised as one of the strategies to make it illegal for peoples to employ force in their quest for self-determination. Furthermore, Israel's recent action against Palestinian NLMs demonstrates how the designation of these groups as terrorist organisations justifies the use of disproportionate force against both them and the Palestinian people in general.

The ultimate goal of each armed conflict is to destroy the military forces of the opposition. Because of this, it is acceptable, or at the absolute least is not prohibited, for the parties involved in a conflict to target one another's military targets or targets who are not entitled to protection from direct attacks. Whether carried out by a State or a non-State party, violence against those targets is not prohibited by international humanitarian law. On the other hand, international humanitarian law forbids the use of violence against civilians and civilian property and prioritises shielding civilians from the devastation caused by war. Therefore, international humanitarian law governs both lawful and illegal acts of violence.

An NLM's classification as a terrorist organisation is essentially contentious since, according to international humanitarian law, an armed conflict is a circumstance in which some acts of violence are permissible, and some are not. Conversely, under local, state, or federal legislation, any violent act classified as "terrorist" is always forbidden and punishable. Any violent act that is classified under state's municipal law as "terrorist act" is therefore subject to prosecution of the said law.

To achieve its goal of investigating whether the acts of terror by the National Liberation Movement could be prosecuted as war crimes under international humanitarian law instead of under international terrorism law, this paper begins by exploring what extent the use of force in exercising the right to self-determination (jus ad bellum) is permitted under international law. The paper then explored the effect of the application of the status Terrorist as Unlawful Combatant on NLMs. It finally explored the possibility of prosecuting terrorism under international humanitarian law as a war crime before concluding the paper by saying that the act of terror by NLMs should be governed by international humanitarian law and not international terrorism law.

The Legality of Use of Force by National Liberation Movements

The UN Charter's Article 2(4) states that the prohibition of using force is one of the most important jus cogens principles that every State Member upholds in order to foster friendly relations and ensure peace amongst States. It is against the principle of non-use of force that Members may threaten or use force against the political independence or territorial integrity of any other Member. Subsequent United Nations General Assembly (UNGA) resolutions further maintained this principle. The International Court of Justice (ICJ) ruled in the Nicaraguan case that Article 2 of the customary law forbade the use of force in international affairs (4). As a result, the idea becomes a jus cogens law, which has universal application across all States and prohibits any deviation (Khan & Nadeem, 2018).

The right to self-defence and military intervention by the UN Security Council under Article 51 and Chapter VII of the UN Charter, respectively, are generally the only exceptions to this concept that are recognised. The question of whether this principle applies to non-state actors' actions and if the use of force is one of the permissible methods that may be used in the fight for self-determination, in particular, calls for close examination of a particular part of the law.

When it comes to Article 2(4)'s applicability in the conflict between individuals and non-state actors for self-determination, the term "All Members" in its ordinary means indicates that the Article was specifically addressed to UN State Members. The phrase "against the territorial integrity or political independence of any state" was added to the travaux préparatoires in order to reassure the smaller States.

This suggests that the discussion on Article 2(4) was not meant to be applicable to all states at the time it was drafted (Goodrich, Hambro, & Simons, 1969; Gray, 2018; Yau, 2018).

As previously mentioned, Nicaragua follows the principle of territorial integrity as mentioned in Article 2(4) with regard to relations between States, but not with regard to non-State entities. Furthermore, following 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 employment of force by peoples subject to colonial rule does not deviate from the Article 2(4) norm of non-use of force if it is instigated by colonial Powers to prevent colonial peoples from exercising their right to self-determination (Cristescu, 1981).

The issue at hand was whether the use of force could ever be a legitimate strategy employed by the people to achieve their right to self-determination, given that Article 2(4) was found to be inapplicable to non-State actors. As one of the legitimate methods in the fight for self-determination after decolonization, international law really imposes no explicit prohibition on the use of force and remains mute on the subject. In Lotus Judgement, finding a permissive rule was not required due to the absence of prohibition (Yau, 2018). As a matter of fact, anything done which is not explicitly forbidden is seen as acceptable and legal. Nevertheless, permission or licence to use force in the fight for independence does not imply a legal right to do so (Cassese, 1995).

The right to self-defence, guaranteed by Article 51 of the UN Charter, has been used by the majority of NLMs to support their use of force in the exercise of their right to self-determination, which has not been fully recognised by the international community (Coffin, 2014). This use may be a result of the UNGA's historical decolonization affirmation in Resolutions 3070 (XXVIII) and 3246 that the use of force is one of the tools accessible to people living under colonial authority in their battle for self-determination (XXIX) (Cristescu A., 1981). The legal foundation for using force to defend oneself against colonial powers was referred to as the "right to self-defence" in the travaux préparatoires of the Friendly Relations Declaration of 1970.

Beyond the context of colonialism, however, official support for legally armed struggles for self-determination had been abandoned (Yau, 2018). The phrase "any legitimate action" was used when discussing the right to self-determination in general in the 1993 Vienna Declaration and the Fiftieth Anniversary Declaration, two of the many international declarations prepared to reaffirm the right to self-determination.

To put it briefly, the rule that permits the use of force to exercise self-determination outside of the colonial framework is the absence of specific methods or mechanisms for doing so. The International Court of Justice (ICJ) has reiterated in the Chagos Advisory Opinion that "the right to self-determination under customary national law does not impose a specific mechanism for its implementation in all situations." However, if force is used in a way that undermines the goal of exercising self-determination, it may become illegal (Yau, 2018).

The Terrorist Status: Unlawful Combatant Status for National Liberation Movements

The application of the illegal combatant rule, which has been utilised against a terrorist, is another issue with the indiscriminate designation of people as terrorists (Harris, 2012). A legitimate combatant is entitled to "combatant immunity" under the Third Geneva Convention, Convention Relative to the Treatment of the Prisoners of War (GPW), which protects them from criminalization or prosecution for legitimate actions of war (Corn, 2011). They can therefore kill or injure enemy combatants, destroy other enemy military objectives, and inadvertently cause civilian casualties without running the risk of facing legal repercussions (Fraser, 2017).

Combatants are also granted the protections outlined in the Convention for the Prisoner of War (POW), under Article 4 of the Convention. But according to Additional Protocol II of the Geneva Conventions, non-State forces are not legitimate combatants, and their acts may constitute crimes under national law.

Therefore, this immunity and protection do not apply to non-international armed conflicts (Parsons, 2014). Additionally, states have been hesitant to offer non-state actors protection under international humanitarian law (IHL) and combat immunity because they believe doing so will legitimize their belligerence (Corn, 2011).

In contrast, wars for national liberation are included in the list of international armed conflicts under Additional Protocol I. Specifically, the 1949 Geneva Conventions' Common Article 2 defines international armed conflict, and the Additional Protocol I's Article 1 made clear that armed conflict resulting from people exercising their right to self-determination falls under this provision. It is important to note that while most state members have signed and ratified Additional Protocol I as of right now, several states—most notably the United States, Israel, India, Turkey, and Malaysia—have not done so.

The UNGA Resolution 3103 (XXVIII) from 1973, Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes, however, states that all armed conflicts involving a struggle against "colonial and alien domination and racist regimes" to have an international character. This means that armed conflict in the struggle for self-determination is aligned with this resolution. As such, there ought to be no ambiguity regarding the legitimacy of a people's involvement in an armed battle, and they ought to be regarded as legitimate combatants. But as previously mentioned, States may label peoples who used armed struggle to exercise their right to self-determination as terrorists as there isn't a universally accepted definition of what constitutes a terrorist. Allowing this potential to persist will enable governments to apprehend enemy combatants in an authorised international armed war and bring terrorism charges against them.

It is possible for States to designate people who have used armed conflict to exercise their right to self-determination as terrorists, despite the fact that there is currently no universally accepted definition of what constitutes a terrorist. Allowing states to have the ability to apprehend enemy combatants in a lawful international armed conflict and prosecute them as terrorists will result from maintaining this potential. Thus, this will negate the reason that International Humanitarian Law (IHL) exists in the first place, which is to allow for the legalisation of homicide while simultaneously preventing needless suffering and fatalities among non-combatants (Coffin, 2014).

From an alternative perspective, the fight for independence does not mean that the NLMs will never commit a terrorist act. In actuality, the Geneva Conventions and the Additional Protocols list terrorism as one of the several war crimes. However, this area of law is not fully explored because, in order to facilitate prosecution, the international community currently applies the domestic law to any act of terrorism committed on their soil. Moreover, IHL lacked the countermeasure required to stop terrorist acts, in contrast to domestic criminal law.

Therefore, in order to identify the appropriate legal framework when discussing the exercise of the right to self-determination, it is inevitable to consider the possibility of a combatant terrorist rather than the often-used practise of unlawful combatant designation. A militia may be deemed a lawful combatant in an international armed conflict under Article 4A (2) of the GPW, to be read with Article 2, if it is led by an individual accountable for the actions of his subordinates, has a fixed distinctive sign, carries weapons in plain sight, and conducts operations in line with war customs.

Terrorism Prosecutions Under International Humanitarian Law

Under international law, there is no universally accepted definition for what constitutes terrorism. Legal scholars have previously tried to come up with a consensus definition of terrorism. There are many ways to characterise terrorism nowadays. In fact, as of 1999, since the term "terrorism" was first used, more than a hundred definitions have been proposed (Laqueur, 1999). Though the globe is unified in the battle against terrorism, there is still disagreement on what constitutes the universal definition of the term. The different stances, opinions, and political interests of States are the main obstacles to a common

definition of the term (Maras, 2013). The UNGA first took into consideration a draught definition of "terrorism" that was derived from a proposal put up by India in 1996. Disagreements among Member States prevented the idea from ever being implemented.

The primary arguments in favour of rejecting these definitions stem from the similarities between the terms "terrorist" and "armed revolutionaries" or "national liberation movement." They share a lot of the same characteristics. A contributing element to the existence of many definitions is the state's political and social structure (Rupérez, 2007). One of the most crucial elements in defining terrorism is the state's overall perspective on international relations. No matter the situation or rationale, a sizable portion of UN Member States refused to acknowledge that using violence as a form of recourse was ever appropriate. In statements and UN publications, such as the Summit Declaration 2005, the Secretary-General, the Security Council, and the General Assembly have reiterated this viewpoint. The remaining Member States maintained that under some conditions, such as fighting against foreign occupation and exercising the right to self-determination, the use of force and violence should not be regarded as terrorism.

Nevertheless, the determination of what qualifies as an act of terror and who is classified as a terrorist has been dependent on the state definition as there is no universally accepted definition of what an act of terrorism is. This means that, without conducting any additional research, the state can criminalise any state-designated group or political rival functioning anywhere, including those who support greater human rights and self-determination (Chadwick, 2012).

While there is no universal definition of terrorism, the UN has attempted to distinguish acts of terrorism from those carried out in the context of exercising the right to self-determination. States highlighted the rationale behind the conduct rather than the deed itself as a distinguishing characteristic (Blocher, 2011-2012). Resolutions passed by the UN General Assembly have recognised this, drawing a line between terrorism and the efforts of peoples for their right to self-determination. That perspective, however, was altered in 1985 when Achille Lauro was hijacked (Halberstam, 1988; Blocher, 2011). Since then, all decisions pertaining to terrorism have denounced the act, irrespective of the identity of the perpetrator, as demonstrated by UNGA Resolution 49/60 in 1994.

Terrorists have been documented to be prosecuted using a variety of strategies in the international community's current counterterrorism practise. It is impossible to prosecute terrorism on an international scale in the lack of a universally acknowledged definition of the crime. The Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in 1998 emphasised that terrorism cannot be prosecuted in the International Criminal Court (ICC) because the Court lacks jurisdiction over it because of the absence of a universally accepted definition.

Due to the ICC's limited jurisdiction, the designation of a terrorist in the absence of a universal definition was typically made based on state definitions and prosecuted locally to expedite the criminal prosecution process. According to the concept of non-intervention, foreign governments have no authority to meddle in the way that a state prosecutes a group that it has recognised as a terrorist organisation. Many struggles for self-determination were impacted by the counterterrorism measures implemented following the tragic events of September 11, 2001, as a result of being designated terrorists. States openly employ force to put an end to the movements while citing counterterrorism as justification.

Nonetheless, the Hague Convention did not provide a clear distinction between terrorism and other war crimes, which makes it difficult to prosecute terrorism as a war crime under international humanitarian law. Acts of terror are included among the many war crimes listed by the Additional Protocols and Geneva Conventions. Article 51(2) of the Additional Protocol I, which addresses the protection of civilians during international armed conflicts, and Articles 4 and 13 of the Additional Protocol II, which deal with non-international armed conflicts, both make passing reference to the term "terror."

International terrorism law should not be applied in an armed conflict, despite the existence of complex, legally binding conventions and protocols pertaining to the prevention and suppression of terrorism, as stated in Article 51 of the Additional Protocol I and Articles 4 and 13 of the Additional Protocol II. Furthermore, under the majority of the listed conventions, there was a unique exclusion provision stating that the conventions did not apply to the military or during times of war. A specific exclusion clause in the 1997 Terrorist Bombing Convention, for instance, barred any military operations that fall under the purview of international humanitarian law.

This is because, in contrast to international humanitarian law, terrorist law seeks to prevent and suppress the act itself, whereas international humanitarian law recognises the possibility of civilian and non-combatant losses and seeks to mitigate the effects on them during times of war. Support for this comes from the UN Security Council, which has made it clear that nations' counterterrorism strategies must adhere to all international legal duties, including those pertaining to international human rights, refugee, and humanitarian law.

Despite being listed in both Additional Protocols, the Rome Statute's lack of a provision prevented terrorism from being punished as a crime against humanity or as a war crime (Vyver, 2010). Though not included in the Rome Statute, terrorism can nevertheless be established as a war crime in reference to the Statutes of the International Criminal Tribunal for Rwanda and the Statute of the Special Court for Sierra Leone by creating a unique subcategory of war crimes that is governed by international humanitarian law. It is important to note, nevertheless, that neither of the statutes included terrorism as a primary offence. Alternatively, the crime of terrorism can be established based on the elements under Article 8, crime of aggression, of the Rome Statute without reliance on the term "terrorism" itself. This way, the crime can still be prosecuted as a war crime in the ICC even in the absence of the common element of terrorism, which is an act intended to intimidate or compel an individual or government to comply with the party's wishes (Muhammadin, 2015). Nevertheless, this departure from the precise terms of Article 8 was not considered to be utilised, since the discussion of terrorist actions by NLMs frequently ends with their identification as a terrorist organisation by the state they are at odds with.

In other words, the ICC was unable to use its jurisdiction to try the case because there was no universally agreed definition of what constitutes a "terrorist," which created legal ambiguity when it came to pursuing terrorism as a war crime under international humanitarian law. Because international prosecution is often unfeasible, acts of terrorism are typically prosecuted under municipal law, even though there exists a procedure that allows the act to be prosecuted as an act of transgression under Article 8 of the Rome Statute. This characteristic allowed States to treat the crimes committed by their adversary using their own domestic laws, meaning that acts of terrorism were not considered to be international war crimes. Some States have utilised the broad definition of terrorism to legally suppress any form of self-determination movement under the pretext of counterterrorism. This is in addition to the fact that most States have broad definitions of it.

Conclusion

Since the term "terrorism" lacks a universally accepted definition, the NLM might be designated terrorist organisation for their use of force. With the exception of the UN Charter's Article 2(4) prohibition, international law provisions allow peoples to employ force in the exercise of their right to self-determination. It was made clear, nonetheless, that permission is not the same as a legal right. Even while NLMs are granted "combatant immunity" by international humanitarian law, they are nonetheless required to abide by the guidelines established by the Geneva Conventions and their Additional Protocol. The immunity does not give NLMs permission to target civilians. If they violate any of the rules, they will be prosecuted for their actions. This covers any potential acts of terror that they may carry out as well.

It is imperative to emphasise that there was no indication in the discussion that an act of terror carried out by the NLMs would render a struggle for self-determination illegitimate. Regardless of whether the

NLMs were able to achieve their goal of self-determination, they might still face legal action for any war crimes they have ever perpetrated in accordance with international humanitarian law. Though the procedure is intricate, the case of Kosovo serves as an example, as the Kosovo Special Court is prosecuting the NLMs of their people in addition to the war crimes done by their counterpart. Ultimately, a life lived with honour and dignity was the ultimate goal of any struggle for self-determination, even when it involved the exercise of a legal right guaranteed by international law and there may have been civilian losses. Unnecessary civilian deaths should not be committed thus tarnishing such honour.

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