

CHAPTER 3:

CONFLICTING LEGAL ISSUES IN EXERCISING THE RIGHT TO SELF- DETERMINATION

3.1 INTRODUCTION

It has been established that the self-determination of peoples is an acknowledged right under international law. However, as had been highlighted in the previous chapter, the right was not provided by the law with a permissible or legible method that can be used. Due to this, there are some crucial problems arising in exercising the right mainly due to the fact that the right is a contrasting right to the state's sovereignty and the right to territorial integrity that is also protected by international law.

The lack of methods in any provision of law, although allowing the freedom for interpretation on how the right may be exercised, it also allows an interpretation that may illegalise the act itself. This is especially so by states who held sovereignty and legitimate international status. Following the purpose enshrined in the UN Charter of pursuing international peace and security, in acknowledging the right to self-determination as a right under international law, the right was not intended to be misused for the disintegration of state sovereignty and disruption of national unity and territorial integrity (Cristescu A. , 1981).

The issue of national liberation movements (NLMs) being paralysed by their overall criminalization through their designation as a terrorist organisation by states was brought up by the absence of a universally accepted definition of the term

"terrorism" and the lack of defining methods of exercising the right to self-determination.

Added to the absence of a universally accepted definition of the term "terrorism", the lack of defining methods of exercising the right to self-determination has also brought forth the issue of where NLMs were paralyzed by their criminalisation as a whole through their designation as terrorist organisations by states. By designing a NLM as a terrorist organisation, the designated NLM will be legally subjected to the state's municipal criminal prosecution and sanctions that might be definitive in their struggle. Actions that should be legal under international humanitarian law will be prosecuted as a criminal act under the guise of terrorism law.

As of that, in this chapter, several points of concern regarding these two issues will be discussed extensively. The contrasting nature of right to self-determination to the right of states will touch on issues of counterinsurgency, foreign influence on state recognition, recognition of the universal declaration of independence and the issue of applying the principle of *uti possidetis* in drawing new borders. In regard to the issue of designing NLMs as terrorist organisations, several points of law will be discussed which include the legality of the use of force by NLMs, the possibility of prosecuting terrorism under international humanitarian law, the application of the status of a terrorist as an unlawful combatant on NLMs and also the recognition of NLMs as legal representative of the people.

3.2 CONTRASTING STATE SOVEREIGNTY AND RIGHT TO TERRITORIAL INTEGRITY WITH THE RIGHTS OF PEOPLES

Generally, in exercising a right, there will be a party impacted by the right, especially in a circumstance where the right is directly contrasting with another right. This is the case in regard to the right to self-determination, where the right of peoples was directly contrasting with the right to the state's territorial integrity. Due to this, the exercise of the right to self-determination can be seen as a direct challenge to state sovereignty by the state affected.

However, the International Court of Justice (ICJ), in their 2010 Kosovo Opinion, concluded that the principle of territorial integrity is said to be "*confined to the sphere of relations between States*". The Court used three international instruments that embody the principle of territorial integrity to support its position. The first reference was made to Article 2(4) of the UN Charter which read:

*"All Members shall refrain in their international relations from the threat or the use of force against **the territorial integrity** or political independence of any state, or any other manner inconsistent with the Purposes of the United Nations".*

The second reference was based on the General Assembly's Friendly Relations Declaration of 1970, which is considered to be a reflection of customary international law. Article 1, paragraph 1 of this Declaration stipulates that

*"States shall refrain in their international relations from the threat or use of force against the **territorial integrity** of political independence of any State."*

The final reference was called was Article IV of the Helsinki Final Act 1975 which states:

*"The participating States will respect **the territorial integrity** of each of the participating States"*

All three paragraph above has explicitly addressed States and prohibited the threat or use of force in their international relations as the foremost context in framing the principle of territorial integrity. In short, based on the Court findings, the territorial integrity principle is exclusively beneficial to States and can only be addressed by them. Thus, a State's territorial integrity can only be violated by another State.

However, in regard to the right to self-determination, the right of peoples was directly contrasting with the right to the state's territorial integrity as both rights claimed political, economic, and cultural control over a territory and its population. Due to this, the exercise of the right to self-determination can be seen as a direct challenge to state sovereignty by the state affected. With that, it is not surprising that there are conflicts arising from this clash of interests, especially by states who are protecting their sovereignty and territorial integrity. With the recognition of the right to self-determination as a right of peoples under international law, there were various measures taken by states to protect their sovereignty and curb any challenges to their territorial integrity. Based on this conclusion and the aforementioned provisions, this part of the chapter addresses the issues that may arise between these rights that have contrasting interests.

3.2.1 Settler Programs as Counterinsurgency

One of the issues raised in discussing the legitimate method to exercise the right to self-determination is whether the struggle by the people for their self-

determination falls within the interpretation of insurgency under domestic criminal law and on what ground can the struggle be distinguished as a legitimate struggle in exercising the right to self-determination from a politically driven insurgency. Insurgency as defined by the NATO (North Atlantic Treaty Organization) counterinsurgency doctrine in 2017, based on their analysis of the Malayan Insurgency in 1948-1960, is the acts of a planned, often ideologically driven group or movement that aims to bring about or prevent a political change of a ruling authority within an area¹. It comprises three elements which are: (1) actions or activities by an organised group; (2) a goal of some form of political change over a ruling regime; and (3) the use of violence or subversive activity. NATO highlighted that all three elements must be satisfied for an act to be considered an insurgency.

In exercising their right to territorial integrity, most states have criminalised the act of insurgency by any of its citizens and established various acts of counterinsurgency. Counterinsurgency, as defined by NATO, is a comprehensive civilian and military effort to isolate and defeat an insurgency, create a safe and secure environment, address core grievances, and enable the promotion of legitimate governance and rule of law². Following its principles of counterinsurgency which is to isolate and defeat the insurgent and to operate within the international and applicable domestic law, the states are allowed to use any legal means to curb the insurgency as the insurgent will use any methods within their power to undermine the authority and legitimacy of the state government. If the conflict escalated to armed conflict, the IHL will be applied. In the course of that, if any armed attack falls within the interpretation

¹ This term and definition modify an existing NATO Agreed term and/or definition and has been processed for NATO Agreed status via terminology tracking file (TTF) 2011-1002.

² This term and definition modify an existing NATO Agreed term and/or definition and has been processed for NATO Agreed status via terminology tracking file (TTF) 2011-1001.

of an act of terrorism, states are legally allowed to take extreme measures to retaliate in the name of counterterrorism.

In discussing the methods of counterinsurgency, apart from criminal punishment by the states, one of the methods used was the settler program. It is a program where the government move a portion of its people into the disputed land to disperse the territorially concentrated group in the land. With the influx of settlers as the majority of the land, the government will have a better claim to the disputed land. This was the practice faced by the Muslims in Mindanao in the Philippines and the Tamil population in the Northern and Eastern provinces of Sri Lanka. In both cases, the 'peoples' of the said territory were dispersing in concentration with the settlers being the majority of the territory. For instance, in Mindanao, the settlers who migrated into the territory makeup roughly 70% of the current population, displacing the indigenous occupants of the land (Harris A. , 2012).

This program was aimed to de-legitimising the indigenous population by manipulating the demography of the group territory and thus, establishing the state sovereignty over the territory in pursuance of the principle of *uti possidetis*. A discussion on this will be done further in this chapter. In record, the majority of settlers can strengthen the claim of the authority of the state over the disputed territory. In some cases, the majority of settlers can even claim territory according to the right to self-determination to establish a settler state as opposed to nation-states, such as the United States of America, Canada, and Singapore.

In severe cases, the government will establish martial law and military rule to ensure the safety of the settlers in the territory. Any act of resistance will be deemed

an act of insurgency and punishable by law. This method of counterinsurgency is still practised by some states. For instance, in the case of Uyghur in China, one of the methods used by China to erase the Uyghur claim to the territory was migrating an influx of Han ethnicities into the territory (Yeh, 2020). The same practised was used continuously by Israel to secure its control over the territory. By de-legitimising the indigenous right to self-determination, the state strives to interpret the struggle by the peoples to be an act of insurgency that is punishable under state law.

However, in understanding the right to self-determination provided under international law, the right to self-determination should not be able to be erased by the mere fact that the territory population was occupied by settlers as self-determination is an inherent right of peoples. In the discussion on the case of East Timor, a question was raised whether the outcome of the independence of East Timor might differ in the event that Indonesia migrates an influx of its population into the territory, claiming sovereign authority over the land. Referring to the UNGA resolution in 1966³ that condemned the systematic influx of colonial immigrants into colonised territories, it was of the view that the right to self-determination will not transfer to the settlers and should remain with the ethnos group (Bennett, 2005).

Fundamentally, systemic manipulation of population control in aiming to delegitimise the right to self-determination was wrong and against the principles laid under international law. However, as there is no specific law regarding this apart from the condemnation of systematic population control, states have been using this to exert

³ 2. Regrets the policy pursued by colonial Powers in order to circumvent the rights of people under their rule through the promotion of the systemic influx of foreign immigrants, and the dislocation, dispossession, deportation and eviction of the indigenous inhabitants. See Article 2 of Question of the Violation of Human Rights and Fundamental Freedoms, Including Policies of Racial Discrimination and Segregation and of Apartheid, in All Countries, with Particular Reference to Colonial and Other Dependent Countries and Territories, 1966. UN Doc. A/RES/2144 (XXI).

their authority and control over the territory. This is because, to ensure that the secession is successful and the new state has control over its territory, it is inevitable that they had the support of the territory population.

3.2.2 Great Power Influence on New State Recognition

One of the essential requirements of statehood agreed upon by the international community is the capacity to enter into relations with other states⁴. This requirement was often dismissed as it may technically seem to be more of a consequence of statehood rather than a requirement (Pullar, 2014). However, this criterion set out an important element that needs to be fulfilled which is the recognition of the international community as to have the capacity to enter into relations with the community, the new state must have been acknowledged by the community. Lacking their recognition will make it incapable to enter into relations with them. This is reflected in the practice of the international community where the element of recognition of the other states was the decisive factor of whether the statehood of a nation is achieved. For example, the state of Croatia which declared independence in 1991, was only treated as a state when it achieved recognition from the international community in 1992 (Anderson, 2015).

However, although, the recognition of the international community was a legal requirement, it was heavily influenced by the political and economic interests of the State Members, in particular, the decision of the Great Power nations. Great Power or Superpower is an interchangeable term used in referring to the permanent members of

⁴ See Article 1 of Montevideo Convention (Rights and Duties of States), 1933.

the UNSC, due to their political, military, and economic powers, having the ability to influence the international community (Sterio, 2010). In pursuance of international peace and security, the international community, in avoiding having a hostile relationship with any of the great power nations, will deter from making any decision that will be a direct opposition to the Great Power nations. The presence of opposition or support by the Great Power nations, which are heavily influenced by their economic and political interest, has been the deciding factor in the success of the struggle for self-determination. These factors, though silent in international law, were further proven by the common practice for the legality of the struggle for self-determination and the recognition of statehood in the international community.

A prime example of how recognition by the Great Power nations influences the statehood of a state is the unsuccessful secession of Biafra, a state created by a unilateral non-colonial (UNC) secession pursuant to the law of self-determination (Anderson, 2013). Despite fulfilling all the requirements of statehood, although having no direct opposition from any of the Great Power nations, the lack of support or recognition by any of them spelt the demise of its struggle for self-determination. Without the recognition by any of the Great Powers, primarily the United Kingdom and France, Biafra falls into a legal “grey” zone, although arguably possessing nascent statehood, it was later gradually reabsorbed back into Nigeria, ending their struggle for self-determination indefinitely. This situation was the direct opposite of what happened in the South Sudan struggle for self-determination. Also declared their independence unilaterally⁵, the declaration was followed by the recognition of the US on the exact same date. The condemnation of the international community on the

⁵ Although South Sudan achieved independence as the result of a referendum, it was achieved following decades-long of civil wars where an estimated 2.5 million people died while over five million were internally displaced. See Silva, 2014.

aggression to the people of South Sudan by the Sudan central government also helped the new state establish itself.

On the other hand, a prime example of how the opposition of a Great Power may heavily decide the statehood of a state was the lack of recognition of the Republic of China (ROC) in Taiwan. Previously, was a member of the UN as the representative of China before the expulsion⁶, ROC was deprived of the eligibility to become a state due to the strong opposition of the People's Republic of China (PRC), the current representative of China in UN (United Nations, 1971). Even though as of now, the ROC of Taiwan has the recognition of 13 State Members of the UN, as none of the Great Powers recognises its statehood due to PRC influence, the ROC of Taiwan is not recognised as a state by the UN ever since its expulsion until today, citing Resolution 2758 in any motion of rejecting it (United Nations, 2003). Despite that, as opposed to Biafra, although only having recognition by 13 UN State Members, the ROC of Taiwan managed to maintain its claim of statehood and managed to establish itself in the international community as one of the world's top computer technology producers. This was achieved with the establishment of unofficial diplomatic relations by way of treaties and agreements by 59 states, including the US, the UK and France, paving the way for other states to do the same. Despite the political conflict and claim to statehood, the ROC of Taiwan also managed to have an economic tie with the PRC of China by signing cross-strait agreements, albeit both using private organisations in

⁶ Decides to restore all its rights to the People's republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it. See Restoration of the lawful rights of the People's Republic of China in the United Nation, 1971. UN Doc. A/Res/2758 (XXVI).

the exchanges⁷ (Chen & Cohen, 2019). This tacit understanding between China and Taiwan was one of the reason the ROC of Taiwan managed to maintain its claim of statehood despite official opposition of China.

The two cases above have shown how the influence of Great Power nations may affect the struggle for self-determination. Although an absence of any opposition by the Great Power nations may not directly affect the strife for struggle, the lack of recognition, spelling lack of support does not help the new state in establishing their sovereignty and statehood.

3.2.3 The Recognition of a Unilateral Declaration over State sovereignty

One of the ways where the right to self-determination can be realised was when the dominion or colonising state recognises the independence declared by the people under its control. The recognition will be a form of acquiescence by the state on the newly formed state, reducing the likelihood of violence. A unilateral declaration, however, is where a group of people in a territory declared unilaterally their independence without the recognition of its colonising state. Scholars have been debating whether a unilateral declaration of a state of its independence and sovereignty is recognised under the eyes of international law (Anderson, 2015). The supporting opinion stated that the meaning of peoples provided under the Fiftieth Anniversary Declaration 1995 had included a unilateral secession as a legitimate

⁷ The Straits Exchange Foundation (SEF) of Taiwan and the Association for Relations Across the Taiwan Straits (ARATS) of the PRC are both semi-official organisations set up to handle technical and business matters with each other respectively. See Chiu, 1993.

action. The dissent opined that unilateral declaration cannot be recognised as it is against the very foundation of international law which is to embrace the sovereignty of the State Members.

In discussing this issue, it is inevitable to look back into cases decided in the International Court of Justice (ICJ) pertaining to this matter, mostly on the different outcomes of the cases of Quebec from Canada and Kosovo from Serbia. In reference to the Kosovo Opinion, though it was argued that the attempts at unilateral secession were prohibited by the principle of territorial integrity, the Court was of a different opinion. The Court's finding concluded that the principle of territorial integrity would not be harmed by a unilateral declaration of independence, or any other unilateral action aimed at secession. Thus, making secessionist activities do not oppose the principle at all (Driest, 2015).

This is in line with the finding of the Supreme Court of Canada, in *re Secession of Quebec*, where it suggested that a unilateral secession may be justified as the last resort in the event when the people are denied the ability to exercise their right to self-determination internally. As Quebec failed to prove that their human rights are severely abused and violated as per the case of Kosovo, the court is of the view that they are not entitled to unilaterally declare their independence as they are also not entitled to secession (Brewer E. M., 2012). This is also reflected in the secession of Catalonia (Hayes, 2018).

It can be deduced that the different outcomes are heavily influenced by the existence of the element of oppression in both cases. However, it needs to be highlighted, though a unilateral declaration of independence by a new state may be

legal in the existence of an oppression element, this is not an indicator that a unilateral declaration is a perfect solution for successful self-determination. There are various cases where the peoples had declared their independence unilaterally but are unable to establish a sovereign state such as Palestine, Chechnya, Biafra and many others. A legal unilateral declaration of independence is only the first of many steps that the peoples need to establish their newly found sovereignty and succeed in their struggle for self-determination.

3.2.4 The Application of the Principle '*Uti Possidetis*' in Drawing New Borders

As highlighted before, most of the prevalent issues in regard to self-determination arise when the group claiming for it seek to secede from the existing state. This was due to the fact that seeking secession is a direct conflict with the state's right to territorial integrity. With the absence of any details explanation on the methods of exercising the right, as stated before, there are concerns raised on the possibility of misuse of the right to widen one's territorial claims, deviating from the internationally accepted boundaries. As of that, in order to rectify the issue, the principle of *uti possidetis* (as you possess) or principle of possession was applied in drawing borders and determining the territory of a state.

The principle of *uti possidetis* can be separated into two types based on its history of application: *uti possidetis juris* (possession by legal title) and *uti possidetis de facto* (possession by actual occupation). The *uti possidetis juris* is a principle where a change in sovereignty from a colonial power has no bearing on the current condition

of international borders. This principle upholds the principle of territorial integrity even when there is a change of sovereignty. On the other hand, the principle laid by the *uti possidetis de facto* emphasized the physical possession of the territory. It asserts that the ownership of an area is determined by actual occupation rather than by following the territory set forth by the previous colonial ruler.

Due to the concerns of destabilisation effects of attempting to redraw new borders, the major principle used in settling international disputes over territorial boundaries has generally been based on “stability and continuity of boundaries” (Lu, 2019). Adding to that, one of the securities promised to state members in inserting self-determination as a right in international law was the security of the state territorial integrity as provided under the UN Charter and acknowledge in both the Decolonisation and Friendly Relations Declarations. As a result, the international community's reliance on the *uti possidetis juris* principle in determining borders during the decolonisation period was greatly influenced by the principle of territorial integrity.

However, the application of the principle of *uti possidetis* is not confined only to the context of colonialism. In *Opinion No.2*, the (Yugoslav) Arbitration Commission, the Commission declared that the application of *uti possidetis juris* will be applied regardless of the circumstances in the case of self-determination⁸. The opinion did highlight the exception of the application of this principle which was by way of agreement. Thus, in line with the interpretation that states are prevented by neither territorial integrity nor *uti possidetis* from dividing or amalgamating by

⁸ 'Whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the states concerned agree otherwise'... See para. 5, page 1498, *Opinion No.2*, the (Conference on Yugoslav) Arbitration Commission, 1991.

agreement. This can be referred to as the instance where there is no objection when Norway and Sweden, or the Czech Republic and Slovakia are separated by mutual consent (Miller, 2016).

One of the main concerns in the practice of applying the principle of *uti possidetis juris* in drawing new borders on the right to self-determination is that the claim will be restricted to the existing colonial territory or the subsequent territories emerging after the decolonial process. This will undeniably cause concern for the claim to self-determination by peoples who are affected by the result of the divide and conquer strategy during the era of colonisation. One of the prominent victims of the application of this principle in determining borders is the Kurds. Dispersed over several countries, the Kurds were considered the world's largest nation of people without a sovereign state to call their own in the wake of the nation-state movement following the end of World War II (Evans, 2020).

On the aspect of the application of the doctrine of *uti possidetis de facto*, although seems to favour the fight for self-determination in drawing new borders, the doctrine has a loophole that can be utilised to dissuade the peoples from trying to exercise their right to self-determination. As highlighted in the earlier part of this chapter, in order to curb any demand for self-determination by the peoples of the territory, there were cases where states implemented the settlers program. With the absence of any law that prohibits the act, the state can use any means to facilitate the migration of its people to the disputed territory to systematically manipulate population control. By losing population control over the territory, the possibility of the success of the struggle for self-determination by the people will be diminished.

Thus, it can be deduced that the application of the doctrine *uti possidetis* in drawing

new borders can be a stumbling block for the people in exercising their right to self-determination as the doctrine can be used as a method to curb the formation of new borders.

3.3 THE FRAMING OF THE NATIONAL LIBERATION MOVEMENT AS TERRORIST

One of the crucial issues relating to the exercising of the right to self-determination was the designation of the NLM as a terrorist organisation. The designation has been used as one of the methods to illegalise the use of force by the peoples in their struggle for self-determination as in the case of Palestine. Additionally, the designation of these groups as terrorist organisations justifies the imposition of financial sanctions against them, as demonstrated by Israel's recent action against Palestinian human rights organisations (Cohn, 2021). A financial setback in the struggle for self-determination could be equated to a death sentence for some movements.

In any armed conflict, the ultimate objective is to destroy the enemy's military forces. For this reason, targeting each other's military targets or targets who are not entitled to protection against direct attacks is permissible, or at the very least is not banned, by the parties to a conflict. International humanitarian law does not forbid violence against those targets, regardless of whether it is committed by a State or a non-State party. Contrarily, violence committed against civilians and civilian property is prohibited by international humanitarian law, which places a priority on protecting

civilians from the consequences of warfare. Thus, both legal and illegal acts of violence are governed by international humanitarian law.

The fundamental issue in designing an NLM as a terrorist organisation is that under international humanitarian law, armed conflict is a situation in which certain acts of violence are considered lawful and others are unlawful. In contrast, any act of violence designated as “terrorist” is always unlawful and criminalised under municipal or international law. Thus, there is no exemption from prosecution for any act of violence legally designated as “terrorist”.

This section of the chapter will explore the legality of using force in a struggle for self-determination in light of terrorist law. It will investigate the possibility of whether terrorism could be prosecuted in accordance with international humanitarian law. The designation of NLMs as terrorist organisations raise certain fundamental questions that will also be investigated.

3.3.1 The Legality of the Use of Force (*Jus ad Bellum*) by National Liberation Movements

Under Article 2(4) of the UN Charter⁹, one of the utmost importance and jus cogens principles upheld by each State Member in framing friendly relations and ensuring peace between States was the prohibition of the use of force. The principle of non-use of force prohibits the Members from threatening or using force against the territorial integrity or political independence of any of the other Members. This

⁹ **All** Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the [UN]. See Article 2(4) of UN Charter.

principle was further upheld by the subsequent UNGA resolutions¹⁰. In the case of *Nicaragua*, the ICJ declared that the customary law prohibiting the unlawful use of force in international relations was reflected in Article 2(4). Due to that, the principle becomes a *jus cogens* law where the effect applies to all States and allows no derogation (Khan & Nadeem, 2018).

As a general rule, the only exception recognised to this principle is of the right to self-defence and United Nations Security Council military intervention measures under Article 51¹¹ and Chapter VII¹² of the UN Charter respectively. However, in particular to the question of the use of force in the struggle for self-determination, there is a certain part of the law that needs to be scrutinised, which is whether this principle governs the action of non-state actors and whether the use of force itself is one of the legalise methods that can be used in the struggle for self-determination.

In regard to the applicability of Article 2(4) in the struggle for self-determination, involving non-state actors, and people, with the reference to the term used "All Members..." in its ordinary means, signifies that the Article was expressly addressing the UN State Members. In reference to its *travaux préparatoires*, the term "against the territorial integrity or political independence of any state" was added as an assurance to the smaller States by the major powers, it can allude that the discussion on Article 2(4) was not intended to have universal application at the time it was drafted (Yau, 2018).

¹⁰ See Strict observance of the prohibition of the threat or use of force in international relations, and of the right of peoples to self-determination, 1966. UN. Doc. A/RES/2160 (XXI); Non-use of force in international relations and permanent prohibition of the use of nuclear weapons, 1972. UN Doc. A/RES/2936 (XXVII).

¹¹ Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security. See Article 51 of UN Charter.

¹² See Articles 39-51, Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, of UN Charter.

As also stated before, in *Nicaragua*, the principle of territorial integrity referred to in Article 2(4) is applicable in the relation between States but not to non-State actors. Additionally, if it is provoked by colonial Powers in order to prevent colonial peoples from exercising their right to self-determination, the use of force by peoples under colonial dominance is not a departure from the principle of non-use of force stipulated in Article 2(4) (Cristescu A. , 1981).

With Article 2(4) deemed to be inapplicable to non-State actors, the question at hand was whether the use of force can be used as one of the legal methods by the people in realising their self-determination in any circumstances. In fact, international law has no express prohibition and is silent on the use of force as one of the legal methods in the struggle for self-determination beyond decolonisation. In reference to *Lotus* Judgement, the absence of prohibition made the need to demonstrate a permissive rule to be unnecessary. In a way, any action taken in the absence of any cogent prohibition is considered permitted and lawful (Yau, 2018). However, permission or license to use force in the struggle for self-determination does not constitute a legal right to do so (Cassese, 1995).

Most of the NLMs have been using Article 51 of the UN Charter, the right to self-defence, to justify their right to use force in exercising their right to self-determination which has not been fully accepted by the international community (Coffin, 2014). This usage might be due to the history during the decolonisation period where UNGA has reaffirmed the use of force as one of the means available for people living under colonial rule in their struggle for self-determination as can be

found in Resolutions 3070 (XXVIII) and 3246 (XXIX)¹³ (Cristescu A. , 1981). In the *travaux préparatoires* of Friendly Relations Declaration of 1970, the term “right to self-defence” was used to describe the legal basis of the use of force in exercising self-determination against colonial powers.

However, beyond the colonial framework, the affirmative language in favour of lawfully armed struggles for self-determination was no longer explicit (Yau, 2018). In the numerous international declarations drafted to reaffirm the right to self-determination, the language used was leaning towards “any legitimate action” when the right to self-determination was addressed in general as used in the 1993 Vienna Declaration¹⁴ and the Fiftieth Anniversary Declaration.

In short, the absence of specific methods or mechanisms for the exercise of self-determination becomes the permissible rule that allows the use of force in exercising self-determination beyond the colonial context. This is reaffirmed by ICJ in *Chagos* Advisory Opinion that “the right to self-determination under customary national does not impose a specific mechanism for its implementation in all instances”¹⁵. However, the use of force can become unlawful in the event that it was used in a way that is contrary to the objective of exercising self-determination (Yau, 2018).

¹³ Reaffirms the legitimacy of the peoples' struggle for liberation from colonial and foreign domination and alien subjugation by all available means, including armed struggle. See Importance of the Universal Realization of The Right of Peoples to Self-Determination and of The Speedy Granting of Independence to Colonial Countries and Peoples for The Effective Guarantee and Observance of Human Rights. 1973, para. 2. UN. Doc. A/RES/3070(XXVIII); 1974, para. 3. UN. Doc. A/RES/3246(XXIX).

¹⁴ Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. See Article 2 (2) of Vienna Declaration and Programme of Action, 1993. UN Doc. A/CONF.157/23.

¹⁵ See paras.150-153 of Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019. I.C.J. Rep. Gen. List169.

3.3.2 Prosecuting Terrorism under International Humanitarian Law

The act of terrorism has no universal definition under international law. Previous attempts to find a common definition of terrorism have been made by legal scholars. Today, terrorism is described in a variety of ways. There have been over a hundred definitions of terrorism since the term was first introduced (Laqueur, 1999).

Despite the fact that the entire world is united in the fight against terrorism, the dispute over a universal definition of the term has not yet been settled. A universal definition of the term is primarily prevented by the varied perspectives, viewpoints, and political interests of States (Maras, 2013). When looking for a definition of the term "terrorism" that is widely accepted, the United Nations General Assembly (UNGA) initially considered a draft that was developed from a proposal made by India in 1996. The proposal was never implemented due to disagreements among Member States.

The fundamental justifications for rejecting these definitions are the overlaps between the definitions of "terrorist" and "national liberation movement" or "armed revolutionaries." They are characterised in a very similar way. One of the factors influencing the presence of many definitions is the political and social structure of the state (Ruperez, 2007). The state's general outlook on international relations is one of the most important factors in defining terrorism. Regardless of the circumstance or justification, a significant number of UN Member States refused to recognise any recourse through the use of violence. This view has been reaffirmed by the Secretary-General, the Security Council, and the General Assembly in remarks and UN documents including the Summit Declaration 2005. The remaining Member States

insisted that the use of force and violence should not be considered terrorism in specific circumstances, such as the fight against foreign occupation and while exercising the right to self-determination.

However, due to the absence of a universal definition of the act of terrorism, the designation of what constitutes an act of terror and who is defined as a terrorist has been relying on the state definition. Due to that, the state has a wide range of power to criminalise any state-nominated group or political opponent operating anywhere, including those advocating greater human rights and self-determination, without any further investigation (Chadwick, 2012).

Although in the initial discussion of terrorism, the UN has made an effort, despite the absence of a universal definition, to exclude acts committed in the course of exercising the right to self-determination from acts of terrorism. States emphasized the justification of the action as opposed to the act itself as a distinctive factor (Blocher, 2011). This has been reflected in the UN General Assembly resolutions where a distinction between the struggles of the peoples for their right to self-determination and terrorism¹⁶. This view however changed due to the hijacking of Achille Lauro in 1985¹⁷ (Halberstam, 1988; Blocher, 2011). Following that, all

¹⁶ See Effective Guarantee and Observance of Human Rights, 1977. UN Doc. A/RES/32/147; Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes, 1979. UN Doc. A/RES/34/145; 1981, UN Doc. A/RES/36/109; 1983. UN Doc. A/RES/38/130.

¹⁷ The MS *Achille Lauro*, an Italian ocean liner, was hijacked in October 1985 while sailing from Alexandria, Egypt, to Ashdod, Israel, by four men who claimed to be members of the Palestine Liberation Front (PLF). The four men were initially tried and convicted with a light sentence by the Genoa Assize Court without referring them as terrorists. However, the *Genoa Corte Suprema di Cassazione* later granted the appeal of the prosecution for a heavier sentence by referring to them as terrorists. See *Husain v. Italy* (dec.), no. 18913/03, 2005.

resolutions regarding terrorism have condemned the act regardless of who committed the act as in UNGA Resolution 49/60 in 1994¹⁸.

In the current practice of counterterrorism of the international community, terrorists have been recorded to be prosecuted in various approaches. With the absence of a universally accepted definition of terrorism, the prosecution of terrorism is not possible to be done on the international level. This fact has been highlighted in the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in 1998 of the unviable option of prosecuting terrorism in International Criminal Court (ICC) as it is outside the jurisdiction of the Court due to the absence of a universally accepted definition¹⁹.

With the absence of a universal definition, the designation of a terrorist was generally done based on state definition and prosecuted domestically to ease the process of prosecution of the act due to the limited jurisdiction of the ICC. Following the principle of non-intervention, when a group was designated as a terrorist organisation by a state, the other states have no right to interfere in the manner of how the State prosecutes the group. In the wake of counterterrorism after the tragic event of September 11, 2001, many struggles for self-determination were affected as they were designated as terrorists. States, using counterterrorism as an excuse, blatantly use force to eradicate the movements.

¹⁸ 1. The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed. See Article 1 of Declaration on Measures to Eliminate International Terrorism, 1994. UN Doc. A/RES/49/60.

¹⁹ Regretting 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. See para. 5 of Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 1998. UN Doc. A/CONF.183/10.

However, in regard to prosecuting terrorism as a war crime under international humanitarian law, the act of terrorism was not clearly distinguished as part of a war crime in the Hague Convention. However, the list of numerous war crimes under the Geneva Conventions and Additional Protocols includes acts of terror. The term “terror” was briefly mentioned in Article 51 paragraph 2²⁰ of the Additional Protocol I of the protection of the civilian population in an international armed conflict and Articles 4²¹ and 13²² of the Additional Protocol II for non-international armed conflict. With the inclusion of the term in Article 51 of the Additional Protocol I and Articles 4 and 13 of the Additional Protocol II, despite having an elaborate binding international conventions and protocols related to the prevention and suppression of terrorism, international terrorism law should not be applied in an armed conflict. Furthermore, a special exception clause of the non-applicability of the conventions in relation to the military and time of war was provided under most of the conventions stated. As an example, any activities of armed forces that are governed by international humanitarian law was excluded in an explicit exception clause of the 1997 Terrorist Bombing Convention²³.

²⁰ 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. See Article 51(2) Protection of the civilian population of Additional Protocol I, Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to The Protection of Victims of International Armed Conflicts (Protocol I). 1977.

²¹ The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited: ... d) acts of terrorism; See Article 4 Fundamental guarantees of Additional Protocol II, Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to The Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977.

²² 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. See Article 13(2) Protection of the civilian population of Additional Protocol II, 1977.

²³ 2. The activities of armed forces during armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention... See Article 19(2) of International Convention for the Suppression of Terrorist Bombings, 1997. UN Doc. A/RES/52/164.

This is due to the fact that as opposed to international humanitarian law, the aim of terrorism law is to prevent and suppress the actual act from happening at all while the international humanitarian law acknowledges the possibility of civilians and non-combatants casualties and aims to lessen the impact on them in the time of war. This is supported by the UNSC where it has explicitly stated States' counterterrorism policies must comply with all their obligations under international law, particularly international human rights, refugee, and humanitarian law²⁴.

In establishing terrorism as a war crime, despite having mentioned in both Additional Protocols, the lack of provision in the Rome Statute made terrorism unable to be prosecuted as a war crime or a crime against humanity (Vyver, 2010). Nevertheless, in reference to the Statutes of the International Criminal Tribunal for Rwanda and the Statute of the Special Court for Sierra Leone, terrorism can be established as a war crime despite not being included in the Rome Statute by way of establishing a special subcategory of war crimes governed by the provisions of international humanitarian law. However, it must be highlighted that terrorism was not addressed as a general crime under either of the statutes. According to another point of view, the crime of terrorism can still be prosecuted as a war crime in the ICC despite 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, by establishing the crime based on the elements under Article 8, crime of aggression, of the Rome Statute without reliance on the term "terrorism" itself (Muhammadin, 2015). However, with the debate of terrorist activities by NLMs often concluded with

²⁴ See Resolution 1624(2005) Adopted by the Security Council at Its 5261st Meeting, 2005. UN Doc. S/RES/1624.

their designation as a terrorist organisation by the state they are in conflict with, this departure from the explicit provisions of Article 8 was not regarded as being utilised.

In short, the confusion of law in prosecuting terrorism as a war crime under international humanitarian law was due to the lack of a universally accepted definition of the term “terrorist” which led to the ICC being unable to exercise their jurisdiction to try the case. Despite having a mechanism that allows the act to be prosecuted as an act of transgression under Article 8 of the Rome Statute, an act of terrorism is commonly prosecuted under municipal law due to the inability of international prosecution. It was due to this nature that any act of terrorism was not treated as part of international war crimes and allows States to treat these crimes done by their opposing opponent with their domestic law. Adding the fact that most States have a wide interpretation of what constitutes as an act of terrorism, it has been used by some States to eradicate legally any struggle for self-determination in the name of counterterrorism.

3.3.3 The Application of the Status Terrorist as Unlawful Combatant on National Liberation Movements

Another point of concern pertaining to the indiscriminate designation of peoples as terrorists is the application of the unlawful combatant rule that has been used on a terrorist (Harris G. C., 2003). Under the Third Geneva Convention, Convention Relative to the Treatment of the Prisoners of War (GPW), a lawful combatant is protected under international law from being criminalised or prosecuted for lawful acts of war as they are entitled to “combatant immunity” (Corn, 2011). As

such, without the risk of being prosecuted, they are allowed to kill or wound enemy combatants, destroy other enemy military objectives, and cause incidental civilian casualties (Fraser, 2017).

Under Article 4 of the Convention, combatant also enjoys the protection provided by the Convention for the Prisoner of War (POW). However, this immunity and protection do not extend to non-international armed conflict as per Additional Protocol II of the Geneva Conventions, non-State forces are not lawful combatants and their actions may constitute crimes under domestic law (Parsons, 2014). States have also been reluctant to grant combat immunity and international humanitarian law (IHL) protection to non-state actors as they are of the view that granting the protection to non-state actors, will legitimise their belligerency (Corn, 2011).

On the other hand, Additional Protocol I which defines the category of international armed conflict includes wars for national liberation as an international armed conflict. In particular, the Additional Protocol I indicated in Article 1 that armed conflict in the exercise of their right to self-determination is included within the definition of international armed conflict provided in Common Article 2 of the 1949 Geneva Conventions²⁵. It must be highlighted, although as of now, the majority of the State Members have signed and ratified Additional Protocol I, some States did not ratify it, notably the United States, Israel, India, Turkey and also Malaysia.

²⁵ "...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, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations." See Additional Protocol I, Protocol Additional to the Geneva Conventions (12 August 1949) and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), 1977.

However, the inclusion of armed conflict in the struggle for self-determination as part of international armed conflicts is in line with 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, that has declared that all armed conflicts involving a struggle against "colonial and alien domination and racist regimes" to have an international character²⁶. As of that, there should be no confusion on the legality of the participation of peoples in an armed conflict and they should be treated as a lawful combatant.

However, as stated before, with the absence of an agreed universal definition of terrorist, there is a possibility for States to design peoples who engaged in armed conflict in the exercise of their right to self-determination as terrorists. By allowing this possibility to continue to exist, it will be allowing states to capture enemy combatants in a lawful international armed conflict and prosecute them as terrorists. This will thus defeat the purpose for the existence of IHL itself as a system that provides both the legalisation of murder while also prevention of unnecessary suffering and deaths among non-combatants (Coffin, 2014).

From another point of view, the struggle for self-determination does not eliminate the possibility of an act of terrorism to be done by the NLMs. In fact, the act of terrorism was included in the many war crimes under the Geneva Conventions and the Additional Protocols. This aspect of law however is not entirely explored as the

²⁶ 3. The armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions, and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions and other international instruments is to apply to the persons engaged in armed struggle against colonial and alien domination and racist regimes. See para. 11(3) of Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes. UN Doc. A/RES/3103(XXVIII), 1973.

current practice of the international community is to apply the domestic rule on any act of terrorism within their territory to ease prosecution. Furthermore, unlike domestic criminal law, IHL did not provide the countermeasure needed to combat acts of terrorism.

As of that, in discussing the exercise of the right to self-determination, it is unavoidable to explore the possibility of a combatant terrorist as opposed to the widely used practise of unlawful combatant designation in order to distinguish the legal framework applicable. Under Article 4A (2) of GPW to be read with Article 2, a militia can be considered lawful combatant in an international armed conflict when they are under command of a person responsible for his subordinates, have a fixed distinctive sign, carry weapons in open and conduct their operation in accordance with the customs of war²⁷.

3.3.4 Recognition of National Liberation Movements as Legal Representative of People

Another consequence of the designation of NLMs as a terrorist group apart from the unavailability of IHL protection and immunity to its combatant was that it also subjects the people it represented to the possibility of international sanction where they are restricted from receiving any humanitarian aid. This can be referred to the

²⁷ ...2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: a) that of being commanded by a person responsible for his subordinates; b) that of having a fixed distinctive sign recognizable at a distance; c) that of carrying arms openly; d) that of conducting their operations in accordance with the laws and customs of war. See Article 4A (2) of Geneva Convention Relative to the Treatment of the Prisoners of War (Third Geneva Convention), 1929.

previously mentioned case in 2007, where Palestine was subjected to international sanction by the Quartet where all humanitarian aid was stopped as a form of boycott against Hamas, designated as a terrorist group by the US, the United Kingdom and European Union, most of which are Israel's allies when they were selected as the legal representative of Palestinian Authority in a democratic election in 2006 (Morro, 2007). This was later acknowledged by the former Prime Minister of the UK, Tony Blair, as a mistake in 2017 (Macintyre, 2017).

This brought one of the prominent issues that arise in the matter of struggle for self-determination was the issue of the recognition of the people's representative. The crux of the matter came into the discussion when a NLM claiming to be the representative of the people was designated as a terrorist group. As had been discussed in length before, peoples, in exercising their right to self-determination are allowed to use force legitimately given the circumstances whilst the oppressing powers have no right to use force against them (Cristescu A. , 1981). However, due to the fact that terrorism is more within the domestic law jurisdiction, by designing these groups as a terrorist, States has been enabled to justify and legitimise their use of force or any form of sanctions as part of their counter-terrorism action.

This is one of the issues that are rarely discussed however can be quite crucial in avoiding the false designation of terrorists on such entities. This issue raised a few fundamental questions such as what constitutes a legal representative of the people and whether the entity representation needs to have acknowledgement by the international community apart from the recognition of its people. Under international law, there are no specific provisions that can be referred to answer these questions.

However, based on the various provisions related, one of the utmost important criteria

of a representative of peoples in the struggle for self-determination that can be noted was that it must be representing the people in entirety without any distinction.

This criterion is derived from the excerpt at the end of para 7 of Article 5 of the Friendly Relations Declaration which read:

...and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour.

This short excerpt was inserted in the implication of the requirement of a State in respecting the principle of self-determination where it needs to represent the whole people belonging to the territory (Coffin, 2014). The 1993 Vienna Declaration and Programme of Action also held the same attitude while using the phrase “without distinction of any kind” instead which broaden the definition of distinction²⁸.

In the struggle for self-determination to build a nation, it is unlikely for the peoples to achieve their goal without having any form of organisation or representation that will likely be the government of the new State. Thus, from this, it can be said, that having a representative is one of the criteria needed to build a nation and following the obligation of a government stated in the provision above, it must represent the whole peoples within the territory disputed without any distinction.

Following that, the question of whether the representative need to be acknowledged by the international community, as highlighted before, one of the criteria in building a nation according to Article 1 of the Montevideo Convention was the ability for it to enter into relation with other State. Thus, it is inevitable for the

²⁸ ...thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind. See Article 2 (3) of Vienna Declaration and Programme of Action, 1993. UN Doc. A/CONF.157/23.

struggle to succeed that the representative must have some form of acknowledgement from the international community.

However, the essence of the right to self-determination itself was for the people to have the ability to freely choose their representative in the first place. To restrict the choice of the peoples on whom they can choose to be their representative was contempt to the right itself. Furthermore, it is not farfetched to say that a representative to be chosen depending on foreign influence can be a form of neo-colonisation.

3.4 CONCLUSION

In understanding the principle of the right to self-determination, many factors and issues may determine the success of the struggle for self-determination apart from fulfilling the criteria of establishing a state. According to that, the issues and factors need to be scrutinised and carefully understand in order to avoid any act of struggle for self-determination illegalised or challenged.

Though it was a legal right under international law, a claim to the right to self-determination will be influenced by the interest of the international community. Prominently the State Members of the UN of which the right was provided under its provisions. The State's interest to protect its sovereignty is directly contrasting with the interests of the people who seek to exercise their self-determination. International relations and political interest also set forth the challenges that may be faced by the

people to exercise their rights in terms of creating an international identity that is recognised by the world.

Another crucial issue that is highlighted is regarding the formation of the new body or state as the goal pursued by the peoples and on what basis structure will the population of the new state be created and based on what provision will the new borders be constructed. The reliance on the doctrine *uti possidetis* in creating the border is not without an opportunity to be used by the state to obstruct the creation of the new state. Following the principle of territorial integrity as a state's right, creating a new body of the state is a direct challenge to the right. More so when the creation of a new state comprises the territory of the state without its consent. However, as the provisions suggested, the right to territorial integrity may be lost unitarily when the element of oppression exist as the state failed to play its role as a caretaker of its people.

Further discussed was the issue relating to the move to illegalise the struggle for self-determination by designating the NLM as a terrorist. The absence of a universal definition of the term "terrorism" opens the possibility of the NLM being designated as a terrorist organisation for the use of force. The provisions under international law permit the use of force for peoples in exercising their right to self-determination outside the prohibition of Article 2(4) of the UN Charter. However, it was highlighted that permission does not constitute a legal right.

In the light of that, it was later discussed the possibility of prosecuting a NLM for an act of terror as a war crime under international humanitarian law. With that, the issue how the lack on universally accepted definition of the term "terrorism" has

affected the prosecution of the act in the International Criminal Court was also looked into. However, it was proposed that the act of terror can be prosecuted as a war crime under Article 8 of the Rome Statute as crime of aggression.

The impact of the designation of the NLM as a terrorist organisation was later discussed as it relates to the status of the NLM as a lawful combatant in an armed conflict. The freedom to choose a representative of the people without outside interference was also discussed.

It can be concluded that the struggle of people for their right to self-determination extends beyond the fight against physical oppression. The need for justification and the possibility of the struggle to be illegalised was high as the people are non-state actors thus having limited protection against the act of state actors under international law. The purpose of the UN, ultimately, was to protect and maintain international peace and security. Thus, there exists a possibility that if international peace and security can be maintained at the price of a group of peoples, the principle of the greater good will be chosen.