

Freedom Fighter or Terrorist?

Bahman Akbari¹

¹ PhD Candidate in Law, University of Lucerne, Switzerland

Correspondence: Bahman Akbari, Faculty of Law, University of Lucerne, Switzerland. E-mail: bahman.akbari@stud.unilu.ch

Received: January 11, 2023 Accepted: February 5, 2023 Online Published: February 7, 2023

doi:10.5539/ilr.v12n1p76

URL: <https://doi.org/10.5539/ilr.v12n1p76>

Abstract

In certain cases, making a distinction between freedom fighters and terrorists is a matter of dispute between states. This article describes the main reason for this disagreement and suggests some criteria for separating these two concepts. By referring to the practice of states as well as some regional counter-terrorism conventions, this article argues that the root cause of the issue arises from the legal interpretation of self-determination at the present postcolonial epoch. Therefore, permissions and limitations arising from the right to self-determination determine the main differences between freedom fighters and terrorists. Finally, the article concludes that a freedom fighter is someone who fights for legal rights in conformity with the law of armed conflict; while a terrorist is someone who fights to achieve illegal advantages by means of targeting civilian populations, civilian objects and other protected persons and objects.

Keywords: aggression, tyranny, armed struggle, self-determination, humanitarian law, human rights law, the rule of law

1. Introduction

It is frequently claimed that there is no a precise definition of terrorism in international law, although this term is the subject of many international documents. The divergence between states over the definition of terrorism is observable on their terrorist lists. Due to this disagreement in certain cases a person or a group of persons is called terrorist from one perspective and freedom fighter from other view (Note 1). The reason for this problem lies obviously in states' conflicting interests and perspectives. However, as a result of legal vacuum and ambiguity a legitimate activity could be considered illegitimate and vice versa. Such legal loophole particularly in the case of terrorism can have serious consequences for the international community. It can lead to violation of human rights and the rule of law in the domestic spheres. And at the international level it can cause breakdown in international cooperation for maintaining of international peace and security. Thus, bringing this dispute to an end in a legal discourse is an exigency of the present time. Accordingly, this article intends to spell out the main cause of the disagreement and put forward some legal criteria to distinguish between terrorists and freedom fighters. For this aim the paper will analyze states' attitudes in both documents and practice. It is to be noted that this article concerns those fighting persons or groups that claim legitimacy as well as states' dispute in this regard. Therefore, other entities that declare openly their opposition to international law and the values of the civilized world are out of our discussion.

2. The Problem of Defining Terrorism

The lack of a universally accepted definition of terrorism has always been mentioned as a serious problem for counter-terrorism measures. It also can be referred as a barrier to distinguish freedom fighters from terrorists. The international community has agreed on the definition and punishment of other international crimes such as genocide and war crimes. However, there is no such consensus over the term *terrorism*. Studies have suggested that there are at least 212 different definitions of terrorism (Simon, quoted in Spencer, 2006, p.3). While international conventions do not explicitly offer a definition, regional counter-terrorism conventions are clearer in this regard. In fact, whenever states are unable to reach an agreement at the international level, they try to coordinate in their regional realms. This article acknowledges the existence of an unprecedented harmony between states in fight against international terrorism in the last two decades following the active involvement of the UN Security Council. Nevertheless, in order to reach the goals of this paper, the main focus will be on the differences.

The challenge of recognition of terrorism as an international crime can be investigated in two main fields of

international accords and states practice. These are indeed the reflection of what states agree on paper and what they do in practice. It will be spelled out in this section.

2.1 An Implicit Agreement in International Accords

Since 1920s states have identified terrorism as a global issue which should be resolved within the framework of international law (Young, 2006, pp.24-25). Subsequently, the League of Nations drafted the Convention for the Prevention and Punishment of Terrorism in 1937. It declared that (Note 2):

In the present Convention, the expression “acts of terrorism” means criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.

The Convention addressed only the terrorist activities of non-states actors and mentioned the concept of *State* as the main target of terrorism in its definition. It should be noted that this Convention was ratified only by India. One of the reasons for this low number of ratifications was its broad definition (ibid., p.37). This Convention also never entered into force as a result of the dissolution of the League of Nations.

Following the foundation of the United Nations the use of force in international relation was prohibited and the UN Charter (Note 3) even avoided the use of the word *war* in its literature. Such perspective has had a prominent effect on international relations as well as on states approach to the challenge of terrorism. As a result, several multilateral conventions were drafted to criminalize some specific actions (Note 4). The addressees of these conventions are states themselves and in each of them a particular criminal activity has been addressed. These documents in fact intend to make the post-war world more secure from the oceans to the sky. Although these conventions have been recognized as counter-terrorism treaties, none of them suggest a definition of terrorism, except Article 2, paragraph 1, of the Terrorist Financing Convention which provides implicitly a definition of terrorism. Although this definition is an implicit and the sole definition as well in this collection of international treaties, it was a good progress because in this definition civilians are the center of attention.

After the Second World War, the world was experiencing serious challenges including decolonization and the Cold War. These events led to different kinds of inter-state as well as intra-state conflicts. In such a situation, the UN General Assembly as a global debate chamber was a free environment for reflection of conflicting perspectives; sometimes gave rise to harmony and in other times was stuck in disagreements. In the context of Assembly accords a definition of terrorism suggested by the Declaration on Measures to Eliminate International Terrorism which proclaims that (Note 5):

Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them

Although Assembly resolutions generally speaking are not binding, they can be considered as evidences of customary rules and reflect indeed the conscience of the international community. Therefore, declaring terrorism in all situations and under all pretexts as a criminal intolerable act was a good step and could remedy the problem of defining terrorism to some extent.

The UN Security Council did not play an active role in this regard for many years because there was not unanimity between the permanent members of the Council due to the Cold War competition. Subsequently, this barrier was removed with the end of the Cold War and the Council took up an active role in the counter-terrorism strategy in the aftermath of the September 11 attacks. The Security Council was successful in bringing states together for this aim. Some of the relevant resolutions of the Council were passed unanimously and under Chapter VII (Note 6). Also, the Council’s approach in this phase has been called quasi-legislative by many writers (Happold, 2003; Rosand, 2004; Stromseth, 2003; Alvarez, 2003) since Resolution 1373 (Note 7) imposed general far-reaching obligations on all states for an unspecified time without addressing a particular situation. The problem of definition of terrorism however remained unresolved, although Resolution 1566 provides somehow a definition in its paragraph 3 (Note 8).

The UN above-mentioned approach to definition of terrorism has three characteristics which make it more efficient and comprehensive in comparison with the League of Nations 1937 Convention. Firstly, these documents have paid a central attention to the civilians and *hors de combat*. Secondly, by calling states to prevent terrorist activities, these instruments in fact are applicable for both state and non-state terrorism. And eventually in these documents, terrorism under any pretext, including political and religious, have been condemned expressly. Nevertheless, the lack of a definition of terrorism is still considered as a serious legal vacuum; and legal scholars have referred to

the different reasons for that. *Saul* believes that this is because of political as well as ideological barriers arising from decolonization movements and the Cold War (*Saul*, 2006, p.319). *Aksenova* also argues that terrorism has not yet been defined because it has an ideological nature, it can be used as a governance instrument and it has a potential to be employed as a pre-crime stigmatization and subsequently can trigger collective responsibility (*Aksenova*, 2015, p.298). In my view, states prefer to leave terrorism as an undefined concept to save their freedom for executing their own policy in domestic and international areas. Indeed, they have deliberately created a legal loophole regarding terrorism to leave this term open to interpretation. Nevertheless, this paper believes that according to customary norms and treaty laws identification of terrorism in reality is not difficult (See generally *Young*, 2006).

2.2 An Explicit Disagreement in Practice

In addition to the lack of a core definition of terrorism in the context of multilateral conventions, there is a particular dispute in this regard between two groups of states in practice; and the disagreement about the separation of freedom fighters and terrorists arises basically from this dispute. On the one hand, some Southern states believe that armed struggles against aggression, colonialism, etc. should be excluded from the meaning of terrorism. On the other hand, some Northern states believe that the domestic struggles against tyranny and oppression should be recognized legitimate. With regard to the first approach referring to the regional conventions is helpful. Indeed, regional accords are suitable resources to find out the main point of international disagreements. There are sixteen regional conventions and protocols (Note 9); all of them have mentioned the term *terrorism* in their titles and six of them have provided a definition of terrorism (Note 10). However, a number of these conventions contain the provisions which can provide a clue about one of the main roots of the problem in question. According to Article 2 (a) of the Convention of the Organization of the Islamic Conference on Combating International Terrorism (Note 11):

Peoples' struggle including armed struggle against foreign occupation, aggression, colonialism and hegemony, aimed at liberation and self-determination in accordance with the principles of international law, shall not be considered a terrorist crime.

The Arab Convention on the Suppression of Terrorism (Note 12) as well as the Convention of the Cooperation Council for the Arab States of the Gulf on Combating Terrorism (Note 13) also have adopted similar approach. Likewise, the Organization of African Unity Convention on the Prevention and Combating of Terrorism (Note 14) in its introduction reaffirms

the legitimate right of peoples for self-determination and independence pursuant to the principles of international law and the provisions of the Charters of the Organization of African Unity and the United Nations as well as the African Charter on Human and Peoples' Rights.

As we can see these provisions preserve the right of armed struggles against aggression, colonialism and so on; and exclude such combats from terrorist crimes. Following this attitude for example a number of jihadi groups are recognized as legitimate groups by some Southern states. For investigation of the second approach, we can point out Northern states practice. In certain situations when people, as rebels or insurgents, protest against their government, whether the protest is against one particular act of the government or target its whole structure, some states consider such action as the peoples' basic rights and condemn the government's misbehaviour against the people. Take the Arab Spring for example. And if the government has a weak legitimate position in the international community, they try to carry out an international unity against that for example by calling the attention of the UN Security Council. In such a situation, the states that advocate the insurrectional movement usually invoke the right of peaceful demonstration, referendum and so forth.

The rights which are cited in the two above-mentioned situations can be encapsulated in the right of self-determination which is almost a well-established phrase in legal discourse and the closest term, in the context of international law, to the concept of freedom fighter. The Southern states have pointed out this right clearly in the aforementioned conventions and the Northern states invoke the numerous people's rights before their governments which in general can be translated to the right of self-determination. Moreover, each kind of domestic armed struggle usually seeks to make a basic change in political system; and such an action can be justified only in the name of self-determination. As a result, investigation of the application of the right to self-determination in the current world order can be useful for resolving this disagreement.

The UN General Assembly adopted Resolution 3034 (XXVII) in 1972 on the subject of international terrorism in which the right of self-determination has been addressed (Note 15). Similar approach was repeated by General Assembly Resolution 44/29 (Note 16). This Assembly attitude has been considered a big improvement (*ibid.*, p.39). Nevertheless, calling attention to the right of armed struggle for liberation and exclusion of such fighting from

terrorist crimes by the above-mentioned states imply that in both legal and political areas making a distinction between activities for liberation and terrorism is still a matter of dispute. While some states tried to separate the right to self-determination from terrorist crimes in General Assembly resolutions like Resolution 3034 (XXVII) others did not support such approach (Saul, 2006, p.200). It also to be noted that after September 11 terrorist attacks a draft convention on international terrorism was prepared by a Working Group at the request of the General Assembly's Sixth Committee, but as a result of some disagreements among states this goal was not achieved. One of the barriers was the Malaysia objection, on behalf of the Organization of Islamic Cooperation (OIC), to the definition of terrorism. In fact, Malaysia intended to insert the aforementioned article of the OIC Convention in the draft (Subedi, 2002, pp.162-164). Similar approaches had been adopted by some states in the past. For instance, in 1979 a number of states including Algeria and Libya tried to made an exception to the Hostages Convention to allow hostage-taking for national liberation (Tiefenbrun, 2003, p.388). Accordingly, this article believes that solving the problem of the separation of freedom fighters and terrorists lies in the meaning, function and scope of the right to self-determination.

3. Self-determination from the Past to the Present

3.1 In the Colonial Period

The process of the U.S. independence between 1776 and 1826 has been mentioned as the first instance of decolonization (Fisch, 2015, p.70). However, in that time the term in question did not have a clear legal or political status and its application was limited to the domestic sphere. According to Cassese Lenin and Wilson made self-determination an international concept; the former for socialist aims after the October Revolution and the latter for democratization after the First World War (Cassese quoted in Griffioen, 2010, p.6). Also, while after the Great War self-determination became a prominent principle for peace negotiations and a base for world order (Fisch, 2015, p. 9) it was being considered just as a political watchword. While the principle of self-determination was one of the main concerns of the Allied Powers (Griffioen, 2010, pp.6-7) it was not recognized in the Covenant of the League of Nations. The Covenant in Article 22 however established the *mandate system* according to which the *mandated territories* had to be governed properly. According to Griffioen the right to self-determination was the base of this system (ibid., p. 9).

The dismantling of the colonial empires after the Second World War was the second example of decolonization (Fisch, 2015, p. 70). After that, the UN Charter established *trusteeship system* which is elaborated in Chapter XII of the Charter. It provided a detailed guideline for administration of *non-self-governing* and *trust territories*. In Article 76 (2) the realization of self-government and independence, among others, for the people of trust territories were referred to as the aims of this system. More importantly, in paragraph 2 of Article 1 “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples” was mentioned as one of the purposes of the United Nations. Obviously, being recognized as one of the main purposes of the United Nations suggests the crucial position of this concept in the contemporary time; and subsequently all the United Nations’ instruments must be applied for the realization of the aims such as this. However, the United Nations approach to self-determination triggered some frictions in the following years (ibid., p.193) and limited its fight against terrorism (Alvarez, 2003, p.238).

The right in question was gradually developed by the United Nations’ different instruments. A prominent step was taken by the General Assembly when it adopted Resolution 1514 (XV) in 1960 titled the Declaration on the Granting of Independence to Colonial Countries and Peoples (Note 17). This Declaration has been mentioned as an “important landmark in the anti-colonialist trend” (Akehurst, 1987, p.294). The importance of the right to self-determination has been reaffirmed in the succeeding agreements, including the 1966 Human Rights Covenants (Note 18). The common Article 1 of these Covenants was the repetition of the paragraph 2 of General Assembly Resolution 1514 (XV) that had proclaimed:

All peoples have the right of self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Moreover, according to Friendly Relations Declaration this right “constitutes a significant contribution to contemporary international law” (Note 19). The concept of Self-determination then was reaffirmed by ICJ in *Namibia case*. The Court called the term in question as a principle and applicable to all non-self-governing territories (Note 20). The United Nations different bodies such as the General Assembly and the Security Council also welcomed the representatives of National Liberation Movements in their official debates (Shaw, 2008, pp. 245-246).

As we can perceive from the above-mentioned instruments as well as the socio-political circumstances of that period (Note 21) the right to self-determination was invoked in support of decolonization movements and was

originally related to the colonial and non-self-governing territories. Needless to say, self-determination for indigenous people yet is a matter of question and has been acknowledged in a separate declaration adopted by the UN General Assembly in 2007 (Note 22). However, now we must figure out whether this principle has still function for all nations, as both Northern and Southern states referred to. The paper will try to answer this question in the succeeding section.

3.2 In the Post-colonial World

As mentioned earlier the right to self-determination was indicated in ICCPR and ICESCR. However, both covenants after speaking about self-determination in paragraph 1 of Article 1 referred to the non-self governing and trust territories in paragraph 3. *Griffioen* argues that the phrase “*all peoples*” in this common article shows that the right is not limited to the colonial territories (*Griffioen*, 2010, pp. 16-17). This argument may seem insufficient for proving the applicability of the concept of self-determination in the post-colonial era. But as the writer then explains it can be deduced from conventional law as well as customary law that the right to self-determination could not be limited to the decolonization movements (*ibid.*, pp.50-80). Referring to the subsequent documents and factual evidences can be useful in this regard.

The third periodical reports of Peru on the ICCPR with regard to the notion of self-determination in Article 1 of the Covenant points out all peoples’ freedom to decide about “its political and economic condition or regime” (Note 23). It can be seen as a reason for applicability of the right in the post-colonial epoch, since this report was issued in 1995. More importantly, the Report of the Committee on the Elimination of Racial Discrimination divided this right into *external* and *internal* aspects. The report stipulated that (Note 24):

In respect of the self-determination of peoples two aspects have to be distinguished. The right to self-determination of peoples has an internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level, ... The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination and exploitation.

As we can see, in respect of internal self-determination this report at first pointed out the right of people to pursue development in different fields free from foreign intervention and then referred to the term *citizens*, instead of people, and their right to participate in the public affairs of their countries. Also, the principle of equal rights of nations at the international level was mentioned as the external aspect of this right. Accordingly, we can conclude that self-determination means peoples’ rights to decide freely about their own destinies. From this sense self-determination has application in the post-colonial age.

To spell out the principle in question in the context of states practice, we can refer to the several instances of dissolution, uniting, independence and so on which have occurred particularly in 1990s. Examples include German reunification, dissolution of the Socialist Federal Republic of Yugoslavia, Kurdish autonomy in Kurdistan Region in Iraq and South African general election. All of these instances happened pursuant to the principle of self-determination and were acknowledged by the international community.

This paper however intends to consider the matter from another perspective. According to this paper, today internal self-determination has been included in human rights law. Thus, we do not need to refer much to the phrase self-determination in the current post-colonial period. More precisely, that aspect of self-determination which is invoked to support the rights of citizens to participate in the internal affairs of their countries has been reflected in numerous contemporary human rights documents like the Universal Declaration of Human Rights (UDHR) (Note 25). Indeed, human rights instruments were created in order to address peoples’ rights against their governments. And governments in the contemporary era are immune, at least according to international law, from external intervention; and enjoy the principle of sovereign equality to pursue their own peoples-demands. This satisfies the other aspect of self-determination which forbids intervention from outside. Numerous scholars adopted such attitude to the right of self-determination and considered it as “a right to political participation” (*ibid.*, p. 86) “the first building block in the creation of a democratic entitlement” (*Franck*, 1992, p.55) “the right of the majority within a generally accepted political unit to the exercise of power” (*Higgins*, 1963, p.104) and people right to participate “in the decision-making processes of the State” (*Raić*, 2002, p.237).

Therefore, according to international documents, states practice and the opinions of the legal scholars we can conclude that the principle of self-determination has yet function in the contemporary post-colonial time as a right of nations to pursue their developments without interference of others as well as the right of citizens to participate

in the affairs of their countries. However, we still are faced with this separate question that in what circumstance is a group of people, by virtue of the right of self-determination, allowed to resort to armed conflicts? This article will answer this question in the next section.

4. Armed Struggle by Non-state Actors for Self-determination in the Current Era

In the previous section this article discussed that the right to self-determination was born in the colonial period as a right of struggle for ending colonialism and has persisted to the present time as the right to political participation. Accordingly, we defined this right, generally speaking, as a right for people of a territory against external domination as well as internal tyranny. This part of the paper intends to enquire about the possibility of armed struggle by non-state actors for the two aspects of self-determination. Then we can portray the main differences between struggle for self-determination and terrorism.

4.1 Struggle against External Intervention

One of the concerns of the Southern states is struggle against intervention. The word *intervention* has been used here because it is more comprehensive than aggression and encompasses all kinds of external pressures. Following the formation of the United Nations, the nations which were thitherto governed under the mandate system gradually gained independence. Moreover, the UN Charter put emphasis on equality of states and, more importantly, forbade the use of force in international relations. There is a disagreement about this issue that whether the prohibition of the use of force has been limited to military force or not. However, what is clear is that the illegality of aggression is one of the purposes and principles of the United Nations and subsequently is one of the peremptory norms of international law. With regard to military intervention in the current modern political system, it is originally states, not non-state actors, authority to repel aggressions individually or collectively pursuant to Article 51 of the UN Charter. The reason for such monopoly is clear and sensible. States have always avoided conferring legitimacy on non-state armed groups. Even if a weak state is forced to use non-governmental forces in order to strengthen its military power, like when the government of Afghanistan in 2021 called peoples to fight against the invasion of Taliban, the primary responsibility still lies with the state. Accordingly, such recruitment and combat should be done under the limitation of international law particularly the Geneva Conventions and their Additional Protocols (Note 26). Likewise, the militias must act in accordance with the regulations prescribed by these accords. The member states of these documents are obliged to comply with the law of war. Also, some provisions of these accords, like the protection of civilians, are customary rules, and subsequently is obligatory for all. Accordingly, before the UN Security Council takes an action a state for exercising the right of self-defence in some specific situations may call the help of militias, but it must be resorted in conformity with the pertinent international regulations. In this way one who fight to force back aggression or drive occupier out is certainly a freedom fighter.

But what verdicts does international law provide in respect of other kinds of interventions? Suppose state A interferes in the internal affairs of state B. Or state A lobbies other states or organizations to deprive state B of economic benefits. International law is not so clear in such instances. However, one may invoke Article 49 of the ILC Articles on State Responsibility (Note 27) for justification of military response to such interventions. This article permits countermeasures against a wrongful act. But it should be noted that according to Article 2 of ILC Articles, that action or omission of a state is a wrongful act which firstly can be “attributable to the State” and secondly “constitutes a breach of an international obligation”. In above-mentioned examples it is difficult to prove these two conditions. Even if we could attribute such interfering actions to a state and consider those acts as a violation of the principle of non-intervention, according to Article 51 countermeasures should meet the principle of proportionality. Is the use of paramilitary forces against the wrongdoer state a proportional response? Pursuant to Article 50 the answer is no. This article stipulates that, countermeasures cannot affect some particular obligations including “the obligation to refrain from the threat or use of force” and “obligations of a humanitarian character prohibiting reprisals” (Note 28). Above all, international regulations forbid states to resort to terrorist acts in all situations. Security Council Resolution 1269 reaffirms that the suppression of terrorism “including those in which States are involved” is necessary to maintenance of international peace and security (Note 29). General Assembly Resolution 44/29 calls upon all states “to refrain from organizing, instigating, assisting or participating in terrorist acts” (Note 30). Friendly Relations Declaration obliges states “to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State”. All international as well as regional counter-terrorism conventions also try to prevent terrorist activities.

To sum up, this Southern states’ approach is a kind of making reservation against international counter-terrorist conventions. The reason for that arises specially from the issues such as the Arab–Israeli conflict. In general, also as *Saul* argues some of these states regard international counter-terrorism measures as a western instrument which threatens their political independence, territorial integrity and Islamic values (Saul, 2008, particularly at p. 13).

Nevertheless, it seems unnecessary to exclude non-state actors' struggles against external intervention from the terrorist crimes when in the contemporary international law both legal permission and limitation in respect of armed conflicts concern principally states; and terrorist activities in all forms and manifestations have been criminalized strictly as well.

4.2 *Struggle against Internal Tyranny*

The other side of the argument is about internal conflicts between armed non-state individuals and authority. This matter should be discussed in the scope of internal self-determination. This paper argued that this aspect of self-determination is, broadly speaking, the citizens right to participate in the public affairs of their countries; and these days it is regarded as a part of human rights. When we put the right of self-determination in the collection of international human rights, subsequently it will be interrelated with other human rights. According to *Shaw* self-determination relates to the rights such as freedoms of expression, assembly and association (Shaw, 2008, p.292). Thus, as long as these rights are fulfilled the right of self-determination is fulfilled too. Accordingly, when human rights in a society are respected properly, taking military actions by a group of individuals on the pretext of exercising the right to self-determination is illegal, illogical and of course improbable.

However, when human rights are the subject to gross and systematic violation by a state, the picture will be different because in this situation we are faced with an oppressive regime and this circumstance obviously demands other instruments for exercising the internal self-determination of peoples. Although there is no precise criterion for measuring the gross and systematic violation of human rights, we can use generally two yardsticks as follows: 1. The target state's long-term record and 2. The state's reaction against the citizen expectations at the beginning of a protest movement. In respect of the first criterion we can consider the reports of the relevant governmental as well as non-governmental bodies such as Human Rights Council and Human Rights Watch about the freedom of speech, the right of minorities, the rights of women, etc. in the state concerned. If the record of the state does not score a good mark, then we will observe the second factor namely the administration's behavior against the protesters. If instead of fulfilling the peoples legitimate expectations, it adopts a brutal manner by violent suppress of peaceful demonstrations, imprisoning the journalists, trying alleged suspects unfairly, impose harsh punishment and so on, the systematic and gross violation is met. In such a situation a state in fact is breaching its international obligations; and since the victims are the citizens of the recalcitrant state, the relevant international regulations do not forbid the oppressed people to pursue their rights. Hence, the people, of course as an *ultima ratio* and when exhaust the primal democratic route, can resort to armed actions against such oppressive government. The question of secession also can be raised here. But states usually take a cautious approach toward recognizing secessionist movements, because international law does not provide a clear perspective in this regard. On the one hand, all peoples are entitled to the right of self-determination, and subsequently the inhabitants of a specific area may claim for this right. On the other hand, this may be in conflict with the principle of respect for territorial integrity of states (Akehurst, 1987, p.296). Therefore, this subject should be discussed in a separate paper. In general, however it can be said that in the case of gross and systematic human rights violation, taking into account other facts, the right to secession can be inferred from the right to self-determination (ibid).

The peoples' right to fight against tyranny has been endorsed from the early modern international law. For instance, according to *Hobbes* sovereign's power is based on a contract between individuals and governors. In this contract people ignore parts of their freedom in the interest of security. However, the contract should be respected as long as the sovereign does not create a fundamental threat to people (Hobbes, 1996). Today such warfare likewise is considered as "the weapon of the weak" (Huntington quoted in Laqueur, 2017, p.392). As it is argued, the UN Charter also does not condemn non-international armed conflicts at least expressly (Migliazza quoted in Daboné, 2011, p.400). In addition, this ultimate way can be inferred from the UDHR which in its preamble warns that:

...it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law

Nevertheless, in such a situation a non-state actor for legitimize its armed conflict must meet some requirements. The principal obligation of such entity is observance of international humanitarian law. In fact, a non-state armed group cannot resort to the right of self-determination as a legitimate right when it does not observe *jus in bello* in practice. Common Article 3 of the Geneva Conventions explicitly obliges 'each Party to the conflict' to respect some basic regulations of war. According to states practice as well as Judicial decisions this article is an international customary rule (Clapham, 2010, p.7). Moreover, the provisions of Additional Protocol (I) to the Geneva Conventions "include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination" (Note 31). The Appeals Chamber of Special Court for Sierra Leone also reaffirmed that "it is well-settled that all parties to an armed

conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties” (Note 32).

In addition to observance of the law of armed conflict the fighters must show their commitment to international human rights law as well. Since the principle of self-determination has been recognized in the context of international human rights law, it cannot be applied in conflict with other human rights. Pursuant to the principle of *ex injuria jus non oritur* a non-state actor cannot violate fundamental human rights in the guise of self-determination. Indeed, a non-state actor cannot invoke the right of self-determination as a human right when it does not believe in other human rights. One principle as a human right should be invoked in the whole context of human rights. Therefore, the fighters must show that they are raising a voice for human rights. In general, invoking international law and calling for assistance of the international community during the conflict is a sign that demonstrate the intention of the fighters. As *Jo* (2015, p.117) argues “rebel groups with outside supporters under human rights pressure” are more likely to comply with international regulations.

Moreover, such groups must represent the will of the all peoples of the country particularly when they are about to establish a government. In other words, after the fall of the oppressive regime the whole peoples must be entitled to participate in the formation of the new political system. The armed non-state group should fulfill this duty if it wants to maintain its legitimate position until the formation of a new government. In fact, it is the right of the people of the target territory to decide on the form of prospective government in a democratic process even if they allegedly do not seek a democratic government. Self-determination as it is expressed “is the historic root from which the democratic entitlement grew” (Franck, 1992, p.52). It is also argued that self-determination is not the sole principle in international law, subsequently it should find its position alongside other principles such as the rule of law (Waldron, 2010, p.399). Nevertheless, as it is mentioned earlier, the primary obligation yet is respect for the law of armed conflicts because when we discuss about such an armed non-state group, we are in fact referring to an entity which has not still succeeded in establishing a government. In this circumstance, the group’s adherence to the law of war reflects, to some extent, their adherence to other international rules including human rights law and the rule of law.

These are the fighters’ main obligations. The practices of states have demonstrated the necessity of these criteria. For instance, during the Arab Spring the international community adopted a positive attitude before the insurgents who fought to bring down authoritarianism and establish democracy. On the other hand, no state has recognized Taliban as a government at least until the time of writing this paper, although it overthrew the *Ashraf Ghani*’s government and established a de facto administration.

5. Conclusion

This article discussed about the main differences between a freedom fighter and a terrorist. The dispute between states in this question, which results from ideological differences and contradictory political interests, has led to a *non liquet* in international law. However, resolving ambiguities and closing gaps must be the primal function of each legal system. Otherwise, justice and peace which are the ultimate aims of law will never be achieved. By referring to states practice and some of regional counter-terrorism treaties we realize that states’ disagreement over the separation of freedom fighters and terrorists can be traced to the true application of self-determination at the present time. The Southern states put emphasis on external self-determination against hegemony, colonialism and aggression. The Northern states lay stress on internal self-determination against tyranny and atrocity. As a result, some anti-terrorism treaties which have been drafted by the former states exclude the right of self-determination from the meaning of terrorism. However, it is unnecessary. Respect for the territorial integrity and political independence of states constitute the fundamental principles of international relations and the peremptory norms of contemporary international law. Also, it is primarily at the discretion of states, not non-state actors, to respond to any menace to these principles through the preset legal means. Such response also should be limited to target territory and cannot be extended to other places by proxy wars.

The other aspect of self-determination which is cited by the Northern states is the right of citizens to participate in the affairs of their countries. This right is now one of the well-established human rights. And, when it is the subject to gross systematic violation by an oppressive regime, there will be no legal obstacle against the citizens to pursue their legitimate rights even via, as the last instrument, fighting against such regime under international legal limitations. Of course, an armed group enjoys such legitimate position as long as it acts under such limitation; and it may be actionable if the group deviates from the legal way at each stage of its struggle; just as the military force of a state should be responsible for its crimes during an armed conflict.

As a result of such contemporary interpretation of self-determination and taking into account the components of definition of terrorism in international law, the main differences between a freedom fighter and a terrorist are that

the former fights for legal rights in conformity with international humanitarian law; while the latter fights to achieve illegal advantages via targeting civilian populations, civilian objects and other protected persons and objects. Therefore, for *what reason* and in *which route* are the criteria for separation of a freedom fighter and a terrorist. Indeed, if the motivation for struggle is the pursuit of peoples' legitimate rights and it operates within the framework of the law of armed conflict it is an action for self-determination. But if fighters intend to combat against international well-established regulations including human rights law through targeting protected persons and objects it is terrorism. Obviously, this yardstick can help us for solving the problem of definition of terrorism as well.

References

- Akehurst, M. A. (1987). *Modern Introduction to International Law*. Crows Nest: George Allen and Unwin.
- Aksenova, M. (2015). Conceptualizing Terrorism: International Offence or Domestic Governance Tool? *Journal of Conflict & Security Law*, 20(2), 277-299. <https://doi.org/10.1093/jcsl/krv002>
- Alvarez, J. E. (2003). Hegemonic International Law Revisited. *American Journal of International Law*, 97(4), 873-888. <https://doi.org/10.2307/3133686>
- Alvarez, J. E. (2003). The UN's 'War' on Terrorism. *International Journal of Legal Information*, 31(2), 238-250. <https://doi.org/10.1017/S0731126500010581>
- Clapham, A. (2010). *The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement*, pp.1-45. <https://doi.org/10.2139/ssrn.1569636>
- Daboné, Z. (2011). International law: armed groups in a state-centric system. *International review of the Red Cross*, 93(882), 395-424. <https://doi.org/10.1017/S1816383112000057>
- Fisch, J. (2015). *The Right of Self-Determination of Peoples: The Domestication of an Illusion* (translated by A. Mage). Cambridge: Cambridge University Press. <https://doi.org/10.1017/CBO9781139805698>
- Franck, T. M. (1992). The Emerging Right to Democratic Governance. *The American Journal of International Law*, 86(1), 46-91. <https://doi.org/10.2307/2203138>
- Griffioen, C. (2010). *Self-determination as a Human Right: The Emergency Exit of Remedial Secession*. Utrecht: Science Shop of Law, Economics and Governance, Utrecht University.
- Happold, M. (2003). Security Council Resolution 1373 and the Constitution of the United Nations. *Leiden Journal of International Law*, 16(3), 593-610. <https://doi.org/10.1017/S0922156503001304>
- Higgins, R. (1963). *The Development of International Law Through the Political Organs of the United Nations*. Oxford: Oxford University Press.
- Hobbes, T. (1996). *Leviathan*. Oxford: Oxford University Press.
- Jo, H. (2015). *Compliant Rebels: Rebel Groups and International Law in World Politics*. Cambridge: Cambridge University Press.
- Raič, D. (2002). *Statehood and the Law of Self-Determination*. Kluwer Law International. <https://doi.org/10.1163/9789047403388>
- Rosand, E. (2004). The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative? *Fordham International Law Journal*, 28(3), 542-590.
- Saul, B. (2006). *Defining Terrorism in International Law*. Oxford: Oxford University Press.
- Saul, B. (2008). Branding Enemies: Regional Legal Responses to Terrorism in Asia. *Asia-Pacific Yearbook of International Humanitarian Law*, 2, available at *Sydney Law School Research Paper* No. 08/127.
- Shaw, M. N. (2008). *International Law*. Cambridge: Cambridge University Press. <https://doi.org/10.1017/CBO9780511841637>
- Spencer, A. (2006). Questioning the Concept of 'New Terrorism'. *Peace Conflict & Development*, 3, 1-33.
- Stromseth, J. E. (2003). The Security Council's Counter-Terrorism Role: Continuity and Innovation. *ASIL Proceedings*, 97, 41-45. <https://doi.org/10.1017/S0272503700059747>
- Subedi, S. P. (2002). The UN Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of the Definition of Terrorism in International Law. *International Law FORUM du droit international*, 4(3), 159-169. <https://doi.org/10.1163/157180402400497800>
- Tiefenbrun, S. (2003). A Semiotic Approach to a Legal Definition of Terrorism. *ILSA Journal of International and*

Comparative Law, 9(357), 357-389.

Waldron, J. (2010). Two Conceptions of Self-Determination. In S. Besson, & J. Tasioulas (Eds.), *The Philosophy of International Law* (pp.397-413). Oxford: Oxford University Press.

Young, R. (2006). Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation. *Boston College International and Comparative Law Review*, 29(1), 23-105.

Notes

Note 1. For instance, while Hezbollah has been listed as a terrorist group in many states like Australia, Germany, Netherlands and the United States, according to some other states such as Russia and Iran it is a legitimate group.

Note 2. Convention for the Prevention and Punishment of Terrorism, League of Nations, 1937, art.1(2).

Note 3. The Charter of the United Nations, 24 October 1945.

Note 4. See United Nations (2008) *International Instruments related to the Prevention and Suppression of International Terrorism*, New York: United Nations publication.

Note 5. Declaration on Measures to Eliminate International Terrorism, GA Res 49/60, 9 December 1994, UN Doc A/RES/49/60, para. 3.

Note 6. See for instance SC Res 1390, 28 January 2002, UN Doc S/RES 1390 (2002); SC Res 1455, 17 January 2003, UN Doc S/RES 1455(2003); SC Res 1526, 30 January 2004, UN Doc S/RES 1526 (2004) and SC Res 1617, 29 July 2005, UN Doc S/RES 1617(2005).

Note 7. SC Res. 1373, UN Doc S/RES/1373(2001).

Note 8. SC Res 1566, 8 October 2004, UN Doc S/RES/1566.

Note 9. See United Nations (Supra Note 4).

Note 10. See Arab Convention on the Suppression of Terrorism, 22 April 1998, art. 1(2); Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, 4 June 1999, art. 1; Convention of the Organization of the Islamic Conference on Combating International Terrorism, 1 July 1999, art. 1(2); Organization of African Unity Convention on the Prevention and Combating of Terrorism, 14 July 1999, art. 1(3); Shanghai Convention on Combating Terrorism, Separatism and Extremism, 15 June 2001, art.1(1); Convention of the Cooperation Council for the Arab States of the Gulf on Combating Terrorism, 4 May 2004, art. 1(2&3).

Note 11. Convention of the Organization of the Islamic Conference on Combating International Terrorism, 1 July 1999.

Note 12. Arab Convention on the Suppression of Terrorism, 22 April 1998, see art 2(a).

Note 13. Convention of the Cooperation Council for the Arab States of the Gulf on Combating Terrorism, 4 May 2004, see art 2(a).

Note 14. Organization of African Unity Convention on the Prevention and Combating of Terrorism, 14 July 1999.

Note 15. See GA Res 3034 (XXVII), 18 December 1972, UN Doc A/RES/3034 (XXVII), para. 3.

Note 16. GA Res 44/29, 4 December 1989, UN Doc A/RES /44/29.

Note 17. See GA Res 1514 (XV), 14 December 1960, UN Doc A/RES/1514(XV).

Note 18. International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI), 16 December 1966, UN Doc A/RES/2200A (XXI).

Note 19. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res 26/25 (XXV) 24 October 1970, UN Doc A/RES/26/25.

Note 20. Legal Consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, I.C.J. Report 1970, see, e.g., para.52.

Note 21. There were still a large number of trust and non-self-governing territories at the time of the adoption of the Covenants. See UN, List of former Trust and Non-Self-Governing Territories, available at <https://www.un.org/dppa/decolonization/en/history/former-trust-and-nsgts>

Note 22. Declaration on the Rights of Indigenous Peoples, GA Res 61/295, 13 September 2007, UN Doc A/Res/61/295.

Note 23. Third Periodical Reports of States Parties due in 1993(Peru), Human Rights Committee, CCPR/C/83/Add.1 (1995), p.4.

Note 24. Report of the Committee on the Elimination of Racial Discrimination, General Assembly, Supplement No. 18 (A/51/18) (1996) p. 125.

Note 25. Universal Declaration of Human Rights, GA Res 217 (III), 10 December 1948, UN Doc A/RES/217A (III), art. 21.

Note 26. The Geneva Conventions of 12 August 1949, and their Additional Protocols of 8 June 1977.

Note 27. ILC Articles on Responsibility of States for Internationally Wrongful Acts, A/56/10 (2001).

Note 28. See para 1 of art. 50 (a) & (c).

Note 29. SC Res 1269, 19 October 1999, UN Doc S/RES 1269 (1999).

Note 30. Para 3.

Note 31. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 1, para. 4.

Note 32. Prosecutor v. Sam Hinga Norman - Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Case No. SCSL-2004-14-AR72(E), Special Court for Sierra Leone, Appeals Chamber, 31 May 2004, para. 22.

Copyrights

Copyright for this article is retained by the author(s), with first publication rights granted to the journal.

This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/4.0/>).