

TERRORISM AND FREEDOM IN INTERNATIONAL LAW

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Although the terrorist activities in Northern Ireland, the anti-Jewish bombings in France, and the attack at the Olympic Games in Munich in 1972 received widespread denunciation by the nations of the world, an intriguing question to be posed is whether terrorist activities may ever be justified under international law. The answer to this question naturally lies in the basic principles of international law. The following essay explores the issue of justifiable terrorism, beginning with a short overview of the relevant international law principles and their formation.

I. BASIC PRINCIPLES

On October 24, 1970, the General Assembly of the United Nations passed a resolution, without putting it to the vote, approving the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations.¹ Seven basic principles of international law were codified by the Declaration,² but these principles are subsumed by

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1. G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1970), reprinted in 9 INT'L LEGAL MATERIALS 1292 (1970) [hereinafter cited as ILM].

2. The following principles of international law are codified by the Declaration:

- 1) The principle that states shall refrain in their international relations from the threat or use of force against the territorial integrity of any state, or in any other manner inconsistent with the purposes of the United Nations.
- 2) The principle that states shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.
- 3) The duty not to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter.
- 4) The duty of states to cooperate with one another in accordance with the Charter.
- 5) The principle of equal rights and self-determination of peoples.
- 6) The principle of sovereign equality of states.
- 7) The principle that states shall fulfill in good faith the obligations assumed by them in accordance with the Charter.

ILM, *supra* note 1, at 1293-94.

As can be seen, the Declaration specifically refers to the Charter of the United Nations. The first principle is in fact the integral reproduction of U.N. Charter art. 2, para. 4, while

the principle of the sovereign equality of states and the principle of equal rights and self-determination of peoples.

A. *The Principle of Sovereign Equality of States*

Although the principle of sovereign equality of states is ranked only sixth in the 1970 Declaration, it is nonetheless a crucial principle of international law.³ The principle of sovereign equality of states means that "each state has the duty to respect the personality of other states" and that "the territorial integrity and political independence of the state are inviolable."⁴ These two elements of the principle of sovereign equality of states include the first three principles of the 1970 Declaration.⁵ In applying the principle of sovereign equality of states it can be seen that "each state has the right freely to choose and develop its political, social, economic and cultural systems."⁶ Additionally, "each state has the duty to comply fully and in good faith with its international obligations and to live in peace with other states."⁷

B. *The Principle of Equal Rights and Self-determination of Peoples*

The principle of equal rights and self-determination of peoples does not merely concern self-government, or the right of all peoples "freely to determine without external interference their political status

the second principle is the integral reproduction of art. 2, para. 3. The third principle is contained in art. 2, para. 7, and the fourth principle is found under art. 1, para. 3. The fifth principle is found in art. 1, para. 2. The sixth principle can be found in art. 2, para. 1, and the seventh in art. 2, para. 2. For the text of these portions of the Charter see A. PEASLEE, INTERNATIONAL GOVERNMENT ORGANIZATIONS, pt. 1, at 1301-02 (1974).

3. According to the 1970 Declaration, the principle of sovereign equality of states covers the following points:

- a) States are juridically equal.
- b) Each state enjoys the rights inherent in full sovereignty.
- c) Each state has the duty to respect the personality of other states.
- d) The territorial integrity and political independence of the states are inviolable.
- e) Each state has the right freely to choose and develop its political, social, economic and cultural systems.
- f) Each state has the duty to comply fully and in good faith with its international obligations and to live in peace with other states.

ILM, *supra* note 1, at 1296-97.

It can be seen that these elements of the principle of sovereign equality of states include all the other principles contained in the 1970 Declaration except for the fourth principle, which is not a principle of international law but merely one of the purposes of the United Nations, and the dynamic aspect of the fifth principle—self-determination (the passive aspect of the fifth principle being self-government).

4. *Id.*

5. See note 2 *supra*.

6. See note 3 *supra*. This element covers the passive aspect of the fifth principle—self-government.

7. See note 3 *supra*. This element combines the provisions of the second and seventh principles.

and to pursue their economic, social and cultural development,⁸ it also includes self-determination, or the right of the people of a colony or a non-self-governing territory to proclaim their independence, their "free association or integration with an independent state, or (their) . . . emergence into any other political status freely determined."⁹

The scope of application of self-determination is twofold: within the context of a newly forming independent state or decolonization, and also within a sovereign, independent state.

While it seems self-evident that self-determination should be applicable in the burgeoning state or in the context of decolonization, it may appear paradoxical for the same principle to apply within a sovereign state, thus weakening the principle of sovereign equality of states. Such is not the case; it is perfectly correct for self-determination to become operative in such a context. The reason for this is that the principle of the sovereign equality of states has a limit—the respect for human rights and fundamental freedoms.

The Declaration of October 24, 1970, expressly stipulates that, when considering the principle of equal rights and self-determination of peoples, "every state has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter."¹⁰

This provision concerns not only self-determination but also self-government, the latter being both an element of the principle of sovereign equality of states and the passive aspect of the right to self-determination. Consequently, although a state remains free to choose its political, economic, social and cultural systems, these systems must in no way undermine the respect for and observance of human rights and fundamental freedoms.¹¹ In other words, no state should have an unrepresentative and discriminatory government. Should this be the case, self-determination would become possible within a sovereign, independent state, a fact which is categorically and clearly stated in the Declaration of October 24, 1970:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and determination of peoples as described above and thus pos-

8. ILM, *supra* note 1, at 1296.

9. *Id.*

10. *Id.*

11. *Id.*

sessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.¹²

C. *The Universal Nature of Norms*

Article 53 of the Vienna Convention of May 29, 1969, on the Law of Treaties,¹³ states that "any treaty is null and void if, when it is concluded, it is in conflict with a peremptory norm of general international law,"¹⁴ while Article 64 of that convention states that "a treaty becomes void if it conflicts with a peremptory norm of general international law established after the treaty comes into force."¹⁵ A peremptory norm of general international law is defined as "a norm accepted and recognized by the international community of states as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."¹⁶

Since all states are expected to accept peremptory norms, the question then becomes, are the two basic principles of international law discussed above—sovereign equality of states and self-determination of peoples—accepted by all states? It is true these principles have been accepted by the member states of the United Nations, but are they universal principles of international law?

There is no doubt that the principle of sovereign equality of states is a universal principle as it is the *sine qua non* of a state's existence; but does the same hold true for the second principle—equal rights and self-determination of peoples? The answer appears to be yes, as this principle does not appear to be disputed, even if its application sometimes poses certain problems. This is perhaps because the twofold aspect of this principle¹⁷ makes it a vital necessity, as is the case with the principle of sovereign equality of states.

According to Article 53 of the Vienna Convention, a peremptory norm can be modified only by a subsequent norm of general international law.¹⁸ Although no new norm has come into being to warrant such a modification of the norm of sovereign equality of states, could a derogation be made from the basic principle of sovereign equality of

12. *Id.*

13. Vienna Convention on Law of Treaties, *opened for signature* May 23, 1969, *reprinted in* 8 INT'L LEGAL MATERIALS 679, 698-99 (1969).

14. *Id.*

15. *Id.* at 703.

16. *Id.* at 699.

17. *See* note 2 *supra*.

18. Vienna Convention on Law of Treaties, *supra* note 13, at 698.

states if it resulted from the application of the principle of equal rights and self-determination of peoples?

There is no doubt that such a principle may be applied in the case of colonies or non-self-governing territories which, under the United Nations Charter¹⁹ have a status separate and distinct from the territory of the state administering them.²⁰ The fact that this separate and distinct status exists means that the application of the principle would not undermine the principle of sovereign equality of the administering state.

It seems reasonable that this principle may also be applied in exceptional circumstances within a sovereign independent state, *i.e.*, when the government of such a state is not representative of the whole people belonging to that territory, and practices racial discrimination, or racial intolerance or any time the government fails in its duty "to promote through joint and several action universal respect for and observance of human rights and basic freedoms in accordance with the Charter."²¹

The application of the principle of equal rights and self-determination of peoples within a sovereign, independent state does not undermine the principle of sovereign equality of states. As has already been pointed out, the principle of sovereign equality of states includes the passive aspect of the principle of equal rights and self-determination (self-government), and in accordance with the latter, "every state has a duty to promote universal respect for and observance of human rights and fundamental freedoms."²² Consequently, although every state is free to choose its own internal system when applying the principle of sovereign equality of states,²³ this system must nevertheless promote respect for human rights.²⁴

When a government is not representative of the whole people belonging to a territory, and practices racial discrimination and religious intolerance, it seems fair to say that the aforementioned government's major preoccupation is definitely not the promotion of respect for human rights. The government itself has thus violated the basic principle of sovereign equality of states and for this reason the principle of equal rights and self-determination of peoples is applicable in its dy-

19. A. PEASLEE, *supra* note 2, at 1301-02.

20. A. RIGO SUREDA, THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION 353 n.2 (1973).

21. ILM, *supra* note 1, at 1296.

22. *Id.*

23. *Id.* at 1295-96.

24. *Id.*

namic aspect.²⁵

The principle of equal rights and self-determination of peoples in such circumstances in no way undermines the principle of sovereign equality of states. However, since both norms are ones from which no derogation can be permitted, a further question remains. Can these two principles be said to be of equal importance, or should the principle of sovereign equality of states be considered overriding?

When considering these two basic principles of international law, the sovereign equality of states seems to lie at the very center of international law. However, when a government fails to respect fundamental freedoms, that government itself fails to respect the principle of sovereign equality, and thus the right to self-determination gives a people undergoing discrimination at the hands of an unrepresentative government the right to create a new state entity.

II. WHAT KIND OF TERRORISM MAY BE JUSTIFIED?

Terrorism may be defined as the use of violence to cause fear in the population and thus compel it to accept the point of view of those practicing it. As Trotsky wrote, "Intimidation is the most powerful form of political action. Revolution kills a few people, it terrifies a thousand."²⁶ This broad concept of terrorism can be divided into two subgroups—that of the governed against those who govern, and that of the government against the governed.

A. *Terrorism of the Governed Against Those Who Govern (Revolutionary Terrorism)*

Political terrorism by the governed against those who govern has become most widespread over the past years. European resistants practiced it when fighting the German forces of occupation during World War II. It is the kind of terrorism employed by colonized peoples, such as in Indochina and North Africa, against colonizing powers. This type of terrorism is also practiced within established sovereign states. The Catholics in Northern Ireland practice it, as do the Tupamaros, Bretons and Corsicans in France, the Baader gang in West Germany and the Red Brigades in Italy. This form of terrorism is fustigated by those in power and magnified by those who practice it. As Robert Badinter writes, "During the (German) occupation, resistants were called terrorists."²⁷ Terrorism as Badinter points out, has two faces, depending

25. See note 3 *supra*.

26. L. TROTSKY, *THE DEFENCE OF TERRORISM* 55 (1921).

27. Badinter, *Terrorisme et Liberte*, 20F APRÉS-DEMAIN 9 (1979).

on which side of the power barrier one finds oneself.

B. Terrorism of the Government Against the Governed (State Terrorism)

State terrorism is dictatorship. It may be the dictatorship of one man, of a group, of a political party, or of all those who use the terror of repression to maintain their grip on the reins of power.²⁸

State terrorism takes the form of serious threats to individual, social and economic freedoms, such as prohibition of free circulation, house arrest of citizens, false imprisonment, a ban on either public or private expression of opinions, or on the practice of the religion of one's choice, torture and political assassination.

State terrorism may claim to be defensive terrorism, or a reply to subversive terrorism. It may however be offensive terrorism, seeking to impose at any cost the power of one man, a group, or a political party, on present or future opponents, even if the latter intend only to use normal democratic means of protesting.

III. THE RIGHT TO FUNDAMENTAL FREEDOMS

Self-government and self-determination enable peoples to enjoy fundamental freedoms in political, economic and social fields, and entitle them to the right to fight for the respect of these rights. Every state or people is free to choose its regime. The free determination of a political status is a traditional concept in international law.²⁹ States have unanimously bestowed upon themselves the right to the regime of their choice. This is a logical consequence of their sovereignty, since a sovereign independent state has full, exclusive and independent powers. Full power means that the state may intervene in every field, especially political—its internal organization is exclusively its own affair.³⁰ This concept of full power distinguishes the state from the other legal entities in public law, be they internal, external or international.

When one has exclusive exercise of power one has a monopoly of constraint, and full enjoyment of the power to coerce. In other words, this means having the monopoly of public services and of the administration of the law.³¹ To have independent power is to have freedom of decision—to be free from any obligation to obey injunctions or orders made by other states.

28. G. GUILLAUME & G. LEVASSEUR, *TERRORISME INTERNATIONAL* 64 (1977).

29. 1 H. LAUTERPACHT, *OPPENHEIMS INTERNATIONAL LAW*, 153-54 (8th ed. 1967).

30. *Id.* at 286.

31. *Id.* at 287.

The corollary of self-government is the principle of nonintervention. It in itself is an element of the basic principle of sovereign equality of states under the terms of the Declaration of October 24, 1970,³² which has been reaffirmed by the ruling of the International Court of Justice in the Corfu Channel case.³³ "The Court cannot allow (intervention) The Court can only regard the alleged right of intervention as a manifestation of a policy of force, such as has in the past given rise to most serious abuses and such as cannot, whatever may be the present defects in international organization, find a place in international law."³⁴ The principle of non-intervention was solemnly reaffirmed by Resolution 2131(14) of the United Nations General Assembly: Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, December 21, 1965.³⁵

The General Assembly reaffirmed that "every state has an inalienable right to choose its political, economic, social and cultural systems without interference in any form by another state."³⁶ The assembly condemns "not only armed intervention, but all other forms of interference or attempted threats against personality of the state, or against its political, economic and cultural elements. . . . The strict observance by states of these obligations is an essential condition to ensure that nations live together in peace, since the practice of any form of intervention not only violates the spirit and letter of the Charter but also leads to the creation of situations which threaten international peace and security."³⁷

Since the principle of nonintervention is an element of the imperative principle of sovereign equality of states, no state should attempt to impose, even by conventional means, any form of political regime upon another state. Neither should any state seek to intervene, to its own advantage, in the economic, social and cultural affairs of another state.

Are we to take it then that self-government means that a state may organize political, economic, social and cultural systems of its choice, and that the nature of the state's system is internationally indifferent? The answer is no, since self-government is limited by the obligation to respect human rights,³⁸ and consequently no state should have an un-

32. See note 3 *supra*.

33. The Corfu Channel Case, [1949] I.C.J., reprinted in 1 E. HAMBRO, *THE CASE LAW OF THE INTERNATIONAL COURT* (1966).

34. *Id.* at 419.

35. G.A. Res. 2131, 20 U.N. GAOR Supp. (No. 14) 11-12, U.N. Doc. A/6014 (1966), reprinted in 5 INT'L LEGAL MATERIALS 374 (1966).

36. *Id.* at 376.

37. *Id.* at 375-76.

38. ILM, *supra* note 1, at 1296.

representative or discriminatory government. Should this be the case, the static aspect of the principle of equal rights and self-determination of peoples³⁹ would not be respected, and an element of the principle of sovereign equality of states would be violated.

Once a state whose government is unrepresentative and discriminatory violates this principle, the same state cannot then invoke the same principle in order to protect its independence. Although the principle of sovereign equality of states is an imperative principle of international law, it cannot be applied by an unrepresentative and discriminatory government which violates it. Under such conditions the dynamic aspect of the principle of equal rights and self-determination of peoples therefore comes into effect.

First, the right to self-determination can be exercised by the peoples themselves, by the establishment of a sovereign and independent state, the free association or integration with an independent state, or the emergence into any other status freely determined. What means, however, should be employed to achieve this aim—solely peaceful means, terrorism, armed struggle, or civil war?

The Declaration of October 24, 1970,⁴⁰ is obviously reserved on this subject. Nevertheless, it clearly indicates that peaceful means should be employed as long as no state resorts to the use of force and so deprives the people of the exercise of their rights. How can one react to an act of coercive force other than by resorting to force oneself?

The Charter of the United Nations certainly condemns the use of force as being contrary to the principle of sovereign equality of states. In the present case, we are discussing the use of force outside the scope of international relations—between a colonizing power and its colonies or non-self-governing territories, or within a sovereign, independent state. The Charter does not therefore seem to be applicable here. No state which, by being unrepresentative and discriminatory, openly violates the principle of sovereign equality of states can then invoke this principle. As such, the use of force against an unrepresentative and discriminatory government would in no way be contrary to international law.

Acts of terrorism aimed at bringing down an unrepresentative and discriminatory government fall into this category and are thus fully justified. When a state openly violates human rights by refusing to respect the basic principles of international law and when, *a fortiori*, it refuses to honor bilateral or multilateral agreements concerning such rights, it

39. See note 3 *supra*.

40. ILM, *supra* note 1, at 1296.

cannot seek the protection of sovereign equality, and international law admits acts of terrorism.

On the contrary, no act of terrorism should be carried out against a state which, in accordance with international law, promotes respect for human rights and is neither unrepresentative nor discriminatory. Should such a state become the object of such attacks, it would be justified in invoking self-defense.

IV. THIRD PARTY INTERVENTION

The use of force by a people itself to implement self-determination cannot be contrary to international law, but is this true when the fight for self-determination is aided by a third party? Doctrine is divided on the question of whether third party intervention is lawful or unlawful. Five theories may be applicable here:⁴¹ the theory of total lawful aid; that of lawful assistance of the sole legal government; that of lawful assistance to the rebels alone; that of unlawful assistance given to the side which has violated certain principles of international law; lastly the theory of total prohibition.

The principle of self-government and of sovereign equality of states, puts every state under a duty to respect the personality of other states; territorial integrity and political independence are inviolable. Every state and every people has the right freely to determine and develop its political, economic, social and cultural systems, and the principle of self-determination and the Declaration of October 24, 1970⁴² authorizes a people to seek and receive aid in accordance with the principles of the U.N. Charter when such a people are subjected to coercive action which prevents them from exercising their right to self-determination.

The U.N. Charter certainly forbids the use of force as being contrary to the principle of sovereign equality; yet, as we have seen, this principle only commands respect if a government is representative and non-discriminatory. The use of force by a third party to come to the aid of a people subjected to coercive action by an unrepresentative and discriminatory government would not therefore be contrary to the principle of sovereign equality of states since this principle puts all governments under a duty to promote respect for, and observance of, human rights. When it becomes unrepresentative and discriminatory the supposedly legal government violates the basic principles of international

41. C. ZORGBIBE, *LA GUERRE CIVILE* (1969); Pinto, *Les Règles du droit international concernant la guerre Civile*, 1 RECEUIL DES COURS DE L'ACADEMIE DE DROIT INT'L 451-533 (1965).

42. ILM, *supra* note 1, at 1296.

law. If the so-called legal government does not respect the principle of sovereign equality of states, how can it invoke such a principle against third parties? One cannot invoke a principle which one refuses to respect.

In conclusion, when self-determination is exercised within a sovereign independent state of which the supposedly legal government is in fact unrepresentative and discriminatory, subjecting the people to coercive action intended to deprive them of their right to self-determination, third parties have a duty not to assist the unrepresentative and discriminatory government. However, third parties may assist, even through the use of force, people who are unrepresented and discriminated against and who themselves forcibly exercise their right to self-determination.

