International Law and the ‘War on Terror’

David Kretzmer*

1. INTRODUCTION

Terror threatens society in many ways. The obvious danger is to human life and personal security. A different danger lies in the way society reacts to terror. The abominable attacks of 9/11 in the United States and 7/7 in the United Kingdom have created an atmosphere of fear in which many people are prepared to support harsh measures suggested by their governments, even if such measures are incompatible with standards of international law. Abandoning commitment to the rule of law and international standards of human rights will not advance the struggle against terror. It will, however, endanger the very values of our democratic society that are threatened by terror itself.

In this paper, I shall present the general picture of international law as it relates to the struggle against terrorism. I shall not be discussing specific anti-terror conventions or other instruments, but shall concentrate on general principles of international human rights law and international humanitarian law. My object is to show that international law makes allowance for effective measures against terror, without endangering the rights of the vast majority of members of society who have no connection whatsoever with it.

Before embarking on the discussion it is important to state what is meant by terror. As is well known, it has proved to be exceedingly difficult to reach an agreed international definition. The constraints have been political, rather than conceptual. Some states have opposed a definition that would include acts (such as terrorist attacks in Israel) that they support politically. Their argument that acts by groups fighting against colonial domination and foreign occupation should not be regarded as terrorist acts totally ignores the

* Professor David Kretzmer, Hebrew University of Jerusalem; former member of the UN Human Rights Committee.
essential distinction between ends and means that is fundamental in both international human rights law and international humanitarian law. Both these legal regimes rest on the assumption that no matter how legitimate your ends may be, there are limits to the means that may legitimately be employed to achieve them.

The political constraints in reaching a legal definition of terror in international law came to the fore recently when the Legal Committee of the General Assembly failed to reach agreement on a draft comprehensive convention against all forms of terrorism. Despite these constraints, it is widely accepted in academic circles that terror consists of intentional acts of violence against civilians, the aim of which is to spread fear among the population for political, religious or ideological purposes. Under this definition, which will be accepted here, the legitimacy of those purposes is totally irrelevant. Even if one sympathises with a national liberation movement, intentional violence against civilians carried out by members of that movement, or on its behalf, are acts of terror. This has been recognised by implication in a recent resolution of the United Nations Security Council. While not defining terror, this resolution explicitly condemns ‘all acts of terrorism irrespective of their motivation’ (UNSC resolution 1624 of 14 September 2005). One may also cite the statement of Judge Rosalyn Higgins, in her separate opinion in the Advisory Opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, that ‘the protection of civilians remains an intransgressible obligation of humanitarian law’ that binds all parties in a conflict, including those fighting against occupation. Common Article 3 of the Geneva Conventions, which binds all parties in all armed conflicts, prohibits violence to life and person against persons taking no active part in the hostilities ‘at any time and in any place whatsoever’.

2. ‘THE WAR ON TERROR’

International law makes a clear distinction between situations of armed conflict and other situations. In the former situation, the law of armed conflict,