War on Terror: humanitarian and human rights issues
WINSTON P. NAGAN WITH THE ASSISTANCE OF AITZA M. HADDAD

After World War I the status of former German colonies was negotiated, and the colonies were placed under the League of Nations Mandate System. This was intended to ensure the well-being of their peoples and expanded the idea of an international obligation to protect the rights and well-being of dependent people. After World War II, the processes of decolonization and self-determined independence further affirmed this trend. A central postwar issue was the radical depreciation of human rights and humanitarian values that had taken place during the war and was seen in the rise of the idea of unlimited sovereignty. Unlimited sovereignty betokened an abuse of sovereignty. This was reflected in the practices of totalitarian regimes such as Nazi Germany, which abused its sovereignty in seeking to industrialize the business of mass murder. The Nazis were not the only abusers. Professor Rudi Rummel (1994: 9) has indicated that in the twentieth century, as many as 170 million people were murdered by sovereigns, political groups, and claimants to sovereignty. State absolutism fueled by authoritarian, totalitarian, or chauvinist ideologies has indeed created a crisis of legitimacy for the paradigm of international relations and legal order based on the juridical artifact symbolized by the treaty of Westphalia: the sovereign nation-state. Sovereignty is not a license to kill, to make war, to commit crimes against the peace, to disparage essential, basic human rights, to despoil the ecosystem, to reduce human aspirations to the whims of caprice, avarice, or arbitrary experience flowing from the barrel of a gun, or to strip human beings of all vestiges of essential dignity. This entry focuses on the problems of the war on terrorism and its implications for the integrity of humanitarian values and values based on human rights.

Sovereignty today is a critical component of the global process of juridical order. Within that larger process, sovereignty identifies the fundamental features of those decisions that constitute authoritative and controlling decision-making and assure its continued vitality as an institution of governing competence under law. This background provides the challenge for how sovereignty and humanitarian and human rights values are to be reconciled in the context of the War on Terror.

Some of the most important issues concern the nature of the rules relating to the War on Terror and their relationship to the law governing *ius in bello*. The first concerns the relevance of the Geneva Conventions. Lawyers in the US administration maintained that, since this was not a war between states, the Geneva Conventions did not apply. This was a view strongly promoted by the President George W. Bush's Lawyer, Alberto Gonzales, however, he later repudiated this view. Still, an implication of his view was a concern to determine whether a prisoner was to be deemed an unlawful combatant or a prisoner of war. The Geneva Conventions provide for criteria with a responsible degree of expert supervision. These issues were less prominent when litigation challenged the specially created commissions who were to try the prisoners of Guantanamo. The Supreme Court ruled that District Courts had jurisdiction to hear petitions on the merits of Guantanamo prisoners held outside of the United States (*Rasul v. Bush*, No. 03-334, *Al Odah v. United States*, 542 US __ (2004)). In *Hamdi v. Rumsfeld*, 542 US 507 (2004) the Supreme Court determined that detainees who are US citizens must have the ability to challenge their enemy combatant status before an impartial judge. O'Connor's plurality opinion indicated that the plurality relied on the
time-honored traditions of war, the Geneva Convention, and a long list of other international treaties, to hold that the government had authority under the Authorization for Use of Military Force enacted by Congress in 2001 shortly after the 9/11 terrorist attacks to hold any enemy combatants until the cessation of hostilities (not indefinitely). In a later case, *Hamdan v. Rumsfeld*, 548 US 557 (2006), the Supreme Court of the United States held that military commissions set up by the Bush administration to try detainees at Guantanamo Bay lack “the power to proceed because its structures and procedures violate both the Uniform Code of Military Justice and the four Geneva Conventions signed in 1949.” Specifically, the ruling says that Common Article 3 of the Geneva Conventions was violated. In *Boumediene v. Bush*, a case that was consolidated with the habeas petition of *Al Odah v. United States*, 553 US 723 (2008), the majority held that the Guantanamo prisoners had a right to habeas corpus under the US Constitution and that the Military Commissions Act of 2006 was an unconstitutional suspension of that right. In the relevant case law the Supreme Court essentially affirmed the relevance and importance of general international law including the Geneva Conventions. It should be noted that at the back of these petitions was the looming presence of the government’s reliance on national security competence as a measure for the exclusion of international law. It is in this context that the Court strongly asserted the binding character of relevant international law rules.

The Bush administration, which had generated an inherent skepticism of international institutions of cooperation and a greater skepticism of international law, now confronted a crisis. Should the United States act unilaterally in the face of the terrorist threat? How far and to what extent do the rules of international law facilitate or hinder the War against Terrorism? Clearly, there were officials who were impatient with international law, and others who were not. These matters played out practically in terms of the so-called new Bush doctrine: the idea that asymmetrical threats would require governmental action that goes beyond international law or there would have to be serious reconstruction of international law to meet the imperatives of national security in an age of terrorism. The initial reaction of the government was that it needed much more effective intelligence to determine future threats to the United States. In the context of the War against Terrorism, the President made a decision that the Geneva Conventions would not apply to unlawful enemy combatants. The President conceded that detainees would be treated humanely more or less in the spirit of the Geneva Conventions. From an institutional point of view, the Department of State objected to what the executive was doing. Many lawyers in the Judge Advocate General School lodged protests. These battles involved Congressional intervention to make it explicit that the United States does not use torture. The President’s Special Military Commissions, created to try unlawful enemy combatants, took a beating in the courts and the Congress. The first trial before the Military Commissions involved Osama bin Laden’s chauffeur. Through all of these broad developments, disclosures were made that detainees were subjected to robust interrogation methods that probably fell under an accepted definition of torture. Additionally, the CIA conceded that it had black sites. Detainees were kept outside US soil to limit the territorial reach of the normal justice process and frequently detainees were rendered to states that the United States knew would use robust interrogation techniques that would qualify as torture under international law. The full story has not completely emerged, but the flow of memoranda from various agencies of the US government seems to suggest that a serious effort was made to redefine torture so narrowly that torture could occur and yet, arguably, not be torture according to the official semiprofessional definition given by lawyers within the government. Furthermore, the definition of torture involved efforts to specify particular techniques that might functionally but not
technically be torture. This would provide a future defense for those who ordered or carried out the torture. An additional defense was the notion that, when the President declared a War on Terror of unlimited duration, he was acting as Commander in Chief and the only limits on his power were those related to the military necessity for the security of the United States. As Commander in Chief, he was restrained by the principle of necessity, and that principle could only be challenged in an impeachment proceeding. This assertion of executive power has been justified under the theory of a unitary Presidency.

Prior to the disclosure of internal documents, it was widely reported that both Rumsfeld and Cheney were promoting the idea of robust interrogation techniques to expedite the secretion of information from detainees. These directives generated a significant body of internal documents that purported, inter alia, to interpret international law. Many of these documents were publicly disclosed. The disclosure of documents concerning US policy with regard to detainees held in facilities outside the United States has revealed evidence that implies the possibility of command responsibility for the treatment of detainees that might be in violation of both US and international law. The evidence suggests wrongdoing with a possibility of criminal prosecutions for administration officials. Some have already been convicted in military courts martial, but these are individuals at the lower end of the chain of responsibility. Such activities occurred despite the President’s own public statement that the “United States does not engage in torture.” That is a statement of the official legal position of the United States in both domestic and international law. Although the US position is not altogether clear, because the issue has not come squarely before a national or international tribunal, it is basically the impact of the disclosures on informed public opinion that provides the possibility of a reasoned scholarly appraisal. Since the change in administration, the new administration has made it clear that torture will not be practiced or tolerated. However, it has avoided the criminal process for legal accounting.

There are two issues that appear to be particularly significant. The first is: what rights do detainees have who have been apprehended in the War on Terror and detained outside the territorial borders of the United States? The second is: how is torture defined to determine when interrogation methods used on detainees to solicit intelligence cross the line from robust, licit interrogation to breaches of the law? The most obvious law that would apply to the status of detainees in the context of armed conflict is the Third Geneva Convention. The President took his position on the advice of legal counsel reflected in his order of February 7, 2002 based on memoranda developed by White House Special Counsel, Robert J. Delahunty, and Assistant Attorney General John Yoo. The central argument of the administration was that Afghanistan was a failed state and not in a position to honor its obligations under the Geneva Convention. As a result, Taliban and Taliban-supporter detainees could not rely on the Geneva Conventions because there was no functioning government in Afghanistan. This also depended on the competence of the President to suspend US treaties with Afghanistan “pending the restoration of a legitimate government.” These lawyers also denied the efficacy of the rules of customary international law relating to *ius in bello*. The short response to this is that Afghanistan was possibly a failed state, but this is not objectively an authoritative conclusion. That is a matter that was factually in dispute. For example, in the Bybee memorandum of January 22, 2002, Bybee (2002) concedes the point: “We want to make clear that this Office does not have access to all of the facts related to the activities of the Taliban militia and al Qaeda in Afghanistan. Nevertheless, the available facts in the public record would support the conclusion that Afghanistan was a failed state …. Indeed, there are good reasons to doubt whether any of the conditions were met.”

A dispute about a factual matter regarding the status of a detainee and whether that
A detainee should be treated with Prisoner of War (POW) status if in fact governed specifically by Article 5. This Article mandates a “competent tribunal” to determine the status of the person in detention, to determine whether POW status is or is not secured. Similarly, it would appear that the status of an unlawful combatant in terms of the insignia of identification of the combatant is another matter that would fall under Article 5 of the Geneva Convention. Justice O’Connor, writing for a plurality in *Hamdi v. Rumsfeld* (2004), and Justice Souter, concurring, stated that the Geneva Convention does apply to the Taliban detainees. In the absence of a tribunal under Article 5, detainees would appear to be protected by the text of the Third Geneva Convention. Until that happens (a determination by a competent tribunal), the rules protecting the detainees as POWs apply. Grave breaches of the provisions of the Geneva Convention constitute violations of both domestic and international law. Grave breaches under the Geneva Convention include “any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.”

The President mistakenly determined that the Geneva Conventions were not applicable to the universe of detainees in the War on Terror. It is by no means obvious that the President was acting “lawfully” as Commander in Chief. Thus, there is the difficult possibility that the President issued orders and that those orders were carried out by his subordinates in violation of United States and international law and constituted war crimes.

With regard to the practice of extraordinary rendition, the practice of international law generally is consistent. A state is obliged not to transfer a detainee to a jurisdiction where the state knows, or may reasonably be presumed to know, that the detainee will be subjected to torture. It would seem that the only way to insulate US officials from legal accountability, even within the United States, following a change of administration would be to create a rather dubious expectation that the unitary Presidency, even if it is not juridically sustainable, could nevertheless be reasonably relied upon within the chain of command of the Commander in Chief. However, it is by no means clear that the Commander himself would be protected by the jurisprudence of the Presidency that he has sought to invent.

The discussion of the development of the international law that proscribes torture emphasizes the specific problems of effective application and enforcement in the aftermath of 9/11. The evidence of torture of alleged terrorists was, in part, justified by the President’s declaration of an indefinite War on Terror. From the executive perspective, the President was acting as Commander in Chief in a wartime situation and his powers would therefore be inherently as extensive as he thought appropriate to this role. Thus, the President’s War on Terror generated evidence of official conduct fairly characterizable as a violation of the prohibition of torture and creating an important human rights crisis for the United States and indeed the larger world community. These background facts are an indication of the importance and complexity of the effort to eradicate torture on a global basis using the rule of law.

The disclosure of the Yoo/Delahunty Memorandum of January 9, 2002 was followed up a few days later by the Rumsfeld Order of January 19, 2002 (see Lawofwar.org n.d.). The Order, directed to the Chairman of the Joint Chiefs of Staff, was to inform combat commanders that “Al-Qaeda and Taliban individuals … are not entitled to prisoner of war status for purpose of the Geneva Conventions of 1949.” According to this Order, combat commanders were authorized to depart from the Geneva Conventions on the principle of military necessity as they defined it. The Bybee memo followed shortly on January 22, 2002 and
to a large extent supports the Yoo/Delahunty memo with an expansion of the international law issues. This in turn was followed by a memo from Alberto Gonzales to President Bush on January 25, 2002. The Gonzales memo provided a consolidated justification for a departure from the binding effect of the Geneva Convention as well as a response to the concerns and disquiet expressed in the Colin Powell memo of January 26, 2002. Gonzales accepted the principle that Afghanistan was a failed state incapable of honoring its international obligations. He also concluded that the Taliban forces were a militant, terrorist-like group. He then expanded on a further justification for discarding the prescriptive force of the Geneva Conventions:

The nature of [a “war” against terrorism] places a high premium on ... factors such as the ability to quickly obtain information from captured terrorists and their sponsors ... and the need to try terrorists for war crimes ... [t]his new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners...” He also believed the determination “... eliminates any argument regarding the need for case-by-case determinations of POW status.” The determination, Mr. Gonzales said, also reduced the threat of domestic prosecutions under the War Crimes Act (18 U.S.C. 2441). His expressed concern was that certain GPW [Geneva POW Convention] language such as “outrages upon personal dignity” and “inhuman treatment” are “undefined” and that it is difficult to predict with confidence what action might constitute violations, and that it would be “... difficult to predict the needs and circumstances that could arise in the course of the war on terrorism.” He believed that a determination of inapplicability of the GPW would insulate against prosecution by future “prosecutors and independent counsels.” (Lawofwar.org n.d.)

The Gonzales memo appears to concede the fragility of the legal argument put forward in these early memoranda by conceding that these positions by the administration’s lawyers would insulate interrogators and those in the chain of command from prosecution. Implicit in this position is the notion that a nonexpert in legal matters may have a right to rely reasonably on the nature and scope of orders commanding a robust interrogation for the purpose of acquiring information.

Disclosures of memoranda and the context in which they were discussed and authorized have raised the question that the above analysis may be confirmed from further document disclosures of the record of executive communications. Congressman John Conyers asked former Attorney General John Ashcroft, John C. Yoo, Assistant Attorney General, and David Addington to submit to the jurisdiction of the House Judiciary Committee regarding discussions among themselves and other officials concerning the ostensible plan to institutionalize torture practices and use the Office of the Attorney General to provide a colorable defense in the future should a legal reckoning be mandated by law. Conyers wrote to David Addington as follows: “As early as 2004, written reports described you as ‘a principal author of the White House memo justifying torture of terrorism subjects.’ Other sources describe you as participating in the preparation of the key legal memorandum concluding that the protections of the Geneva Convention are ‘obsolete’ when considered against the exigencies of the struggle against global terrorism. In my view, there clearly is ample reason for inviting you to testify.” Congressman Conyers has indicated that he intends to subpoena the relevant officials.

On December 30, 2004, the flow of paper within the administration moved in a different direction. This Memorandum was written for the then Deputy Attorney General of the United States, Alberto Gonzalez. The following are new paragraphs:

This memorandum, it is stipulated, “supersedes the August 2000 memorandum in its entirety.” We presume that the term ‘supersedes’ makes this 2004 memorandum the authoritative statement of the executive’s understanding of the legal standards governing the prohibition against torture. However, the memorandum does not address the issue of the nature of the extent of claims of executive Commander in Chief
competence, or its full currency with regard to defenses for those seeking to rely on superior orders should there be prosecutions for torture. The legal landscape continues to be murky because of documents released by the American Civil Liberties Union suggesting that President Bush signed a secret Executive Order approving of the use of torture on prisoners captured in the war on terror. (Levin 2004)

The memo essentially repudiates the earlier memorandum of Mr. Gonzalez. This Memorandum was a reappraisal of the August 2002 Memorandum. The 2004 Memorandum now “supersedes the August 2002 Memorandum in its entirety.” This Memorandum seems to vindicate the Colin Powell initiative in the State Department. The following quotation explains more fully:

Questions have been raised, both by this Office and by others, about the appropriateness and relevance of the non-statutory discussion in the August 2002 Memorandum, and also about various aspects of the statutory analysis, in particular the statement that “severe” pain under the statute was limited to pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” Id at 1. (5) We decided to withdraw the August 2002 Memorandum, a decision you announced in June 2004. At that time, you directed this Office to prepare a replacement memorandum. Because of the importance of—and public interest in—these issues, you asked that this memorandum be prepared in a form that could be released to the public so that interested parties could understand our analysis of the statute.” (Levin 2004).

A substantial volume of memoranda and evidence confirms that detainees have been tortured. The specific questions of whether there is direct responsibility that can be shown and, if so, whether the evidence goes to the highest level of governance by direct information or information plausibly construed, is still controverted because the government has limited access. A change in the executive may result in disclosure of linkages that at least potentially would require prosecutorial interest. Attorney General Mukasey presented Congress with a proposal for a type of blanket amnesty or immunity. It may also be the case that the executive will act unilaterally and will grant blanket immunity as an executive order for all who may be possibly implicated in the wrongdoing, including the President himself. The President’s own immunity may distinguish between the institution of the Presidency and the individual identity of the President as a person. These issues were not taken up in the last days of the Bush administration. It has raised many thorny questions that a new administration would not seek to resolve for fear of distracting its policy and program from its sense of national need. In any event, the new Obama Administration may be reluctant to attack executive competence that would be an attack on its own powers with consequences not easily predicted.

One approach to avoiding the significant public policy issues that may be very divisive would be for the Obama Administration to demolish some of the institutions of the national security state that have proven to be ineffective and very expensive. It might go further and aggressively promote a broader human rights agenda that could include the adoption of the Optional Protocol to the Torture Convention. If the Protocol was properly developed in US domestic law with the right of access to detainees and timely recommendations, it would be a very effective way of preventing the abuse of prisoners or detainees.

Given the public accessibility to important documents generated initially for internal executive guidance, it is unsurprising that the documents that have come out have also provided incentives to flesh out more fully the inside workings of executive decision making on the issue of using robust methods of interrogation to get intelligence from those under the control of US governmental functionaries. The most recent and insightful study of this is Jane Mayer’s *The Dark Side* (2008). Even this important book will not tell us the precise influences at the highest levels of decision making and how these influences led to the impasse
between fundamental American values and a possible repudiation of those values. Were there groups close to the centers of power who saw 9/11 as an opportunity for a major power grab rather than an important threat to the nation's national security? If such perspectives existed, what deeper motivations drove them? Was it power for the sake of power or power for the sake of undefined higher ideals, higher than even fundamental American values, or were they driven by a process analogous to Joseph Conrad’s *Heart of Darkness* (1899). Was it the case that 9/11 stripped the cultural restraints from some of America’s citizens and leaders? There is, for example, considerable strength of American culture expressed in its fundamental law and its commitment to international law and human rights. Mayer’s book disturbingly suggests that a small group of governmental leaders were determined to undermine the rule of law, in the face of remarkable challenges from other parts of the US government. This includes the Departments of Justice and State, the National Security Council, elements in the system of military justice, and, if we see the Supreme Court as a coordinate part of the government, resistance to undermining the rule of law was found there as well. We shall, therefore, have to be circumspect about the nature and scope of such a determined effort in the face of this level of internal opposition. Central to the apparently critical claim of these operatives was that they needed to do all they could, in the name of national security, to permit and possibly even encourage extreme forms of torture in order to acquire intelligence to prosecute the War on Terror.

There is much historic background from World War II to indicate that information acquired through torture was unreliable. This undermines the utilitarian argument for torture. According to Mayer, the small group of pro-torture operatives coalesced around Vice President Dick Cheney who was the spiritual force behind the persistence of this initiative within the government. The Vice President had other close collaborators including David Addington, who challenged appeals to morality and law as signs of weakness and naiveté. Another key player was Professor John Yoo whose important memorandum sought to redefine torture in such narrow terms that it could sanction an “anything goes attitude” towards detainees. Among the distressing facts disclosed by Mayer is that the government knew that many of the detainees were entirely innocent and certainly not sources for valuable intelligence. The administration detained them nonetheless because they feared that the released detainees would be asked questions about their treatment. Worse than that, the freed detainees would get themselves American lawyers to represent them. To quote Cheney, “People will ask where they have been and what you have been doing with them… They’ll all get lawyers.” These comments were made in a White House meeting. As the evidence and revelations unfold, it becomes more apparent that it would be difficult for the President or Vice President to deny plausibly that they did not know that torture was used and that in fact it could not have been used without their approval. In a review of Mayer’s book, Alan Brinkley concludes that “Mayer’s extraordinary and invaluable book suggests that it would be difficult to find any precedent in American history for the scale, brutality and illegality of the torture and degradation inflicted on detainees over the last six years; and that it would be even harder to imagine a set of policies more likely to increase the dangers facing the United States and the world” (Brinkley 2008).

The stakes are enormously high for the United States and its global position as an ideological leader on the issues of the rule of law, human rights, and democratic entitlement. This provided a reason for a Congressional inquiry sponsored by Congressman Conyers. Results of his inquiry were published which included a reference that a Principals’ Committee within the Bush administration held meetings in the White House Situation Room where they explicitly discussed the use of torture on suspected terrorist detainees. The matter was debated at the highest levels and torture became approved Executive policy.
Among those who attended the meetings, it is alleged, were Condoleezza Rice, Vice President Dick Cheney, Attorney General John Ashcroft, Secretary of State Colin Powell, and CIA Director George Tenent and other high-level US officials who also had been invited to testify or threatened with subpoena should they be reluctant to do so.

The United States is a transparent society, although transparency may sometimes be a delayed article of politics. When transparency illuminates governmental misconduct, enormous pressures for the assignment of responsibility arise. Responsibility will invariably require a legal accounting under law. The law works its methods with slow but meticulous deliberation. The American people will demand a proper accounting and a cleaning of the contaminated stables. The American people do not want torture on a global basis. This is a sentiment already expressed by the Congress of the United States and every President prior to President George W. Bush. When the Senate approved the Torture Convention, it voted 99-1 to give its advice and consent to the treaty. The Torture Convention was negotiated largely by the Republican administration of former President Ronald Reagan. It was a ratification priority of President George H. W. Bush. It was an instrument that received overwhelming bipartisan support in the Senate. The pleasure that Senator Bob Dole got from having the Torture Convention approved by the Senate resulted in his giving a reception at his own personal expense in the Rotunda of the US Senate.

The Obama Administration has repudiated the worst aspects of policy that compromises international law by the Bush administration. However, President Obama has not repudiated the excessive claims to presidential power under the unitary presidential theory, which effectively claims that the President is above international law. Thus, the precise boundaries relating to the War on Terror still remain murky and not resolved either juridically or politically. What the War on Terror has demonstrated is the tragic ease with which leaders in a mighty democracy could descend into the depths of depravity and abuse. The critical lesson is that international law is not a luxury but a critical pillar of a rule of law-governed democracy. And international law is a critical foundation for the restraints of humanitarian law and human rights law.

The effort to develop an idea of international obligation that seeks to control and regulate terrorism and validate human rights and humanitarian concerns is a complex one. For example, a comprehensive convention on international terrorism must confront difficult political and conceptual conflicts. As earlier indicated, important powers in the world community have tended to gravitate to a selective approach to the question of who is a terrorist. In the context of the Afghan War against the Soviet Union, the United States and Saudi Arabia in cooperation with the ISI of Pakistan developed a formidable force of irregular operatives, which the ISI trained in insurgency and terrorist tactics. These were Holy Warriors known as the Mujahideen. They were viewed as freedom fighters. Today many of these fighters and their leaders are viewed as the leading terrorists in the region. Among the distractions regarding the definition of terrorism is the problem that its modern roots are in state terror. In the aftermath of the French Revolution the French National Convention declared that “terror is the order of the day” (September 17, 1993). Robespierre, a leader in the French Revolution, stated “terror is nothing other than justice, prompt, severe, inflexible.” The French Revolution was fought in the name of liberty, equality, and fraternity. It is difficult to reconcile Robespierre with these values.

Terrorism was effectively sovereign state policy. For reasons of state expediency, sovereigns may sometimes still feel that the ultimate tactic for maintaining state security may be recourse to state terrorism. And state terrorism is associated with violations of human rights and humanitarian law. More and more contemporary law seeks to constrain state terrorism by the application of international humanitarian and human rights law. The more credibility given to this development, the more we
remove an important impediment to crafting a comprehensive definition of torture. Still the international environment has reservations about a comprehensive condemnation of the form of violence associated with terrorism.

At one end of the value spectrum there is the concern that important contemporary rights relating to claims to self-determination or freedom from foreign occupancy or domination may require some forms of insurrectionary violence. The critical question is whether we can craft a definition that permits some forms of coercion to support legitimate self-determination and national liberation and yet comply with the general international norms that require restraint regarding the use of coercion. Such restraint may be reflected in the policies underlying the right of self-defense and the policies behind the *ius in bello*, which require the restraints of necessity, proportionality, and humane considerations. Additionally, there is a difficulty with defining terrorism from the perspective of the *mens rea* of the terrorist. The *mens rea* is a universal condition for description of criminal responsibility. In essence, the terrorists’ victims are only incidental to what the terrorist seeks to secure. The active terrorist’s major purpose is to undermine the authority and the security obligations of the state he attacks. Specific damage to persons or property is merely coincidental.

Any definition of terrorism must deal with the objectives of the actor. The proposed UN Comprehensive Convention on International Terrorism in Article 1 focuses instead on death or serious injury to persons, damage to private or state property, and damage to property and facilities that results in major economic loss, intimidates the population, and seeks to coerce compliant behavior in governments or international organizations. This definition does not clarify the objectives of the terrorist nor adequately identify what is distinctive to the terrorist. The Organization of the Islamic Conference seeks to exclude situations of foreign occupation, which it holds are governed by international humanitarian law. It also recommends that the military forces of the state, if acting in conformity with international law, are outside the reach of this Convention, thereby seeking to respond to the problem of state security and the right to resist foreign occupation. In my view it would be better to insist that, if resistance to foreign occupation meets the criterion of an international insurgency, then the rules which require restraint of coercion and in the actual conduct of activities should normally apply and conduct outside this should fall within the definition of terrorism in the Convention. It remains to be seen how this issue might resolve itself in future negotiations. We would suggest that this Comprehensive Treaty is critical to the global approach to the terrorist problem. In any event, it may have an affinity with the international law that makes piracy a universal crime. The pirate is the enemy of mankind. The terrorist should receive a similarly elevated status. Moreover, clarity in such a treaty will broaden the scope of international obligation in the defense of humanitarian and human rights values.

The UN also has a Counterterrorism Committee as well as a Counterterrorism Executive Directory. This Committee conducts experts’ assessments of member States in this field and facilitates the development of counterterrorism technical assistance. The mandate of the Committee is controlled by Security Council Resolutions 1373, 2001 and 1624, 2005. Among the activities to counterterrorism are recommendations covering the following issues:

1. Criminalizing the financing of terrorism;
2. Freezing funds tied to persons involved in terrorism;
3. Denying all forms of financial support to terrorists;
4. Suppressing safe havens as well as sustenance and support for terrorists;
5. Sharing intelligence with other governments regarding terrorist activities and plans;
6. Cooperating with other States regarding the investigation, detection, arrest, extradition and prosecution of terrorists;
7. Criminalizing active and passive support for terrorism in State law.

In addition, the Committee has a charge to monitor progress and appraise the technical assistance needed by states. It should also facilitate technical assistance by connecting countries to technical, financial, and legislative assistance programs. The Committee also produces country reports to provide snapshots of the state of counterterrorism in each country. It also promotes the idea of states adopting the best practices, codes, and standards according to their needs.

In 2010 the General Assembly reviewed its United Nations Global Counterterrorism Strategy. It adopted by consensus a Resolution restating its unequivocal condemnation of terrorism in all forms and expressions “by whomever, wherever and for whatever purposes.” The Resolution endorses the facilitation, promotion, and coordination and coherence of counterterrorism activity at all levels. Importantly the Resolution affirms the four pillars strategies: (i) attacking the conditions that inspire terrorism; (ii) preventing and combating terrorism; (iii) strengthening the role of the UN in this regard; (iv) ensuring respect for human rights and the rule of law in the fight against terrorism. This brief overview of UN concerns regarding the problem of terrorism as a destabilizing force in the world order indicates both the complexity of the issue and the multidimensional, but important, role the United Nations has in forging a comprehensive counterterrorism strategy in defense of Charter values. A better understanding of the nature and definition of international terrorism will clearly facilitate a greater appreciation of the international limitations that are meant to constrain terrorist activities and the efforts of humanitarian and human rights law that constrain reactions to terrorism.

SEE ALSO: Westphalia, Treaty of.

REFERENCES


FURTHER READING


