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Fred L. Borch & Paul S. Wilson (Editors)

# XII

# Panel II
# Discussion—Jus in Bello

## *On the Overlap Between Jus ad Bellum and Jus in Bello*

**Yoram Dinstein**

The jus as bellum and the jus in bello are two distinct bodies of law, and there is no overlap between them. First of all, the aggressor (pursuant to the jus ad bellum) may conduct hostilities in an impeccable way from the standpoint of the jus in bello, and the state resorting to self-defense (under the jus ad bellum) may conduct hostilities in a manner incompatible with the jus in bello. True, sometimes the same party is held accountable for flagrant aggression (under the jus ad bellum) and for the most horrendous war crimes (in violation of the jus in bello). The paradigmatic case is the Nazi record in World War II. But even here, let us not forget that the Nazis were not the only ones who disregarded the jus in bello. The Soviet march to Berlin in 1945 was regrettably accompanied by hundreds of thousands of cases of rape of German women.[1] These grave breaches of the jus in bello do not diminish one iota from the fact that it was Germany that invaded the USSR in Operation BARBAROSSA in June 1941. Consequently, responsibility for the war of aggression (in conformity with the jus ad bellum) was incurred exclusively by the Nazis.

Secondly, the issue of proportionality—which is of consequence both in the jus ad bellum and in the jus in bello—has a totally different meaning in each body of law. In the context of the jus in bello, proportionality denotes that collateral damage to civilians must not be excessive compared to the military

1. ANTHONY BEEVOR, THE FALL OF BERLIN, 1945 (2002)

advantage anticipated in the attack. This requires a balancing act between the expected casualties among combatants and civilians. Insofar as the jus ad bellum is concerned, there is also a balancing act between casualties sustained in an armed attack and in a defensive armed reprisal carried out in response. However, if we are talking about war of self-defense in response to an armed attack of a critical nature, no such balance is required. The best example is that of Pearl Harbor and the Pacific War. The Japanese attack of 7 December 1941 was of critical significance, since it altered the entire strategic situation in the Pacific. Hence, it justified the American declaration of war in self-defense. As we all know, by the time the Pacific War was over, there was no proportion between the number of American casualties sustained in Pearl Harbor (or for that matter thereafter) and the countless Japanese losses throughout the war and especially towards the end (when Japanese cities were pulverized by both conventional and unconventional weapons). The issue of proportionality in losses and counter-losses was irrelevant under the jus ad bellum. Once the Japanese attack in Pearl Harbor justified a war of self-defense on the part of the United States, that war could be fought—as it was—to the finish, irrespective of total numbers of casualties.

**Adam Roberts**

I believe there is some overlap between jus ad bellum and jus in bello when it comes to the impact that they have in public debate. They are not in entirely separate watertight compartments. Charles Garraway put it particularly clearly when he quoted from the US Standing Rules of Engagement that it remains crucially important that irrespective of the circumstances in which a war begins, irrespective of the jus ad bellum, the jus in bello be observed. It is not my position that these two areas be completely confused with each other, merely that there is some degree of overlap occurring inevitably in public debate.

### *On the Power of the Security Council*

**Yoram Dinstein**

In accordance with the UN Charter, members of the organization are bound to carry out decisions of the Security Council, especially in matters affecting peace and security.[2] In practice, when the Security Council states in a resolution that it is acting under Chapter VII of the Charter,[3] this is understood to mean the

2. U.N. CHARTER, arts. 25, 48.
3. U.N. CHARTER, arts. 39-51.

text is binding. Moreover, Article 103 of the Charter proclaims that, in the event of a conflict between the obligations of member states under the Charter and their obligations under any other treaty, the Charter obligations prevail. The upshot is that, when the Security Council creates obligations for a member state thorough a legally binding decision, the state has to observe the Security Council decree irrespective of any other conflicting obligation. The conflicting obligation may be derived from the Geneva or Hague Conventions governing the law of armed conflict. Notwithstanding their venerated status, these instruments must give ground to any obligation based on the Charter. This actually happened in 1990, in the Gulf War with Iraq, when the Security Council imposed a blockade going beyond the general rules regulating blockade in armed conflict. The Security Council had the authority to do this by virtue of Article 103 of the Charter.

### *On the Nature of the Current Conflict in Afghanistan*

**Yoram Dinstein**

Unlike pirates who operate on the high seas, terrorists always operate from within a state. They may mount their attack against targets in the same state or they can use their bases in that state for attacks against other states. International law obligates a state not to allow its territory to be used as a springboard for attacks by terrorists against another state. If the local state in unable to eliminate the terrorists, that does not mean that the aggrieved state must sit idly by. In the absence of effective action by the local state, the aggrieved foreign state may send an expeditionary force into the territory of the state where the terrorists have their bases, with a view to taking them out. But then all action must be directed against the terrorists, and not against the local government.

The question in Afghanistan was not simply whether the United States could enter its territory in order to eradicate al Qaeda. The question was whether the United States could target only al Qaeda fighters on Afghan soil or also members of the Taliban forces. In my opinion, the Taliban opened themselves up to an American use of force because the regime ratified the actions of al Qaeda of 11 September 2001. Between September 11th and October 7th, the United States tried to persuade the Taliban to extradite bin Laden and otherwise disassociate themselves from al Qaeda. The Taliban ignored this pressure and refused to cooperate with the United States despite

the warnings by the United States and the strong language used in Security Council Resolution 1373.[4] Thereby the Taliban regime aligned itself with al Qaeda and turned its own forces into legitimate targets for American action in self-defense against the armed attacks of September 11th.

An analogy for this type of retroactive ratification by a government of the misdeeds of non-state actors can be found in Iran in 1979. The Ayatollah's regime in Iran in 1979—just like the Taliban regime in Afghanistan in 2001—endorsed unlawful action against the United States by non-state actors. In 1979, that unlawful action consisted of the takeover of the US embassy by militant students. In 2001, it was the al Qaeda outrages of September 11. In both instances, the original armed attack was carried out by fanatics without the apparent advance approval of the local government (the Ayatollah's and the Taliban, respectively). But in both instances, the local government assumed full responsibility for the armed attack, and exposed itself to counteraction by way of self-defense. In the case of Iran, the US counteraction was ineffective. In the case of Afghanistan, the US counteraction brought an end to the Taliban regime.

### *On Shielding Military Targets with Noncombatants*

**Yoram Dinstein**

Using civilians to shield military targets is clearly a very serious violation of the jus in bello. the question is whether, in light of the presence of the human shields, the other belligerent party must abort an attack against the military target, bearing in mind the expected high number of civilian casualties which is likely to ensue. In my opinion, in such instances, the proportionality principle (which forbids excessive collateral damage to civilians) need not be applied in the usual manner. Much more latitude has to be given to the attack, because the high number of civilian casualties is deliberately induced by the enemy. That is to say, an attack that would otherwise be unlawful due to excessive collateral damage to civilians would be permissible when caused by the enemy's abuse of the law. When shielding a military target with civilians, the blood of the civilians will normally stain the hands of the defending rather than the attacking side.

4. Resolution 1373 required, amongst other things, that states shall "refrain from providing any type of support . . . to entities or persons involved in terrorist attacks." *See* S. C. Res. 1373, U.N. SCOR, 56th Sess., U.N. Doc. S/1373/(2001)

### *On the Currency of the Law of Armed Conflict*

**Adam Roberts**

There currently exists a problem with certain areas of the law of armed conflict. This may partly be a problem of some international agreements concluded with considerable pressure from non-governmental organizations and international governmental organizations that have considerable support from legal reformers but about which major powers that may have to engage in war have strong reservations. There is a possible disjunction there that needs to be taken seriously. I am not suggesting that the existing body of law is perfect. For example, the UK's reservations to Geneva Protocol I are extremely long and comprehensive. And in my view, despite the recent movement by negotiators to attempt to limit reservations to treaties such as the International Criminal Court, it is preposterous to prohibit reservations. Any major military power should and will be able to make reservations in some form. However, suggesting that there is a need for completely new law dealing with terrorist operations may be too much; a more evolutionary kind of approach based on the practice of states in customary international law may be more appropriate.

### *Unprivileged Combatants*

**Yoram Dinstein**

Civilians who choose to act as combatants without wearing uniforms (or other fixed distinctive emblems) do not commit war crimes. But they expose themselves to attack as combatants, and, most significantly, they are deemed unlawful (or unprivileged) combatants and therefore are not entitled to the status of prisoners of war. Absent that status, they can be detained or put on trial by domestic courts for ordinary crimes such as murder, assault, or arson. The same rule applies to combatants who fight out of uniform, do not carry their arms openly, etc. The latter rule determines the fate of Taliban and al Qaeda fighters (currently in Guantanamo Bay and other places of detension). But it is equally true of Central Intelligence Agency (CIA) operatives and other Americans who participated in hostilities in Afghanistan out of uniform. Had they been captured by the enemy, they would have not qualified for protection under the Geneva Convention (III) Relative to the Treatment of Prisoners of War.

The decision to forego protection pursuant to the jus in bello may be deliberate. There is a cost/benefit calculus, and the CIA probably reached the conclusion that it was willing to run the risk (especially since, in any event, the Afghan reputation in terms of compliance with the Geneva Convention in

regards to prisoners of war leaves a lot to be desired). There are other instances in which risks are deliberately assumed in view of the constraints of the situation. For example, in some armed conflicts, the enemy is known to concentrate fire on members of the medical personnel in the field, who are wearing the distinctive armband of the Red Cross (or its equivalent). A number of armed forces therefore instruct their medical personnel to remove their armband. There is nothing wrong with such instructions, but it must be borne in mind that the consequence is liable to be loss of protection under the Geneva Conventions. Of course, once they remove their armbands and lose the protection afforded by the Conventions, members of the medical personnel may as well behave as full-fledged combatants (actively participating in hostilities), neither seeking nor dispensing any protection from attack.

**Charles Garraway**

I am not convinced that a medic can actually give up his protection. He may choose not to wear the armband that indicates that he is protected under the Geneva Conventions but the fact remains that if he is a medic engaged in full-time medical duties, he is entitled to the protections of the Geneva Conventions. The difficulty arising from not wearing an armband is one of distinction for the enemy. However, if the enemy knows he is a medic and he is acting as a medic, despite the fact that he is not wearing a Red Cross armband, he may not be targeted.

An issue related to this which causes much concern is that of the definition of combatants. As you know, combatants are by definition permitted to take a direct part in the hostilities and it seems that many states are taking a narrower and narrower view of what it means to take a direct part in hostilities in an effort to save costs by using civilians in positions historically filled by members of the armed forces. This issue is a fundamental one and should be further studied to determine what exactly is meant by taking a direct part in the hostilities.