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International Law and the War on Terror
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Panel II
Commentary—Jus in Bello

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All new warfare operates to stress existing law. This is true for every war and every conflict occurring over the last several hundred years. The new type of warfare involved in "the war on terrorism" is no exception. Caution should be taken, however, not to throw out the existing regime but instead we should study and analyze these stresses for such stresses are not necessarily fatal.

There is always a danger, amply demonstrated over the last few months, of decisions being taken and then followed by legal justifications. This in itself creates further dangers as it may lead to conflicting reinterpretations of existing law. For example, we have discussed the differences between Europe and the United States. However, despite these differences, the end result is often exactly the same. The departing point is in how European countries arrive at their conclusions since they have different drivers, different legal regimes (both national and international), different cultures, and different populations. It follows occasionally then, that the European legal justifications for an action may be quite different from that of the United States. This of course

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itself creates some danger as there are then two, or more competing legal justifications. Undoubtedly, states on both sides of the Atlantic would benefit from more consultation and coordination before particular positions are adopted.

I agree with Professor Dinstein that existing law is adequate for the issues presented today. I also agree that the principle of distinction is fundamental and absolutely vital when determining combatant status. However, I do not agree with Professor Dinstein on everything. The law of armed conflict is designed to have a greater degree of flexibility than national law because law, in many respects, always focuses on the last conflict. Accordingly, there is a requirement for built in flexibility so that we can apply the law designed for the last conflict to the new situation.

The definition of armed forces has for generations been based on traditional forms of armies. I am talking here about regular armed forces. In some parts of the world today though, we are returning almost to the Middle Ages and seeing feudal types of armed forces with warlords raising their own forces in much the same way as the barons did against King John. Accordingly, the notion of a structured, disciplined armed force is not reflected in the militaries of some states today. The question regarding these forces then becomes one of status and treatment under the law of armed conflict.

Should these forces be treated as militias and therefore be defined as combatants under the Hauge Regulations, Geneva Conventions, and their Protocols or as something else? Must we re-interpret what is meant by the term "armed forces?" Professor Dinstein chooses a tried and true method in determining that the Taliban are not members of the armed forces of a high contracting party to the Geneva Conventions and are therefore not entitled to the protections and privileges of combatancy. I, however, believe that there is grave danger in the position that has been taken that no Taliban members are entitled to prisoner of war status once captured as this position may rebound on the developed countries of the world in future conflicts. It seems somewhat strange to have an armed conflict in which one side, by definition, is made up entirely of "unprivileged belligerents."

Regarding the presentation of Professor Adam Roberts, I agree that simply because a war is started by a state, that state does not become responsible for everything occurring during the course of the war. I further agree that force applied in the current "war on terror" must be proportionate in nature. Proportionate here is used in a different context to the way it is used when discussing pure jus in bello concepts of course.

Terrorism occupies the zone between criminal law and the law of armed conflict. Sometimes terrorism is solely within one or the other of these realms. However, the current situation is one where substantial overlap exists between the two competing and somewhat conflicting legal regimes. When such an overlap exists, there is also the very real danger of gaps in coverage between the two systems.

An ad hoc approach to interpreting treaty obligations is one method demonstrated lately. The danger with such an approach is that your standing to protest the treatment of your own service members is weakened when you do not apply the Geneva Conventions to those who seem to fall within them. A perfect example of this is the US position on the "detainees" held in Guantanamo Bay, Cuba. As we all know, prisoners of war are subject to the rules and regulations of the armed forces of the detaining party. This would ordinarily mean trial by courts-martial. However, in the same way that service personnel cannot ordinarily be tried by military courts for pre-enlistment offences, so prisoners of war will not be subject to court-martial jurisdiction for offences prior to their capture.[2] This principle seems to force states back to their civil courts for jurisdiction over detainees. However, the United States has clearly stated that it will use military commissions and not prosecutions in its federal courts. Using military commissions is entirely consistent with the law of armed conflict provided they apply to all who commit war crimes, of whatever nationality. It seems that this issue may have been misapprehended when the issue of the designation of Taliban members as prisoners of war or detainees initially surfaced.

Finally I would just like to quote from the US Joint Chiefs of Staff Standing Rules of Engagement, dated January 15th, 2000: "U.S. Forces will comply with the law of war during military operations involving armed conflict no matter how the conflict may be characterized under international law and will comply with its principles and spirit during all operations."[3] That is a simple and clear instruction to commanders and to soldiers. I think those instructions are sensible and that we move away from them at our own peril.

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2. *See generally* Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135, Chap. III - Penal and Disciplinary Sanctions, *reprinted in* DOCUMENTS ON THE LAWS OF WAR (Adam Roberts and Richard Guelff eds., 3rd ed., 2000) at 243.

3. CHAIRMAN JOINT CHIEFS OF STAFF INSTR 3121.01A STANDING RULES OF ENGAGEMENT FOR U.S. FORCES, ENCLOSURE (A) A-9, (15 Jan 2000).