

# VI

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## Panel I

### Discussion—Jus ad Bellum

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#### *On the Application of Force to al Qaeda and Taliban Members*

##### **Leslie Green**

I do not believe that we have distinguished sufficiently between al Qaeda members and Taliban members. Bear in mind that many of the volunteers from the United Kingdom or from other countries who went to join the Taliban had no desire to take part in al Qaeda terrorist activities. These volunteers were concerned with spreading a fundamentalist type of Islam. They were proselytizing, in many cases assisting Islamic colleagues in places such as Chechnya.

The Taliban may indeed not have been the government of the people of Afghanistan. They were, however, the de facto authority in control of most of the territory comprising Afghanistan. If this be the case though, once al Qaeda has been dealt with, the issue of what are we doing in Afghanistan must be raised. Otherwise, we might be supporting a government in frustrating a revolution or a civil war.

Finally, the word terrorism is used with too much abandon. This pejorative has been too widely used and attributed to non-terrorist groups. Governments have always argued that those trying to overthrow them are terrorists. Historically, governments have also taken the position that if the group was fighting a government that was not liked, the group consisted of freedom fighters, fighting for their liberation. Care should be taken to not become involved in what are simply civil wars even when carried out by political ideologies that do

not appeal to us. Such civil wars do not rise to the level of terrorist movements simply because we do not like them.

### **Rein Müllerson**

There are many governments which use the mantra of the Global War on Terrorism to fight their opponents who may not be terrorists at all. This danger, of course, always exists and can be seen today in both Russia and Central Asia. Our task is to distinguish between those using terror tactics and those who are not. It is true that in Afghanistan, and also in Chechnya and other places, religious fundamentalists have used terror tactics. So one has to make distinctions between freedom fighters genuinely struggling for independence and common terrorists. Though I believe in many cases, if not in most cases, terrorists are independence fighters and independence fighters are terrorists too since they use terror tactics in order to achieve their aims. There should not be any difference whether their aims are noble, lawful or not. If they use terror tactics, they are terrorists.

Now about the distinctions between al Qaeda and the Taliban. Of course, there are these distinctions. Al Qaeda is a worldwide net, and the Taliban was an endogenous organization operating only in the territory of Afghanistan. And the United States made these distinctions I believe. The United States demanded that the Taliban surrender Osama bin Laden and other leaders of al Qaeda to it and that the Taliban dismantle the bases used by al Qaeda. The Taliban did not comply with these requests and so the United States used force in self-defense against both al Qaeda and the Taliban.

Perhaps a fine distinction between al Qaeda and the Taliban may be that you could initially attack only al Qaeda and then based upon the reaction of the Taliban, attack them as well. That is to say, if the Taliban come to the assistance of al Qaeda then they too could be properly targeted. This seems to me to be too formalistic, however, and international law does not require making this distinction.

### **Robert Turner**

When asked, “who was the government of Afghanistan on 11 September?,” I would respond by querying whether Somalia had a government a decade ago. It is clearly possible to have states that are so dysfunctional and so split that no authority constitutes the legitimate government. The UN Security Council, acting on behalf of the world community, has taken the position that the Taliban

was *not* the government of Afghanistan, referring to it only as a faction.<sup>1</sup> Moreover, the Security Council had ordered all states to immediately cease supporting terrorism, declaring such support a threat to the peace.<sup>2</sup> Given that the Security Council had de-legitimized any Taliban claim to act on behalf of the government of Afghanistan, it is hard to argue the case that the Taliban was the government of Afghanistan. In my view then, the Taliban was never the legitimate government of Afghanistan. This of course does not necessarily mean that a true, legitimate government actually existed within Afghanistan.

I am not of the same opinion as Michael Schmitt that the case for using force against the Taliban would be easier to understand if the Taliban was the legitimate government of Afghanistan. Subparagraph 4 of Article 2 of the UN Charter protects states against intervention by other states.<sup>3</sup> The *Lotus* case tells us that international law is permissive.<sup>4</sup> The UN Charter and the Kellogg Briand Pact say states cannot use armed force in their political diplomatic relations against each other to solve problems.<sup>5</sup> States may use force to defend themselves against attacks by other states.<sup>6</sup> However, a large body of international law on state responses to attacks by non-state entities such as terrorist groups does not currently exist.

States are not guarantors of the security of their neighbors but they do have a legal obligation to take reasonable steps to insure that their territory is not used to launch armed attacks against other states.<sup>7</sup> Having been placed on notice that terrorist activity is originating from within their territory and thereafter demonstrating an unwillingness or inability to control such activity, a state is deprived to some degree of its right against non-intervention by the aggrieved state. In this case, in the absence of other effective remedies, the aggrieved state may enter the host state for the express purpose of self-defense against the terrorist threat. The aggrieved state may not generally attack the

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1. See generally S. C. Res. 1214, U.N. SCOR, 53d Sess., U.N. Doc. S/1214/(1998), and S. C. Res. 1373, U.N. SCOR, 54th Sess., U.N. Doc. S/1373/(2001).

2. *Id.*

3. Article 2(4) specifically provides that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” U.N. CHARTER, art. 2(4).

4. *Lotus Case (Fr. v. Turk.)*, P.C.I.J. (ser. A) No. 10 (1923), 2 Hudson, World Court Reports 20 (1929).

5. Kellogg Briand Pact, 27 Aug 1928, 46 Stat. 2343, 94 U.N.T.S. 57.

6. U.N. CHARTER, art. 51.

7. Oscar Schachter, *International Law: The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1626 (1984); JOHN F. MURPHY, STATES SUPPORT OF INTERNATIONAL TERRORISM at 89 (1989).

host state's government or attempt to overthrow it. However, when that government is actively engaged in supporting the terrorist, then it too becomes a lawful target. Under this rationale, the Taliban were clearly a legitimate target of the United States, after September 11th.

A note of caution is appropriate though. The general principle that states may not use armed force as a means of resolving differences with other states in a non-defensive setting is thoroughly agreed upon and is tremendously important to uphold. Taking the position, as some do, that there is no international law governing use of force is not only silly but it is harmful to the notion of the rule of law that prohibits states from engaging in aggressive wars.

### **Michael Schmitt**

Once the Taliban refused to comply with the demands of the United States, it relinquished the exclusive right to act against al Qaeda. At that point, the Taliban right to territorial integrity was subordinated to the right to self-defense possessed by the United States. This type of distinction is of critical importance because many states provide support to different rebel groups. This difference needs to be maintained to prevent the argument that any state providing support to a rebel group in another state is engaging in an armed attack thereby authorizing the state to invoke self-defense as a basis for action. The US support of the Iraqi resistance is a great example of this. Clearly, the United States does not want to be in a position where international law permits Saddam Hussein to claim a right of self-defense against the United States simply because the United States is funding the acts of the Iraqi resistance.

Recognizing that the right to self-defense may only have applied initially against al Qaeda, as soon as the Taliban interfered with the US exercise of that right the Taliban properly became targetable as well. Such interference would have been wrongful and would constitute an armed attack by the Taliban, justifying the application of force against the Taliban by United States and coalition forces. I remain somewhat surprised that US and UK forces engaged the Taliban on the first day of Operation ENDURING FREEDOM instead of waiting until Taliban forces proved they were hostile to the exercise of US self-defense. Certainly, had coalition forces waited until the demonstration of such hostility by the Taliban, their claim that their actions against the Taliban were legitimate because they had been attacked and were exercising the right of self-defense would ring truer.

**Wolff von Heinegg**

I would caution against a rush to abolish recognized principles and rules of international law just to serve certain purposes. So for example, if it is agreed the Taliban is the de facto regime, the Taliban should be treated as such and the protections of the Third Geneva Convention should be applied to Taliban members.<sup>8</sup>

**Christopher Greenwood**

The Taliban cannot be considered anything other than the de facto government of Afghanistan immediately before the use of force in October. They controlled 80% of the territory of the country. They controlled virtually all the levers of power within the state and all of the ordinary organs of government from the central bank to the air traffic controllers. The border authorities were taking their instructions from the Taliban. I know it was not the kind of government the civilized world is used to. However, in functioning terms it was the government of Afghanistan. And therefore its acts are imputable to Afghanistan. I agree with Professor Schmitt that this makes the actions of the coalition easier rather than more difficult to justify. However, I do not believe that the question of whether it is convenient to us or not that these people were the government of Afghanistan has any real bearing on the question of whether they were in fact the government. It seems to me that we have become all too ready to accept interpretations of the law on the basis of the convenient result which they produce. As lawyers we should have the integrity to say this is what we think the law is. If the consequences of that are inconvenient, let us look to see what we can do about that. We should not, however, allow the wish to be father to the thought.

*Legitimacy of the Use of Force*

**Robert Turner**

As is well established, there are two instances where force may be appropriately used pursuant to the UN Charter: when authorized by the Security Council and in different variations of self-defense.<sup>9</sup> Interceptive self-defense or anticipatory self-defense is the theory that force may be used in order to protect against the prospective loss of lives caused by an armed attack. It is true

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8. See generally Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3516.

9. See U.N. CHARTER arts. 42 and 51.

historically, pre-UN Charter, that if a state was slaughtering its own citizens, another state would have no legitimate basis for intervening as these were purely matters internal to the affairs of the state. However, the growth of international humanitarian law subsequent to the Charter clearly recognizes that individuals have internationally respected rights and that when a state does engage in an act like genocide, it is not an internal matter. It is a matter of legitimate global concern and international law should apply and prohibit such state acts. To promote such international law, states must act as if it is their customary practice to recognize a limited right of the world community to intervene, to stop massive slaughter of innocent people.

### **Wolff von Heinegg**

There is no need to refer to humanitarian intervention as a legal justification for the attacks on Afghanistan. There seems to be a general consensus that the fight against terrorism justifies the action taken in and against Afghanistan and probably in and against all other states similarly situated. Referring to humanitarian intervention as a basis for action against Afghanistan is counterproductive, lessening state credibility in the fight against international terrorism.

In looking at the action taken against Afghanistan, the strongest and best legal justification is self-defense. If it is proved that the acts of September 11th are attributable to the Taliban and thus to Afghanistan, every measure of self-defense may be taken. This is a very important point as it addresses the traditional concept of self-defense and what we are today ready to acknowledge to be within the competency of the Security Council. If the Security Council in Resolution 1373 requires states to take very concrete measure against international terrorism, every state is obliged to do just that. Such obligations are conferred upon states by the Security Council for the purpose of peace and international security. Benefiting from these measures is the entire international community and not just the United States or Germany. So these obligations laid down by the Security Council, for example in 1373, can be qualified obligations. When a state does not comply with such resolutions, it violates its obligations towards the community of states as a whole. This violation, when it constitutes a threat like permitting al Qaeda to continue operations in Afghanistan, can then be acted upon by the affected community of states as a whole. Clearly in a situation like this, there is no need to advocate humanitarian intervention as the basis for such actions when the self-defense position is so strong.

**Michael Schmitt**

It is important that Security Council Resolution 1368 and 1373 not be interpreted as use of force authorizations, which they clearly were not. To do so would seem to somehow imply that the Security Council needs to act before the right of self-defense matures and can be exercised. The law of self-defense provides all the answers necessary for determining whether the right to act exists for the United States as well as the international community. Security Council Resolution 1373 is relevant on the issue of whether or not the Taliban is in compliance with their obligations under international law to remove the al Qaeda threat on the territory that it controls. The resolution though, was not needed before the right to act in self-defense could be invoked by aggrieved states.

**Christopher Greenwood**

The self-defense case for the use of force by the Americans and their allies in Afghanistan is an extremely powerful one and should not be watered down in any way by trying to squeeze interpretations out of Security Council Resolutions or referring to humanitarian law as the basis for intervention in Afghanistan. This is a classic example of how to undercut a strong case. Although I am a supporter of humanitarian intervention, I do not believe that Afghanistan is a particularly good example of this. Instead of straining to understand actions in Afghanistan as for humanitarian purposes, we should instead stay focused on the self-defense reasons for such actions.

If a neutral state allowed a belligerent to conduct military operations from its territory or from its waters and refused to put a stop to that, then the receiving belligerent is entitled to take military action in the neutral's territory to put a stop to them. If the neutral state intervened to protect the belligerent it had been sheltering, then it exposed its own armed forces to attack. In the present case, this argument is particularly strong as the Taliban regime was subject to sanctions imposed by the United Nations beforehand for their support for al Qaeda. The Taliban made it crystal clear that they would resist vigorously any attempt by any part of the international community to deal with the al Qaeda presence in their territory. This is an important point as we do not want to give credence to a theory that as soon as any state has a group of terrorists which have operated from its territory, it exposes itself to armed attack. That very broad brush approach opens up the most horrific possibilities because at some time or other virtually every state however hard it had tried otherwise, had ended up with terrorists operating from its territory.

*On Regime Change In Iraq*

**Robert Turner**

Saddam Hussein's *non*-nuclear options are the options that truly frighten me. As we all know, Saddam Hussein is trying to obtain nuclear weapons and delivery systems. However, he is also playing with smallpox that is immune to known cures as well as with the bubonic plague. Saddam does not stop there either; he is playing with all sorts of biological systems that could be spread without leaving fingerprints and that could cause a major loss of life around the world.

As long ago as October 1990 I advocated the intentional killing of Saddam Hussein and I continue to feel that way.<sup>10</sup> Attacking regime elites who threaten international peace is clearly not "assassination" but is instead a legitimate act of self-defense which the United States should avail itself of. The same argument can be made for targeting and eliminating Osama bin Laden.

The consequences of military action in the Middle East are frightening, as there is the very real possibility that conflict with Iraq may spread and ignite the entire region. However, the penalties for inaction are even greater. Time is not on our side. The best way for the United States to deter Saddam and his procurement of weapons of mass destruction is by presenting a united front with the world community that demands the unfettered access of UN weapons inspectors.

One viable justification for attacking Iraq might well be a request from Israel for assistance under Article 51 given that Saddam Hussein has repeatedly admitted to not only encouraging people to engage in terrorism, but to providing money to pay the families of people who commit suicide bombings. Clearly, soliciting such acts against the sovereign territory of Israel violates international law and Israel and its allies are entitled to act in defense of Israeli citizens.

Moreover, given that the UN Security Council Resolutions of 1990 and 1991 remain valid, the conditions contained in them have not been met by Saddam Hussein, and since Saddam Hussein continued to aggressively pursue the development of weapons of mass destruction in violation of international law, it seems clear that sufficient authority exists to effect a regime change in Iraq. Saddam Hussein is acting aggressively, in violation of international law, and I believe it is legal for the world community to use force against Iraq to stop that threat. Furthermore, I also believe that it is legal to specifically use force against Saddam Hussein as an individual if that is the best method available to end the threat to world peace.

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10. Robert F. Turner, *Killing Saddam: Would it be a Crime?*, WASH. POST, Oct. 7, 1990 at D1

**Michael Schmitt**

There is a colorable argument that an international armed conflict currently exists with Iraq and that the conflict is merely in a state of ceasefire. Given this, to the extent that Iraq has in some form materially breached the ceasefire agreement then recommencement of hostilities would be appropriate. This position certainly has merit.

**Yoram Dinstein**

Under the *jus in bello*, there is nothing inherently wrong in the targeting of enemy combatants. Enemy military personnel can be attacked either collectively or individually. Saddam Hussein, being the commander-in-chief of the Iraqi forces, is a legitimate military objective for attack by the United States.<sup>11</sup> Obviously, such an attack—like all other attacks—has to be carried out by lawful combatants on the American side, i.e., members of the armed forces wearing uniform, carrying their arms openly, etc.

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11. See Yoram Dinstein, *Legitimate Military Objectives under the Current Jus in Bello*, in *LEGAL AND ETHICAL LESSONS OF NATO'S KOSOVO CAMPAIGN* (Andru Wall ed., 2003) (Vol. 78, US Naval War College International Law Studies).