

Responsibility in the Hizbullah-Israel 2006 War :
Jus in bello, jus ad bellum

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During the war, I had been consulted by various groups over the possibility of an international court action, indeed openly by the Hizbullah foreign relations senior official in an eerie debate on television. My response was invariably negative: action cannot be taken without implicating Hizbullah. If the Hizbullah leadership was ready to stand before an international court, one could examine further possibilities. Without this readiness, it would be futile to start any case. I know that the Lebanese government prepared an action of compensation, and entrusted it with a leading judge. I do not know that it could be presented in earnest before an international jurisdiction, were one to be found. International jurisdictional competence is remarkably difficult to get asserted.

I Jus in bello

In war, one tends to see only the atrocities the other side perpetrates, and there was a sense of outrage I could detect from that official, whom I had known for several years, and who couldn't comprehend how the lawyer for the victims of Sabra and Shatila would waver over a court action for the victims of the second Qana massacre. On 18 April 1996, during the so-called operation of Grapes of Wrath, over one hundred civilians had been killed by shelling, and the UN had concluded that the bombing was deliberate: '[i]t is unlikely that the shelling of the United Nations compound was the result of gross technical and/or procedural errors.' [Report dated 1 May 1996 of the Secretary-General's Military Adviser concerning the shelling of the United Nations compound at Qana on 18 April 1996, 'Findings'.] On 30 July 2006, 28 people huddling in a frail shelter in Qana were also killed by aerial bombing. This time, there was no investigation, but the massacre did turn the tide, to some extent, of Lebanese outrage against Hizbullah.

Technically, war trials could be segmented, and they occasionally have, usually with a tinge of victors' justice as in Nuremberg. There have been limited prosecutions for some egregious war crimes -- one is not sure that the Abu Ghreib cases quite fit in that category. Particularly egregious in the Hizbullah-Lebanon war of July-August 2006 was the launch by Israel in the last few days of hundreds of vicious fragmentation bomblets, cluster bombs known as 'grapes' in Arabic, that continue to kill to date, mostly children for their lack of awareness of their lethal effect. I cannot imagine how, under any scenario, the use of this sort of weapon can be condoned. [In a remarkable article by John Borneman, 'The state of war crimes following the Israeli-Hezbollah war', *Windsor Yearbook of Access to Justice*, 25, 2007, 53- 69, at 55, 65, he mentions how the Israeli army deliberately 'flooded' in the last two days of the war some 1800 bombs carrying 1.2 million bomblets in the Lebanese South.] The Israeli government and army will always conjure up some military justification for their use. Anything less than jail for the

commander who took that decision makes a mockery of *jus in bello*. [Professor Ken Mann, in oral response, argued the Winograd Report defence, that those weapons are not formally banned in international law. This is beside the point, since the use of weapons, and not their nature, determines whether a war crime has been committed. A knife stuck at a prisoner of war transported in an ambulance is a war crime, no one argues that knives are forbidden weapons in international law.]

On the other side of the breach, and whatever Hizbullah's claims to the contrary, rockets lobbed over Israel, and in particular the Galilee, could hardly make the distinction between civilians and the military. An additional painful irony is that as many Arab civilians of Israel were killed as Jewish civilians in the rocket attacks, and one of the significant blunders of the Hizbullah leadership when that toll rose was their call for Israeli Arabs to leave, to which the answer was that the Israelis had been trying to do just that, to force us to leave, for sixty years.

So the atrocities neutralize each other, effectively, for neither party is ready to stand in any judicial forum to account for its crimes. So no court action, and no responsibility expected for *jus in bello*.

II *Jus ad bellum*

Jus ad bellum is more interesting, but even fuzzier. I took an early position on this, by making a statement about the responsibility of Hizbullah in starting the war by crossing the Blue Line and killing and abducting Israeli soldiers. [Mallat, *Daily Star*, 14 July 2006.] This is in line with my early depiction of the war as a Hizbullah-Israel war. [*New York Times* series on the war, July 2006.] 90 per cent of the devastation of Lebanon was Shi'i, Hizbullah territory. In the South, the city of Saida, a mostly Sunni city, was hardly bombed. Everyone was devastated, to various degrees, in Lebanon. Within a month, with a tight siege that left a semi-hostile Syria only as an occasional supply of fuel, mostly illegally, and its replenishing of Hizbullah weaponry under night cover, the country ground to a halt. But the difference in suffering was qualitative: a million Lebanese Shi'is were forced out of their homes, and the casualties were to the tune of 90 to 95 pc Shi'i. Here is an additional paradox over the war: the Hizbullah leadership's claim of 'divine victory' in the teeth of the rest of the Lebanese. Some one thousand Lebanese civilians were killed, the South of Lebanon was devastated, and the Beirut Southern suburb known as the *murabba' amni* (security square) obliterated. We are talking about one square kilometer neatly separated by relatively large thoroughways on all four sides. I visited the square during a lull three weeks into the five-weeks war. This was a hallucinating experience, not one building was spared. They had been either reduced to rubble or to an outward shell. The more lunar sense came from the fact that buildings on the other sides of the thoroughfares were intact.

One could actually see the strategic thinking in Israel shifting in the very early days, three days exactly, from engaging the whole of Lebanon with bombing the roads across the

country, to the later concentration on Hizbullah and the population presumed to support it.

There was more: one thing I did not emphasise at the time was the violation of Lebanese law by Hizbullah, more specifically the coup that it was in effect engineering. There is some debate between my distinguished colleagues Carlos Eddé, a courageous leader of an old, decent political party in Lebanon, and journalist Michael Young over the paternity of the 'coup' label [See Mallat, 2221- *Lebanon's Cedar Revolution: An essay on justice and non-violence*, Beirut 2007, 92-3]. When Hizbullah turned its weapons to the heart of Beirut, which it has occupied *manu militari* since December 2006, the matter became clear to me. Contrary to the benign view that this is part of people's right to demonstrate, the move is supported by the lethal force of Hizbullah. In the first place, very few demonstrators are physically on those grounds. But those who are forcefully prevent people from crossing into downtown Beirut, choking the city and devastating its businesses. The continuous coup is the result of the ignoring by the Lebanese government of Hizbullah taking the country to war against the government in which they participated at the time, and against the massive choice of the population.

As is inevitably the case considering the century-old zero-sum nature of the Arab-Israeli conflict, there is another side of the coin: the Israeli government, and I would also add the American government's responsibility for the war. As early as July 13, I had argued before friends active in one way or the other at the Security Council, and with the US ambassador in Lebanon, that a Security Council decision should be issued henceforth condemning Hizbullah's violation of international law, and asking for the release of the two soldiers. The Israeli and US government chose otherwise. I think that was a grave mistake. While it squares well with Israeli oblivion to the other side, whomever it might be, and its recurring pretense about the absence of partners in peace, the US government responsibility in fanning the flames of the war is more troubling. This is virtual history in its purest manifestation: what would have happened if the Security Council, instead of remaining silent for five weeks, had condemned the attack and requested the surrender of the two soldiers, 'otherwise'... ?

Now the conflict may be described as a zero-sum game, it is also asymmetrical, typically so in many ways in the Hizbullah-Israel war. One of the dimensions of this asymmetry is particularly disturbing: Israel has thousands of prisoners of war, the other side has three, one with the Hamas group in power in Gaza. In fact, an averted ideologue would point out that Hizbullah did not breach the fragile peace on the border on July 12, but that Israel did earlier that year when two Hamas operatives were assassinated in Saida. I must say that I saw this as a grave development at the time, especially when a statement from a Sunni Islamic group accused the Hizbullah leader of betrayal for protecting the border against incursions by Palestinians. With targeted assassinations an open policy of the Israeli government over the past five years, a troubling layer of international law violations is added. With its one-sided continuation, asymmetry increases. Opposite is a policy of suicide bombing, itself an instance of crime against humanity according to Amnesty International. With no set beginning of a hundred-year war, the difficulty of the argument of *jus ad bellum* over such a deep, protracted conflict as the Arab-Israel war

saga becomes evident. It was a telling development in the 1973 war that the world did not condemn the Egyptian-Syrian attack against Israel, for the dominant perception of the October War was that it represented a legitimate response to the occupation of Syrian and Egyptian territory seven years earlier. This is also what makes the Arab-Israeli conflict so intractable, for it did not start in 1967, but in 1948.

I still condemned the July 12 attack as a clear case of *jus ad bellum*. Some sort of a Gestalt is needed, which is perforce relative [Borneman discards the *jus ad bellum* argument on the basis that the narratives of the two parties cannot be reconciled. I do not agree, but accept the difficulty, in a protracted conflict like the Arab-Israeli conflict, to define 'the beginning' of armed hostilities. See my *The Middle East into the 21st Century*, London 1996, chapter 1.] It is interesting that the argument won a recognition of sorts when the Hizbullah leader famously stated that he would not have allowed the July 12 abduction had he known what ensued. One of his Lebanese foes asked him to therefore resign. This was unlikely, since responsibility does not easily attach in the Middle East, and rulers tend to be ensconced in their power regardless of massive criticism -- the last time a decent resignation took place was when the late Itzhak Rabin left office upon the disclosure of a joint bank account abroad with his wife.

This was in 1974. With political responsibility lacking so remarkably in the Middle East, I hardly see any judicial accountability sticking.