

REPRISAL UNDER INTERNATIONAL LAW: A DEFENSE TO CRIMINAL CONDUCT?

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ABSTRACT

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The doctrine of reprisal in the laws of war authorizes execution of an otherwise illegal act under the law of armed conflict if it meets certain conditions, including a prior illegal act by the first party and an effort to redress that wrong short of conflict. The responding illegal act becomes authorized under the law of war if it is proportionate to the original wrong and is done to compel the offending state to comply with the laws of war. International conventions have limited the targets subject to reprisal, such as prohibiting them against prisoners of war, but the doctrine survives. In order to afford soldiers alleged to have committed war crimes during operations in Afghanistan and Iraq particularly, this paper proposes a model instruction for courts-martial that makes the doctrine of reprisal available as an affirmative defense to criminal charges. The model instruction encompasses the traditional components of reprisal under the law of war, but aims to offer a remedy to soldiers who must distinguish between combatants and non-combatants on these battlefields and whose actions may subsequently be characterized as criminal. Reprisal is a viable law of war doctrine for today's military forces.

REPRISAL UNDER INTERNATIONAL LAW: A DEFENSE TO CRIMINAL CONDUCT?

Revenge is a kind of wild justice; which the more mans nature runs to, the more ought law to weed it out. For as for the first wrong, it doth offend the law; but the revenge of that wrong putteth the law out of office.

—Francis Bacon, *Essays: Of Revenge* (1597)

Current military operations in Iraq and Afghanistan have presented myriad challenges to the United States armed forces at many levels, from strategic to tactical, from large unit formations to the individual soldier. American forces have daily faced an enemy that fights outside the normal construct addressed in the laws of armed conflict on which our servicemembers train. There are numerous examples where esoteric discussion of the applicability of the laws of war by legal scholars are challenged by the experience of a soldier walking patrols day after day during his tour of duty in Iraq or Afghanistan.

The policy of the United States is to abide by the laws of armed conflict and maintain the moral high ground, even in cases where some might argue the conventions of international law do not apply. Maintaining that standard of observing legal norms allows the United States to demand observance of the law by others. In Iraq and Afghanistan, however, calls for compliance by the enemy with the laws of war have not achieved such respect for these standards. The enemy, in fact, fights wars based on a variety of practices in direct violation of the laws of war, including failing to discriminate between combatants and non-combatants, using weapons and tactics that cause unnecessary harm, and torture, mutilation and desecration of casualties. In spite of these challenges soldiers face in tactics used against them, the United States has conducted several courts-martial designed to hold American servicemembers

accountable for their actions during war, applying the laws of armed conflict and demanding adherence.

It is time, however, to ensure American servicemembers get the full protections of the law of war in waging their own fight, and to hold them accountable in greater consideration of the full circumstances on the ground that these soldiers face every day. In order to accomplish this goal and to allow soldiers whose actions are questioned to offer a context to their response, the United States should apply and enforce the doctrine of reprisals. If “violating the law of war, even in a manner it allows, is a repugnant act, yet an even more repugnant act is to allow an adversary to violate that same law with impunity.”¹ American soldiers should have an opportunity to use the law of war to demand compliance, and changes in the law should ensure soldiers have an opportunity to present as part of their legal defense that their actions were in response to illegal acts of the enemy. In some cases, the prior illegal acts of the enemy may provide a legal excuse for American soldiers’ actions.

Reprisals under International Law

Reprisal is an otherwise illegal act done in response to a prior illegal act by an enemy, proportionate to the original wrong and designed to compel the enemy to desist from his illegal acts on the battlefield. Under such circumstances, the law of armed conflict recognizes the otherwise illegal act as legal. International law has evolved in its application of the doctrine of reprisal to avoid an increasing spiral of violence as one side reprises against another’s illegal acts generating increasingly violent bloodshed, when the laws of war are designed to regulate and limit such harm. Some commentators have gone so far as to suggest that international law should no longer

recognize the doctrine of reprisal due to its lack of efficacy. But the doctrine lives, notwithstanding efforts to ban reprisals in international conventions, and soldiers should be allowed to avail themselves of the doctrine in defending their actions alleged to be illegal.

Naulilaa Case

The classic definition of reprisal comes from the *Naulilaa* case, involving claims between Portugal and Germany, in which the arbitration tribunal stated:

Reprisals are an act of self-help on the part of the injured states, responding after an unsatisfied demand to an act contrary to international law on the part of the offending State They would be illegal if a previous act contrary to international law had not furnished the reason for them. They aim to impose on the offending State reparation for the offense or the return to legality in avoidance of new offenses.²

The aim of the reprisal, and the element that distinguishes it from an act purely of self-defense or vengeance, is to compel another state or entity to abide by international law and the laws of war in the on-going battle, or *jus in bello*.³

In addition, the *Naulilaa* case laid out requirements or limits on use of reprisal by a state, including: (1) that the reprisal may only be carried out by a state or its agent or instrumentality; (2) the act of reprisal must be proportionate to the illegal act it responds to; and, (3) there must first be an attempt to resolve or address the illegal act by other than resort to force. In *Naulilaa*, the arbitration panel found the state claiming authorized reprisal, Germany, had not met the requirements in that the response was not proportionate, having destroyed Portuguese forts and posts in six separate acts in response to the loss of three Germans; the earlier Portuguese misunderstanding did not violate international law; and there had been no attempt to resolve the matter peacefully

before resorting to reprisal.⁴ Notwithstanding that Germany's claim of reprisal was found to be without merit, the standards enunciated remain valid.

Elements of Reprisal

At first blush, the first element of reprisal under *Nautilaa* might appear to make this doctrine inapplicable to Operations Enduring and Iraqi Freedom where the violator is not a state. But the importance of the state requirement is to limit the possibilities of unconstrained responses characterized as reprisals and an abrogation of compliance with the law of war by a party to the conflict. The law should read "state" generally to mean a party to the conflict, without regard to state borders. Thus, where Al Qaeda or Shi'a or Sunni groups or cells have waged a fight against American forces in Afghanistan and Iraq, then these cells or groups become essentially the "state" for analysis of the reprisal doctrine. At the same time as one examines the source of the original violation, so also must one examine the nature of the violation. An illegal act that might give rise to reprisal must be a violation of the law of armed conflict, that is, a law regarding the conduct of war and not the precipitation of conflict. Addressing reprisals within the context of the conduct of war avoids entities committing illegal acts, characterized as reprisals, simply based on the allegation of an illegal act of aggression, or *jus ad bellum*.

The requirement for proportionality in reprisal may not be a purely 1:1 calculation, particularly as there is no requirement that the form of reprisal match the nature of the original illegal act, e.g., an illegal use of a weapon by the first actor does not limit reprisal only to another illegal use of that kind of weapon. But as the *Nautilaa* arbitration found the German claimed reprisal illegal based in part on lack of proportionality, states

must articulate the basis for the measure of response. In assessing whether the response is proportionate, one considers that the basis for the reprisal is to force compliance with international law. This proviso may mean that less harm might compel the desired compliance, but the upper limit on proportionality in reprisal would appear to be the level of violence in the original act. The Commission of Experts convened by the United Nations noted that “the proportionality is not strict, for if the reprisal is to be effective, it will often be greater than the original wrongdoing. Nevertheless, there must be a reasonable relationship between the original wrong and the reprisal measure.”⁵

The third element of attempting to address the illegal act by means other than resort to force characterizes reprisal as a last resort, or the principle of subsidiarity.⁶ Although means short of force are preferred, such alternatives are not required where expeditious response will save lives. Requiring resort to peaceful resolution, however, reinforces the efforts to avoid upward spirals in violence by entities claiming reprisals.

Additional elements of reprisal found in customary international law include notice, *i.e.*, warning of the reprisal action, and that the reprisal is temporary in that it ceases once the adversary stops violating the law.⁷

International Conventions and Reprisal

International law and treaties have addressed reprisals and over time circumscribed their application by more limited definitions of persons or things subject to reprisals. Largely in response to reprisals in the First and Second World Wars, parties to the Geneva Conventions prohibited reprisals against prisoners of war, and later extended the prohibition to the wounded and sick, and medical personnel and their equipment or facilities.⁸ Civilians and civilian property in occupied territories or

internment also gained protection from reprisals, as did cultural property. The Protocols to the Geneva Conventions sought further to expand the protected groups from reprisal, but those provisions met resistance and many ratifying states asserted reservations to the reprisal limitations. Currently, the Geneva Conventions do not contain a ban on reprisals, but for international armed conflicts any reprisals must be directed against combatants or other military objectives.⁹

The importance of this evolution in the law is to reflect the growing concern to protect classes of people and property from unlawful violence even during a conflict, but also the continued insistence by states on the viability of the doctrine of reprisal. This view thus recognizes the existence of non-compliant entities with the law of armed conflict and the need to respond and compel their adherence to a standard of conduct. Applying this view to on-going operations in Afghanistan and Iraq, there is a need to compel enemy forces to comply with rules regarding the conduct of war, and exhortations by the United States have not succeeded. In such cases belligerent reprisals remain one of the only viable sanctions in the face of persistent violations of the law of war.¹⁰ The greater challenge for parties executing reprisals is to identify and target parties that are not protected. This discrimination is particularly challenging where the enemy does not distinguish itself by appearance or uniform, and where the lines between participants in the war and those who abstain are so vague. As noted by one scholar, urban bombings in World War II, justified as reprisals, “reduced the laws of war to the vanishing point.”¹¹

Considerations against Reprisal

A criticism of reprisal as a means of self-help by states is that it fails to serve any effective deterrent function and, in fact, is just as likely to escalate conflict. Certainly on today's battlefields, the enemy who routinely commits law of armed conflict violations has shown no motivation to alter his behavior to comply with international law. The most logical alternative to reprisal might be an effective tribunal to hear claims of the state victim of the illegal act. But historically such tribunals lack efficacy during a conflict, and they may rely on the offending state to turn over custody of the alleged violator. Rarely will a state take such action against its own citizenry or members of its armed forces. The United States course of action is to hold members of its armed forces accountable through its own judicial process, applying the Uniform Code of Military Justice to acts committed on the battlefield.

Remoteness in time of the sanctions from an international tribunal, assuming it gains competence from consent of the parties, reinforces the need for reprisal as an option for victim states of violations of the law of armed conflict. The threat of reprisal gives force to the demand for a state to refrain from violations in the conduct of war, or at a minimum, may deter more egregious behavior. The issue for today's conflicts is whether a non-state entity that shows virtually no compliance with the law of armed conflict will or can be influenced to cease their violations if they experience treatment in kind; or, whether a series of reprisals may constitute a continuous exchange of increasingly violent hostilities.

One might resolve the viability of the doctrine of reprisals depending on whether one adopts a traditional view of international law characterized by reciprocity between states. In that case, the wrong done by one state merits a wrong done unto it by the

victim-state. The modern construct, however, calls for obligations not only to other states under international law, but also to the international community at large, and respect for human rights to all peoples that would dissuade recourse to reprisal notwithstanding the wrong done by an opposing entity.¹² The 1949 Geneva Conventions reinforced the obligation of a state's respect toward non-combatants "in all circumstances" as opposed to determining its actions based simply on state to state reciprocity.¹³ Current application of this adherence to international human rights law as a basis of prohibiting all forms of reprisal was enunciated by the International Criminal Tribunal for the former Yugoslavia (ICTY):¹⁴

The Trial Chamber wishes to stress, in this regard, the irrelevance of reciprocity, particularly in relation to obligations found within international humanitarian law which have an absolute and non-derogable character. It thus follows that the tu quoque defence has no place in contemporary international humanitarian law. The defining characteristic of modern international humanitarian law is instead the obligation to uphold key tenets of this body of law regardless of the conduct of enemy combatants.¹⁵

The ICTY asserted that international prosecution for war crimes was the remedy for violations rather than reprisals; notwithstanding the pronouncements of the ICTY, however, the doctrine of reprisals is not dead.

United States Rules Regarding Reprisals

United States regulations permit reprisal by US forces as laid out in Field Manual (FM) 27-10, Law of Land Warfare.¹⁶ It recognizes reprisal as a proper remedial action for violation of the law of war against the United States.¹⁷ The Army rules prohibit reprisals against prisoners of war, the wounded and sick and protected civilians, but permit reprisals against enemy troops.¹⁸ Of note, FM 27-10 adheres to the tenets of international law by expressly prohibiting reprisals as a form of revenge, and further

requires that individual soldiers should not execute reprisals unless approved on order of a commander, but without further specifying the level of a subordinate commander who may approve a reprisal.¹⁹

The argument against reprisals exists that, insofar as “any situation ‘where a belligerent reprisal seems permissible presents the belligerent with an opportunity to violate a rule of the law of war with impunity.’”²⁰ As the doctrine of reprisal developed, an act of reprisal could only be taken by authority of the government of a state.²¹ Illegal acts in World Wars I and II resulted in indiscriminate attacks that killed civilians, but the belligerent parties qualified their acts as reprisals, and therefore asserted they were not illegal.²² Discussion in drafting Protocols I and II to the Geneva Conventions had as one view that actions in reprisal could only be taken at high levels of government,²³ reflecting a desire that by withholding authority to a higher level might avoid a series of counter-reprisals that would result in ever increasing violence. Requiring high level approval also responded to the argument against reprisals that the likelihood an individual who committed a violation of the law of war would be tried by national courts is meager, and if tried, the offender would likely only receive a mild punishment.²⁴ In the United States military, on the other hand, courts-martial have held soldiers accountable for their actions on the battlefield.

An additional challenge with regard to belligerent reprisals is that most often the target of the reprisal is not a perpetrator of the initial illegal act that forms the basis for the reprisal. Rather, the victim is part of the group, or collective, and under a rubric of collective responsibility is made to suffer for the acts of others in that group.²⁵ The

Oxford Manual addressed the authority to inflict harm on other than the perpetrators as follows:

If the injured party deem the misdeed so serious in character as to make it necessary to recall the enemy to a respect for law, no other recourse than a resort to reprisals remains. Reprisals are an exception to the general rule of equity, that an innocent person ought not to suffer for the guilty. They are also at variance with the rule that each belligerent should conform to the rules of war, without reciprocity on the part of the enemy.²⁶

Although a reprisal target may not have been a perpetrator, clearly neither could he be a prisoner of war. The 1929 Geneva Convention Relative to the Treatment of Prisoners of War protected this group of potential targets, and the United States Military Commission following World War II relied on that authority in denying a reprisal defense. In the trial of General Anton Dostler in October 1945, the Commission reaffirmed there could be no reprisal against prisoners of war, and found Dostler guilty of having had fifteen American prisoners executed.²⁷

While proper reprisal measures are executed against an enemy not in compliance with the laws of war, the challenge exists for American servicemembers in Afghanistan and Iraq to distinguish combatants and non-combatants. The enemy does not wear a uniform and operates among the civilian populace; those civilians may provide assistance to the enemy or carry out their own attacks on US forces. When the local citizenry becomes involved in the war effort against American soldiers, then they become subject to targeting for reprisals. The aim of reprisal is then to compel the enemy authorities to bring the local citizenry in line, both to adhere to the law of war and to protect the enemy force that may be subject to acts of reprisal.²⁸ But where the status of the offender is not clear, the reprisal target may be subject to scrutiny after the fact. In this regard, the soldier executing the reprisal that caused civilian casualties

must be allowed to try and color his actions as reprisal, if the act meets the provisions as set forth below.

Applicability of Reprisal Doctrine in Today's Conflicts

Turning one's perspective to the view of the soldier lends support to the vitality of reprisal. At the same time, the law and policy must recognize the incentive of nations to maintain the value of reputational capital by acting in accordance with standards of international civility.²⁹ Notions of equity gave rise to reprisal, allowing a wronged individual to seek redress; but when private remedies became excessive, then states took control of rights of reprisal.³⁰ Shifting the responsibility from state to soldier is acceptable now inasmuch as there is a system of accountability for violations through the military criminal justice system.

The doctrine of reprisal gathers further support in the context of today's wars, where coalition soldiers face a non-state actor who does not adhere to the law of war. As fighting in Afghanistan and Iraq drags on over several years, American society increasingly looks at matters not simply as to what is happening over there, but with growing attention and empathy to how it is affecting this nation's soldiers who endure these battles. Growing support for these soldiers makes it more palatable for society to embrace reprisal. And if the doctrine of reprisal enjoys popular support, then law of that society should similarly reflect support for the doctrine.

Reprisal and Military Law

The challenge in applying reprisal is the context and who espouses it. There have been numerous allegations of American soldiers having committed major crimes on today's battlefields, including aggravated assault, rape and murder. Rarely, if ever in

Afghanistan or Iraq, has a declaration that such an action is a lawful reprisal preceded commission of the act. It is after commission, discovery and charging that a soldier might posit reprisal as an affirmative defense³¹ to criminal charges. In order to put an event in context, the first step in investigating alleged unlawful acts should be to develop a general overview of the military situation. Next, the individual should not be charged or convicted on the basis of hindsight but using information available to him at the time of the event in question. Analysis and inquiry should include a review of the tactical doctrine of opposing forces, in this case relying frequently on violations of the law of armed conflict, and the tempo of military operations considered as a relevant factor in determining the legitimacy of the enemy attacks. Ultimately, no criminal liability should attach for good faith errors, and the duration and intensity of the attacks is relevant in determining culpability.³²

The Manual for Courts-Martial³³ provides special rules for defenses, and specifically for those, such as reprisals, in which the accused does not deny having committed the objective act constituting the charged offense, but denies criminal responsibility.³⁴ In such cases the accused soldier assumes the burden of proof to establish his defense and to show that the death or injury caused was justified.³⁵ Additionally, the law recognizes a mistake of fact defense³⁶ if an accused soldier thought, for instance, that the enemy's original act was a violation of the law of war, and relied on that act as a basis for his reprisal.

Timing of the characterization of an act as reprisal is not in and of itself determinative that it is or is not a lawful reprisal. There must, however, be some correlation between the precipitating illegal act and the offending act defended as

reprisal. The relevant connection may be evaluated by time or individuals; that is, has the soldier accused of wrongdoing suffered from illegal acts of the enemy, and was that a basis for his conduct. It is important at this point in analysis not simply to underwrite acts of vengeance, but to apply the legal doctrine and note that reprisal by a soldier at a given time must intend to reform the conduct of his adversary, and not simply wreak vengeance, for “an unlawful act committed under the guise of retaliation or vengeance remains unlawful, and the claim of retaliation or vengeance is no defense.”³⁷

Recognizing reprisal as an affirmative defense puts the burden on the soldier to prove the propriety of his actions. That defense itself forces the accused soldier to act with conviction, for the defense of reprisal at court-martial requires the soldier to admit the illegal nature of his act, but assert its lawfulness in a broader context. The defense then assumes the burden of proving an earlier illegal act by the enemy, and the soldier’s authority to execute a reprisal, thereby making his otherwise illegal act lawful in accordance with the doctrine.

The best means to analyze reprisal as a defense to criminal charges is to consider the legal instructions a fact-finder would consider and apply to the facts as proven. Department of the Army Pamphlet 27-9³⁸ contains legal instructions, and this paper proposes adding the following instruction for courts-martial in which an accused soldier asserts a defense of reprisal:

The accused in this case relies on the doctrine of reprisal to justify his actions. If you find that the prosecution has not proven beyond a reasonable doubt that the accused committed the charged offense, then the accused is not guilty and you need not make any findings as to reprisal. If, on the other hand, you find the prosecution has proven the accused committed the charged illegal act, then you must consider whether the doctrine of reprisal excuses the wrongful nature of the accused’s act. In order to be valid, an act done in reprisal must meet the

following conditions: (1) there was a prior law of war violation committed by an enemy combatant, (2) that the accused, if he acted on his own authority, made an effort to redress the illegal act before resort to force, (3) that the act done by the accused was proportionate to the enemy's illegal act, and (4) that the act of the accused was done with the intent to make the enemy conform his conduct to the laws of armed conflict and not merely as an act of vengeance, the latter of which is not protected by reprisal and does not constitute a legal excuse for criminal conduct.

This proposed instruction on the law of reprisal sets the framework for a court-martial to determine guilt or innocence of a soldier. But it is not formulaic so that a court-martial simply finds evidence of each component; rather, there is ample room and need for the court to balance the evidence and apply reprisal as a defense. This balancing reflects the concern that, "[o]ne must place oneself back into that period of stormy battles....in a quiet discussion of the legal basis, these things sound very difficult and even incomprehensible. Expressions made at the moment of embitterment, today, without an understanding of that situation, sound quite different."³⁹ In assuring that American forces continue as a military that values compliance with the law of armed conflict, the court-martial must consider particular aspects in balancing evidence or claims in evaluating the reprisal. Where one recognized the law of belligerent reprisals, then reprisal exists as a possible defense to allegation of a war crime, especially where committed against a combatant.⁴⁰

There are numerous examples of violations of the laws of war committed by enemy forces in Afghanistan and Iraq since 2001, including murder of non-combatants, indiscriminate targeting, torture and murder of captured American soldiers. The criminal law must, however, not simply allow any soldier to cite to general illegal acts by the enemy to justify his conduct, but must show some connection to that soldier's service or experience. This causal proximity may be part of the calculus that supports a soldier's

decision to reprise, and the soldier must know his decision-making may be subject to scrutiny by a criminal court after the fact. The causal proximity could be a function of time (*e.g.*, a notorious event close in time to the act of the accused), location (*e.g.*, known criminal acts in or emanating from a specific village or community), method (*e.g.*, a truck bomb technique prevalent or popular), or unit (*e.g.*, the soldier's team, squad, platoon or company suffering casualties). Any of these bases are examples that might establish a soldier's proximity to an enemy illegal act that a servicemember could argue satisfies the first prong of a reprisal defense to allegations of criminal conduct. Further, this causal proximity analysis precludes every act a reprisal.

Evidence on the second element, that a soldier prior to committing reprisal made an effort to address the wrongdoing short of force, raises issues both of authority to execute reprisal and authority or method of redress. Although as noted above current Army regulation limits authority to order reprisal to a commander, the current conflicts warrant pushing this decision to individual soldier level. Army rules are not specific as to what level of command holds this authority; thus, advocating lower level responsibility is not antithetical to the current practice.

Some argue that authority for reprisals must reside at high levels in order to limit hasty or ill-conceived reprisals by subordinate commanders in the heat of the moment,⁴¹ but the court-martial system poses a check on widespread violations. Individual soldiers can execute reprisal, but they are criminally culpable if their actions do not fall within the parameters of the doctrine. This position supports the individual legal responsibility of soldiers to adhere to the laws of war. It also recognizes the nature of today's conflicts; that is, focus at small unit level and with individual soldiers the primary

executor of tasks and missions, as to former times where focus was on larger unit formations and movements.

In contrast to requiring causal proximity and individual soldier authority, however, the soldier defending on the basis of reprisal should not be required himself to redress the earlier wrong before resort to force. The intent is not to minimize the importance or fail to acknowledge the requirement to legitimize reprisal, but today's conflicts are with an enemy who has routinely flouted the laws of armed conflict, and to require redress efforts for each discrete violation makes reprisal an untenable doctrine. At the same time, one must consider that historically reprisal without any hope of compelling compliance by the enemy is not lawful reprisal. But "the reckless enemy often leaves his opponent no other means of securing himself against the repetition of barbarous outrage,"⁴² and the law should not allow an enemy to rely on unchecked violations of its own as a defense to acts done against the enemy. Therefore, although the effectiveness of reprisal to prevent violations of the law of war must be the objective of the reprisal, that may be the only means of deterring an adversary from committing violations of the law of war.⁴³

In the current context, rather than applying conventional doctrine to individual soldier decisions, the soldiers have freedom to act, but may be held to account for their decisions in a court of law. The finder of fact must then balance the evidence. There is in the end a gain in that soldiers do not face a non-compliant enemy without recourse to options to compel the enemy to adhere to legal standards. American soldiers will not act in the absence of law since their actions are subject to investigation, examination and accounting in the criminal courts.

Proportionality endures as an element of reprisal in the proposed instruction. Again, however, a court-martial has flexibility in assessing a proportionate response. As Walzer noted, “the kind and amount of permissible...violence is that which is reasonably designed so to affect the enemy’s expectations about the costs and gains of reiteration or continuation of his initial criminal act as to induce the termination of and future abstention from such act.”⁴⁴ The court measures proportionality either to the original violation or to the desired goal, and thus the reprisal may be more severe in order to deter the offender from future violations. At the same time, however, courts and military tribunals have exercised close scrutiny over the proportionality element of reprisal. For example, in the Adreatine Cave massacre in World War II, Germans claimed their actions against Italian prisoners were a lawful reprisal for the partisan killings of 33 German soldiers. But the tribunal found the German response was disproportionate and therefore not a lawful reprisal, insofar as the Germans killed 335 Italian prisoners, including five generals, 11 other senior officers, 21 junior officers, and six non-commissioned officers. The German response was disproportionate both in the number killed and status of the victims.⁴⁵

The final element of the reprisal affirmative defense is the characteristic that gives credence to the doctrine. Reprisal is not a practice to facilitate or authorize revenge, and courts-martial will hold accountable soldiers who seek to justify wanton violence.

Rarely is there direct evidence of intent, but a court deduces intent from myriad factors. This examination benefits an accused soldier by calling on review of all the circumstances, but with emphasis on the individual soldier, what he has seen and

experienced, and how that has influenced his actions. The ethical challenge then falls on the court-martial, not loosely to apply the law to clear a soldier of alleged wrongdoing, but to respect American's adherence to the laws of armed conflict. The additive with application of reprisal is the individual soldier's actions are measured against his current threat and he is credited with authority to execute the war.

Conclusion

The law of armed conflict has long recognized the doctrine of reprisal, enabling forces to respond to an enemy who violates the law of armed conflict during fighting. In today's conflicts in Afghanistan and Iraq, American soldiers have faced an enemy who routinely violates the law of war, and soldiers have been held to account in the criminal courts for their actions sometimes in response to the enemy. The United States armed forces should embrace the doctrine of reprisal in its military law in order to allow soldiers to place their actions in the context of the fight they wage daily. In some instances, these soldiers have acted properly in executing reprisals, and their actions should not be colored as criminal, notwithstanding that the actions themselves are illegal. Although today's enemy is persistent in committing law of war violations, soldiers must be allowed to respond and defend their actions using the long-standing doctrine of reprisal.

Endnotes

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² Andrew D. Mitchell, "Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law," *Military Law Review* 170 (December 2001): 156.

³ *Ibid.*, 157.

⁴ Michael J. Kelly, "Time Warp to 1945 – Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law," *Journal of Transnational Law & Policy* 13, no. 1 (Fall 2003): 4.

⁵ United Nations Security Council, *Commission of Experts' Final Report*, S/1994/674 (New York: United Nations Security Council, May 27 1994), in section II.F., Applicable Law, Reprisals, <http://www.his.com/~twarrick/commxyu3.htm> (accessed February 13, 2009).

⁶ Frits Kalshoven, "Reprisal," in *Crimes of War: What the Public Should Know (a-z guide)*, eds., Sheryl Mendez, Anthony Downkin, Roy Gutman and David Rieff (West Sussex, UK: John Wiley and Sons Limited, 2007), <http://www.crimesofwar.org/thebook/reprisal.html> (accessed February 13, 2009).

⁷ Ibid.

⁸ Shane Darcy, "The Evolution of the Law of Belligerent Reprisals," *Military Law Review* 175 (March 2003): 199.

⁹ United Nations Security Council, *Commission of Experts' Final Report*.

¹⁰ Shane Darcy, *Collective Responsibility and Accountability Under International Law* (Transnational Publishers, Inc., 2007), 174.

¹¹ Howard M. Hensel, ed., *The Law of Armed Conflict*, (Burlington, VT: Ashgate Publishing Company, 2005), 110.

¹² Mitchell, "Does One Illegality Merit Another?," 175.

¹³ Hensel, *The Law of Armed Conflict*, 173.

¹⁴ Ibid.

¹⁵ International Criminal Tribunal for Yugoslavia, *Kupreskic* case, Judgment of 14 January 2000 (para. 511), quoted in Howard M. Hensel, ed., *The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict* (Burlington, VT: Ashgate Publishing Company, 2008), 174.

¹⁶ U.S. Department of the Army, *The Law of Land Warfare*, Field Manual 27-10 (Washington, D.C.: U.S. Department of the Army, 15 July 1976), 176.

¹⁷ Ibid.

¹⁸ Ibid., 177.

¹⁹ Ibid.

²⁰ Stanislaw E. Nahlik, "From Reprisals to Individual Penal Responsibility," in *Humanitarian Law of Armed Conflict: Challenges Ahead*, eds. Astrid J.M. Delissen and Gerard J. Tanja (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1991), 165.

²¹ Frits Kalshoven and Yves Sandoz, eds., *Implementation of International Humanitarian Law* (AD Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1989), 388.

²² Hensel, *The Law of Armed Conflict*, 113.

²³ Nahlik, "From Reprisals to Individual Penal Responsibility," 170.

²⁴ *Ibid.*, 175.

²⁵ Darcy, *Collective Responsibility and Accountability Under International Law*, 131.

²⁶ *Ibid.*, 133.

²⁷ *Trial of General Anton Dostler*, United States Military Commission, Rome, 8-12 October 1945, Case No. 2, I *Law Reports of Trials of War Criminals* 22, in Shane Darcy, *Collective Responsibility and Accountability Under International Law* I(Transnational Publishers, Inc., 2007), 139.

²⁸ Darcy, *Collective Responsibility and Accountability Under International Law*, 141.

²⁹ Gary M. Anderson and Adam Gifford Jr., "Order Out Of Anarchy: The International Law Of War," *CATO Journal* 15, no. 1 (August 2004), <http://www.cato.org/pubs/journal/cj15n1-2.html> (accessed February 3, 2009).

³⁰ Kelly, "Time Warp to 1945 – Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law," 2-3.

³¹ William J. Fenrick, "Attacking the Enemy Civilian as a Punishable Offense", *Duke Journal of Comparative & International Law* 7 (date), 558.

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³³ *Manual for Courts-Martial, United States* (Washington, D.C.: U.S. Government Printing Office, 2005).

³⁴ *Ibid.*, Rule for Courts-Martial 916(a).

³⁵ *Ibid.*, Rule for Courts-Martial 916(b, c).

³⁶ *Ibid.*, Rule for Courts-Martial 916(j).

³⁷ United Nations Security Council, *Commission of Experts' Final Report*.

³⁸ U.S. Department of the Army, *Military Judges' Benchbook*, Department of the Army Pamphlet 27-9 (Washington, D.C.: U.S. Department of the Army, April 1, 2001).

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⁴⁰ Darcy, *Collective Responsibility and Accountability Under International Law*, 169.

⁴¹ Sutter, "The Continuing Role for Belligerent Reprisals," 4.

⁴² Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), 213.

⁴³ Sutter, "The Continuing Role for Belligerent Reprisals," 2.

⁴⁴ Walzer, *Just and Unjust Wars*, 211.

⁴⁵ Sutter, "The Continuing Role for Belligerent Reprisals," 5.

