

2001

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Recommended Citation

Michael F. Noone Jr., *Applying Just Was Jus in Bello Doctrine to Reprisals: An Afghan Hypothetical*, 51 Cath. U. L. Rev. 27 (2002).

Available at: <https://scholarship.law.edu/lawreview/vol51/iss1/5>

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APPLYING JUST WAR *JUS IN BELLO* DOCTRINE TO REPRISALS: AN AFGHAN HYPOTHETICAL

Michael F. Noone, Jr.⁺

*In the Pathan country, the presence of women and children in a village may be taken as a sure sign that the men belonging to it do not mean to fight. The fact need not of course influence the decision to destroy it*¹

*Most [Taliban field commanders] have never heard of international treaties on the treatment of POWs. For them, you are just infidels invading their land.*²

Father Schall surmises that American prisoners of Taliban forces might be tortured. I expected that American prisoners would be killed. As this is written, Northern Alliance successes have diminished either possibility. However, the threat remains both in Afghanistan and in other parts of the world in which U.S. Forces, trained to observe the law of war, will face warriors, not soldiers.³ The practices of the Taliban were graphically described by Milt Bearden who retired from the CIA in 1994 after spending thirty years in Clandestine Services and directing the final years of the Agency's covert war in Afghanistan. Bearden wrote *The Black Tulip*, a novel based on his Afghan experiences, when he retired. Early in the novel Taliban warriors ambush four Soviet soldiers, two of whom survive the attack. One of the Taliban, Salahuddin, approaches a survivor who:

[S]lowly raised his hands above his head in a primordial state of submission and settled into a sitting position on his knees. . .

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1. MAJOR C.E. CALLWELL, *SMALL WARS: THEIR PRINCIPLES AND PRACTICE* 269 (1899).

2. Timothy Gusinov, *Soviet 'deja vu' Offers U.S. Aid in Afghanistan*, WASH. TIMES, Nov. 3, 2001 at A6. Former Soviet Major Timothy Gusinov served nine years in Afghanistan.

3. See generally HARRY HOLBERT TURNEY-HIGH, *PRIMITIVE WAR: ITS PRACTICE AND CONCEPTS* (2d ed. 1971) (drawing the distinction based on tactics and behavior).

Salahuddin moved his face close to the young soldier's trembling lips and smiled reassuringly, even gently. He brushed his lips against the young man's forehead and tenderly slipped the V formed by the outstretched thumb and index finger of his left hand under the soldier's jaw. He tilted the soldier's blond head slightly upward and squeezed his neck firmly. When he was satisfied with the tension in the soldier's neck muscles, Salahuddin drew his long bladed knife from its scabbard, and in a single fluid motion cut the young man's throat and pushed his head down away from his knees to direct the pulsing lines of blood away from his own feet and legs. He closed his eyes and sang out softly, "*Allah hu akhbar*. God is great."⁴

The tone of the description suggests that Bearden had seen such an event. Similar evidence is offered by Richard Kidd who provided relief to refugees along the Afghan-Tajiki border in 1993 and returned to Afghanistan in 1998-1999 when he served as Planning and Operations Manager of the UN Office for Coordination of Humanitarian Assistance to Afghanistan. He reported that during his stays there, videotapes of the murder of a captured Soviet helicopter pilot were still circulating.⁵

When the first U.S. prisoner's throat is cut in Afghanistan or in some other primitive war, and that film is released, the American public will demand retaliation. The law of armed conflict rejects revenge as a motivating factor but permits reprisals, which the U.S. Army defines as:

acts of retaliation in the form of conduct which would otherwise be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the law of war, for the purpose of enforcing future compliance with the recognized rules of civilized warfare.⁶

An act of reprisal is intended to coerce the enemy to change its

4. MILTON BEARDEN, *THE BLACK TULIP* 36 (1998).

5. Conversation with the author; see also Richard Kidd, *How Afghan Men Fight*, at <http://www.csmonitor.com/cgi-bin/gettrasciarchive?script/2001/10/01/p11ss1.txt> (Oct. 1, 2001) ("We may see videos of American prisoners being killed."); LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 23 n.22 (2d ed. 2000) ("During the civil war in Afghanistan there were reports that Russian soldiers supporting the government captured by the *mujahudin* were frequently killed if they refused conversion."). "Soviet soldiers captured during their war in the 1980s were frequently staked out, sliced open and left to die slowly beneath the merciless Afghan sun, according to Western witnesses with the mujahedin at the time." Ken Ringle, *A 4,000-Year History of Glory and Blood*, WASH. POST, Oct. 3, 2001, at C4. See generally SVETLANA ALEXIEVICH, *ZINKY BOYS: SOVIET VOICES FROM THE AFGHANISTAN WALL* (U.S. ed. 1992) (describing Afghan atrocities and Russian retaliation).

6. Dep't of the Army, FM 27-10, *The Law of Land Warfare* 177 (1956).

behavior. In the philosopher Michael Walzer's words, "[it] is characterized by a certain posture of looking back, acting after, which implies a willingness not to act at all, to abide by some set of restraints,"⁷ and "[t]he backward-looking characteristic of reprisals is confirmed by the rule of proportionality that restrains them."⁸ Because the act of reprisal is intended to coerce, rather than to punish, it is, by its nature, directed toward the innocent not the guilty.⁹

Thus, two characteristics of the law of reprisal must cause concern: the persons acted upon will be innocent and the acts undertaken would be otherwise illegal. The first characteristic is, however, limited by other law of armed conflict rules. Some innocent persons, the sick, wounded, and prisoners of war, are classified as protected persons and, as such, are immune from reprisal as are some, if not all, civilians.¹⁰ U.S. military law limits reprisals to "enemy troops who have not yet fallen into the hands of the forces making the reprisals."¹¹ This right is subject to the principle of proportionality, which Walzer describes as a matter of adjusting means to ends¹² and distinguishes¹³ his backward looking views, which would presumably limit the number of innocent targets to the number of war crime victims, to the forward-looking "utilitarian" views of Myres

7. MICHAEL WALZER, *JUST AND UNJUST WARS* 210 (1977).

8. *Id.* at 211; Dep't of the Army, FM 27-10, *supra* note 6, at 177.

9. If a contemporary Salahuddin were to cut his prisoner's throat, he would have committed a grave breach of the law of war and is legally and morally responsible for his crime. GREEN, *supra* note 5, at 45. If the murder of prisoners were permitted, the doctrine of command responsibility imposes personal liability on all those accountable for his actions. *Id.* at 303-04. Salahuddin and his commanders could be prosecuted as war criminals. *Id.* at 309.

10. The 1949 Geneva Conventions, to which the United States is a signator, and now regarded by all authorities as customary international law binding on all states and, merely guarantees civilians in occupied territory protection from reprisals. The 1977 Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts adopted two protocols intended to supplement the 1949 Geneva Conventions. Provisions in the first of these protocols - which the United States has refused to ratify - seek to extend protection from reprisal to the entire civilian population. Arguably, extending protection to this new class of civilians implies that they are not presently protected by customary international law. Compare L. Lynn Hogue, *Identifying Customary International Law of War in Protocol I: A Proposed Restatement*, 13 LOY. L.A. INT'L & COMP. L.J. 279 (1990), with Hans Gasser, *Some Legal Issues Concerning Ratification of the 1977 Geneva Protocol*, in *ARMED CONFLICT AND THE NEW LAW* 81, 92 (M. Meyer ed., 1989)(describing the proposal as "the most far reaching innovation in the law on the conduct of military operations"). Whatever the (slight) logical merits of such an argument, unrestricted bombing of the civilian population or otherwise protected targets would be utterly inconsistent with United States values.

11. Dep't of the Army, FM 27-10, *supra* note 6, at 177.

12. WALZER, *supra* note 7, at 210.

13. *Id.* at 211.

McDougal and Florentio Feliciano whose calculus would call for an estimate of the number of innocent targets needed to prevent future violations.¹⁴ Whichever the calculus, my analysis leads to the conclusion that U.S. authorities could respond to public demands for retaliation by saying that the customary international law of reprisal would permit attacks, targeting, and tactics that would otherwise be illegal, but the right to do so is limited to opposing belligerent forces, however ill-defined, and by the principle of proportionality.

If reprisals against belligerent forces are permitted, two questions remain: what kinds of reprisals should be undertaken and what limits does the law of war impose on them? Father Schall's essay, which focuses on Aquinas' criteria for initiating a just war (*jus ad bello*) not those for waging it (*jus in bello*), causes us to reflect on both ends and means. First, Aquinas wrote the Summa¹⁵ for theologians, not princes, nor journalists, nor an informed electorate. In 1270, about the time he wrote, princes were at best marginally literate and certainly incapable of engaging in the sort of casuistry, which is the hallmark of rigorous Thomistic training. Presumably, a prince's Confessor was expected, by both his ecclesiastical superiors and the prince, to aid the ruler in deciding whether a martial undertaking met the moral criteria for a just war. *Jus ad bello* criteria are relatively crude, the medieval equivalent of a three-pronged Constitutional law test, but, when used by an artist like Father Schall, are capable of ensuring a morally nuanced and rationally satisfying conclusion which can be understood by our modern princes, the media, and the voters.

What of *jus in bello*? Its doctrinal history can be traced to Gratian's *Decretum*, completed about 1140, which incorporated St. Isadore of Seville's (ca. 560-636) descriptive analysis of the law of war.¹⁶ The most comprehensive early treatment of reprisals is found in Giovanni da Legnano's *De Bello, De Represalis et De Duello* "Of War, Reprisals and Duels,"¹⁷ written in Bologna in 1370, which distinguishes the classes of

14. MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER* 682 (1961).

15. In doing so he incorporated Augustine's Fourth Century views on the morality of war. R.A. Markus, *St. Augustine's Views on the 'Just War,'* in *THE CHURCH AND WAR* 1-16 (W.J. Sheils ed., 1983).

16. James A. Brundage, *The Limits of War-Making Power: The Contribution of Medieval Canonists*, in *PEACE IN A NUCLEAR AGE: THE BISHOPS' PASTORAL LETTER IN PERSPECTIVE* 73-75 (Charles J. Reid, Jr. ed., 1986).

17. GIOVANNI DE LEGANO, *TRACTATUS: DE BELLO, DE REPRESALIIS ET DE DUELLO* 307-33 (Thomas Erskine Holland ed., 1917); JAMES MULDOON, *POPES, LAWYERS AND INFIDELS* 21-22 (1979); Brundage, *supra* note 16.

persons against whom reprisals may be directed but which offers no guidance as to the kinds of otherwise forbidden acts which would be permitted in reprisal. Secondary literature indicates that subsequent medieval commentators distinguished between the means of warfare that could legitimately be used when the enemy force was not Christian and, in Christian lands at least, between combatants and non-combatants. The medieval Church's efforts to regulate the weapons of war ultimately failed.¹⁸ A recent summary of contemporary practice and *opinio juris* sets out the three traditional criteria for judging any act of reprisal: military necessity, humanity, and proportionality.¹⁹ These principles could be applied both to otherwise forbidden tactics, e.g., perfidy, feigning surrender or incapacitation,²⁰ or weapons, e.g., gas or expanding bullets.

Of course the fundamental criterion for judging the legitimacy of any act of reprisal is whether it will coerce the enemy into changing his practices. This criterion assumes a rational opponent who recognizes that his practice was illegal and who is capable of analyzing the costs of continuing the practice in light of the acts of reprisal. Ingrid Detter De Lupis offers a list of perfidious acts in her book *The Law of War*.²¹ In primitive war many of these practices are traditional, improper use of a white flag, pretending to have wounded or civilian status or pretending surrender, and their costs are assumed by the warriors who have concluded that there is no marginal utility in renouncing them. Other illegal practices, misuse of the opponent's uniform, Red Cross sign or equivalent emblems or attacks on medical units, do not apply because primitive warriors like the Afghans have no assets against which the act could be directed. Since the act of reprisal cannot rely on illegal tactics in response to deviations from law of armed conflict norms, it must utilize otherwise forbidden weapons.²²

Commentators, of whom Professor De Lupis is representative, classify weapons into three categories: nuclear, chemical/bacteriological, and

18. G.I.A.D. Draper, *The Interaction of Christianity and Chivalry in the Historical Development of the Law of War*, 5 INT'L REV. RED CROSS 5 (1965).

19. Edward Kwakwa, *Belligerent Reprisals in the Law of Armed Conflict*, 27 STAN. J. INT'L L. 49, 80 (1990).

20. See generally GREEN, *supra* note 5, at 144-46.

21. INGRID DETTER DE LUPIS, *THE LAW OF WAR* 259-63 (1987).

22. The U.S. Army's Field Manual provides: "the employment by a belligerent of a weapon the use of which is normally precluded by the law of war would constitute a lawful reprisal for intentional mistreatment of prisoners of war held by the enemy." Dep't of the Army, FM 27-10, *supra* note 6, at 177. The authors of the Manual do not explain why they fail to discuss tactical deviations from the legal norm as potential reprisals.

conventional.²³ The first two categories would have no application in an Afghan scenario since they could not be directed solely at belligerents nor would their use be accepted as humane by the United States and international communities. If a lawful reprisal is to be directed against primitive forces, the United States must, therefore, rely on conventional weapons, "the use of which is normally precluded by the law of war."²⁴ If a weapon's use is normally prohibited, cost and training considerations will dictate that it not be part of the military's inventory of conventional weapons, thus precluding its availability for exceptional use in reprisal. Only two otherwise illegal weapons are reasonably available and could be used with a minimum of training. The first of these is the expanding or "Dum-Dum" bullet, originally designed for use against Afghani tribesmen.²⁵ Although soft nosed bullets are routinely used in law enforcement and by hunters, they are not stocked by the military, thus creating a logistics problem, and, in light of military firearms' different characteristics²⁶ may not be usable in standard U.S. weapons. Moreover, their use would be purely symbolic since primitive warriors would not consider them more threatening than military rounds. Therefore, blinding lasers remain the only readily available effective illegal weapons which could be used in reprisal and on which U.S. troops have been or could be easily trained.

For the purposes of this essay I will assume that blinding lasers can cause unnecessary suffering and thus violate the customary law of armed conflict. This assumption motivated a 1995 Review Conference of the Conventional Weapons Convention (CCW) to adopt Protocol IV intended to bar their use if they were specifically designed for that purpose. The protocol has been subsequently analyzed by authors expert in the law of war,²⁷ but neither they nor, apparently, the participants at

23. GREEN, *supra* note 5, at 31.

24. Dep't of the Army, FM 27-10, *supra* note 6, at 177. Conventional weapons are typically banned on the grounds that they cause unnecessary suffering and thus fail the humanity criterion. On these grounds napalm and flame throwers were opposed during the UN Conventional Weapons Conference which produced the 1980 Convention on Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Three protocols were annexed: the first prohibited weapons intended to injure by fragments indelectable by X-ray; the second dealt with the use of mines and booby traps; the third related to weapons which rely on fire. W.J. Fenrick, *New Developments in the Law Concerning the Use of Conventional Weapons in Armed Conflict*, CAN. Y.B. INT'L L. 229, 248-49 (1981).

25. GREEN, *supra* note 5, at 31 n.76; Burrus M. Carnahan, *Unnecessary Suffering, The Red Cross and Tactical Laser Weapons*, 18 LOY. L.A. INT'L & COMP. L.J. 705, 718 (1996).

26. Fenrick, *supra* note 24, at 250-51.

27. Burrus M. Carnahan & Marjorie Robertson, *The Protocol on Blinding Laser*

the CCW discussed the potential of laser use in reprisal. Available literature indicates that portable ground-based low-energy lasers have been developed and deployed with U.S. Forces for target marking, range finding, and have many other military uses as well.²⁸ Although not designed to blind, they are capable of doing so under some circumstances. The Department of Defense has also developed high-energy lasers for use in ballistic missile defense.²⁹ Available literature does not discuss the blinding capabilities of “Star Wars” lasers, some of which are designed to operate from aerial platforms.

Although our knowledge is limited, laser weapons satisfy military criteria; they are available and troops have been trained to use them. Their use satisfies the legal criteria for reprisal: necessity, for without some action, torture and murder would continue; humanity, because they are non-lethal; and potentially proportional in terms of the harm inflicted and the persons against whom the harm is directed. There remains a fundamental objection to the use of reprisals against fanatic warriors: that, unlike soldiers, neither they nor their leaders will fear death sufficiently to be coerced to change their practices. The objection is a sound one if the threat is death but the threat of irreversible blindness, directed by an enemy at a distance,³⁰ could cause warriors to change their practices. Therefore, I recommend that the U.S. National Command Authority announce that blinding lasers will be used in reprisal for violations of the law of armed conflict. There are, of course, objections, on prudential grounds, to my proposal. Neither space nor skill enables me to list and analyze them. However, Father Schall’s comments and his opening quotation from Aquinas’ *De Bello* oblige me to conclude with a reminder that any retaliatory act, in order to be licit must be performed with a right intention:

For it may happen that the war is declared by the legitimate authority, and for a just cause, and yet be rendered unlawful through a wicked intention. Hence Augustine says: “The

Weapons: A New Direction for International Humanitarian Law, 90 AM. J. INT’L L. 484 (1996); Carnahan, *supra* note 25; Anne Peters, *Blinding Laser Weapons: New Limits on the Technology of Warfare*, 18 LOY. L.A. INT’L & COMP. L.J. 733 (1996); W. Hays Parks, *Memorandum of Law: Trauvaux Preparatoires and Legal Analysis of Blinding Laser Weapons Protocol*, 1997-JUN ARMY LAW. 33.

28. Peters, *supra* note 27, at 766 n.3.

29. *Id.* at 766 n.4.

30. In this regard, Col. Charles Dunlap (USAF) *Kosovo, Casualty Aversion, and the American Military Ethos: A Perspective*, 10 J. LEGAL STUD. 95 (2000), effectively disposes of arguments that it is not fair to kill an enemy at a distance if he cannot respond. The Salahuddins of the world, while human, have no claim to fair treatment.

passion for inflicting harm, the cruel thirst for vengeance, an unpacific and relentless spirit, the fever of revolt, the lust of power, and such like things, all these are rightly condemned in war."³¹

31. SUMMA THEOLOGICA OF ST. THOMAS AQUINAS 2 (2d ed. 1920) (citing ST. AUGUSTINE, CONTRA FAUSTUM, BOOK XXII 74).