Persons *Hors de combat* in Non-International Armed Conflicts

September 2017
International Humanitarian Law

Article 3 common to the three Geneva Conventions (Common Article 3)- applicable both to state and non-state actors, lays out that in non-international armed conflicts fighters who have laid down their arms and those placed “hors de combat” are to be treated humanely in all circumstances without distinction. Amongst other acts, violence to life and person, mutilation, cruel treatment and torture, and murder are specifically prohibited.

Definition of hors de combat

While Common Article 3 offers no definition of the term hors de combat, its definition is provided for in Article 41 of Additional Protocol I of the Geneva Conventions (Additional Protocol 1), which lays out that a person is hors de combat if:

a. They are in the power of an adverse Party;
b. They clearly express an intention to surrender; or
c. They have been rendered unconscious or are otherwise incapacitated by wounds or sickness, and therefore are incapable of defending themselves;

provided in any of these cases they abstain from any hostile act and do not attempt to escape.

They are in the power of an adverse Party

The provision that a person in the power of an adverse party is hors de combat and entitled to basic protections is self-explanatory. While international humanitarian law does (IHL) not recognise the status of prisoner of war in non-international armed conflicts, such persons must be treated humanely as prescribed by Common Article 3 and the rules of customary international law.

They clearly express an intention to surrender

IHL does not offer guidelines on how an offer to surrender should be issued, although the ICRC has stated that in land warfare, a clear intention to surrender is generally shown by laying down one’s weapons and raising one’s hands, or emerge from one’s position displaying a white flag. There is an obligation to accept a clear intention to surrender-which can be gleaned from the prohibition under IHL of the declaration that no quarter is to be given or ordering that there are to be no survivors.

1 While Additional Protocol 1 applies to international armed conflicts, there has been no practice indicating that this definition cannot also be applied for the purposes of Common Article 3. Further, the ICRC has noted that this definition has been adopted for the purposes of both international and non-international armed conflicts. See ICRC, Customary International Humanitarian Law, Volume I: Rule 47.
2 See ICRC, Customary International Humanitarian Law, Volume I: Chapters 32 and 37 for a detailed breakdown of the ICRC’s position on the customary rules relating to the treatment to be given to such persons.
3 ICRC, Customary International Humanitarian Law, Volume I: Rule 47.
4 Common Article 3 prohibiting the murder of protected persons; including those placed hors de combat; 1907 Hague Regulations on the Laws and Customs of War on Land (1907 Hague Regulations), Article 23(4); ICRC, Customary International Humanitarian Law, Volume I: Rule 46; Rome Statute of the International Criminal Court (Rome Statute), Article 8(2)(e)(x) listing it as a war crime; UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone.
They have been rendered unconscious or are otherwise incapacitated by wounds or sickness, and therefore are incapable of defending themselves.

This element is taken from the prohibition on launching attacks against defenceless persons once they have been incapacitated.\(^5\) Common Article 3 indicates that the reasons for such incapacitation are non-exhaustive.\(^6\)

**Simulating being hors de combat: perfidy**

The killing, injury or capture of an adversary by simulating being placed hors de combat is a violation of the IHL customary law prohibition on the use of perfidy.\(^7\) The commonly accepted definition of perfidy is:

> acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence.\(^8\)

The ICRC has listed examples of what may constitute acts of perfidy to include the simulation of having civilian status and therefore not taking a direct part in hostilities, of being hors de combat due to having been disabled by injuries or sickness, or of surrender.\(^9\)

**International Human Rights Law**

In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice observed that protections granted by the International Covenant on Civil and Political Rights (ICCPR) do not cease in times of war, except under Article 4 which allows some provisions in the covenant to be derogated from during times of public emergency “which threatens the life of the nation”. Article 6 of the ICCPR, on the right to life, specifically lays out that no one shall be arbitrarily deprived of their life. Other rights that may not be derogated from and therefore continue to apply during armed conflicts are the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; to not be held in slavery; to fair trial and recognition before the law; and to freedom of thought, conscience and religion.\(^10\) Any killing, infliction of cruel treatment or punishment, or denial of fair trial rights of persons placed hors de combat by members of the armed forces of the state, or other forces under the control of the state, would therefore be a violation of these rights under international human rights law.

Additionally, while international human rights law applies to states vis-à-vis its citizens and

\(^5\) 1907 Hague Regulations, Article 23(3); Common Article 3.

\(^6\) Common Article 3 includes the phrase “or any other cause” when it lists the reasons that may have placed fighters hors de combat.

\(^7\) This is one of the oldest commonly accepted rules of warfare, and is contained in the 1907 Hague Regulations, Article 23(b). See also ICRC, Customary International Humanitarian Law, Volume I: Rule 65.

\(^8\) See ICRC, Customary International Humanitarian Law, Volume I: Rule 65 which quotes this definition from Additional Protocol I, Article 37(1), which is also contained in the Elements of Crimes in the Rome Statue of the International Criminal Court- Article 8(2)(b)(xi) and (e)(ix), and is contained in the military manuals of numerous states. Note that the Preparatory Committee for the Elements of Crimes for the International Criminal Court concluded that the elements of the crime of treacherously killing or wounding were identical in international and non-international armed conflicts- Knut Dörmann, Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary, ICRC/Cambridge University Press, page 476.


\(^10\) Legality of the Threat or Use of Nuclear Weapons, International Court of Justice, para. 25. Advisory Opinion of 8 July 1996.
others under its jurisdiction, it is often argued that non-state actors exercising government-like functions and control over a territory are obliged to respect human rights norms when their conduct affects the human rights of the individual under their control. Whether non-state actors fit into this criterion for the purposes of human rights law obligations is an objective determination which should be undertaken on a case by case basis.

**International Criminal Law**

Breaches of Common Article 3 have been recognised as amounting to war crimes in the statutes of various international tribunals. Individuals can therefore be held individually responsible for any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

- Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- Taking of hostages;
- The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable.

The ICRC further lists the ordering that **no quarter be given** as constituting a war crime in non-international armed conflicts whether or not the order is carried out. This position is supported by it being listed as a war in non-international armed conflicts crime in the Rome Statute, as well as in legislation of numerous states.

The killing of wounding an adversary by resort to perfidy is also a war crime, where it is also sometimes referred to as “killing or wounding treacherously a combatant adversary”.

If the killing of a person placed hors de combat is not an isolated event, but rather committed as part of a widespread or systematic attack which the attacker is aware of, then it may also constitute the act of murder as a crime against humanity.

---

12 Statute of the International Criminal Tribunal for Rwanda, Article 4; Statute of the Special Court for Sierra Leone, Article 3; Rome Statute, Article 8(2)(c); International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Duško Tadić*, Decision on Defence Motion for Interlocutory Appeal, para. 134.
13 Ibid.; See also ICRC, Customary International Humanitarian Law, Volume I: Rule 156.
14 ICRC, Customary International Humanitarian Law, Volume I: Rule 156.
16 See ICTY, *Prosecutor v. Milan Martić*, Appeals Chamber Judgement, 8 October 2008, para. 313 which finds that a person placed hors de combat may be subject to an act constituting a crime against humanity.