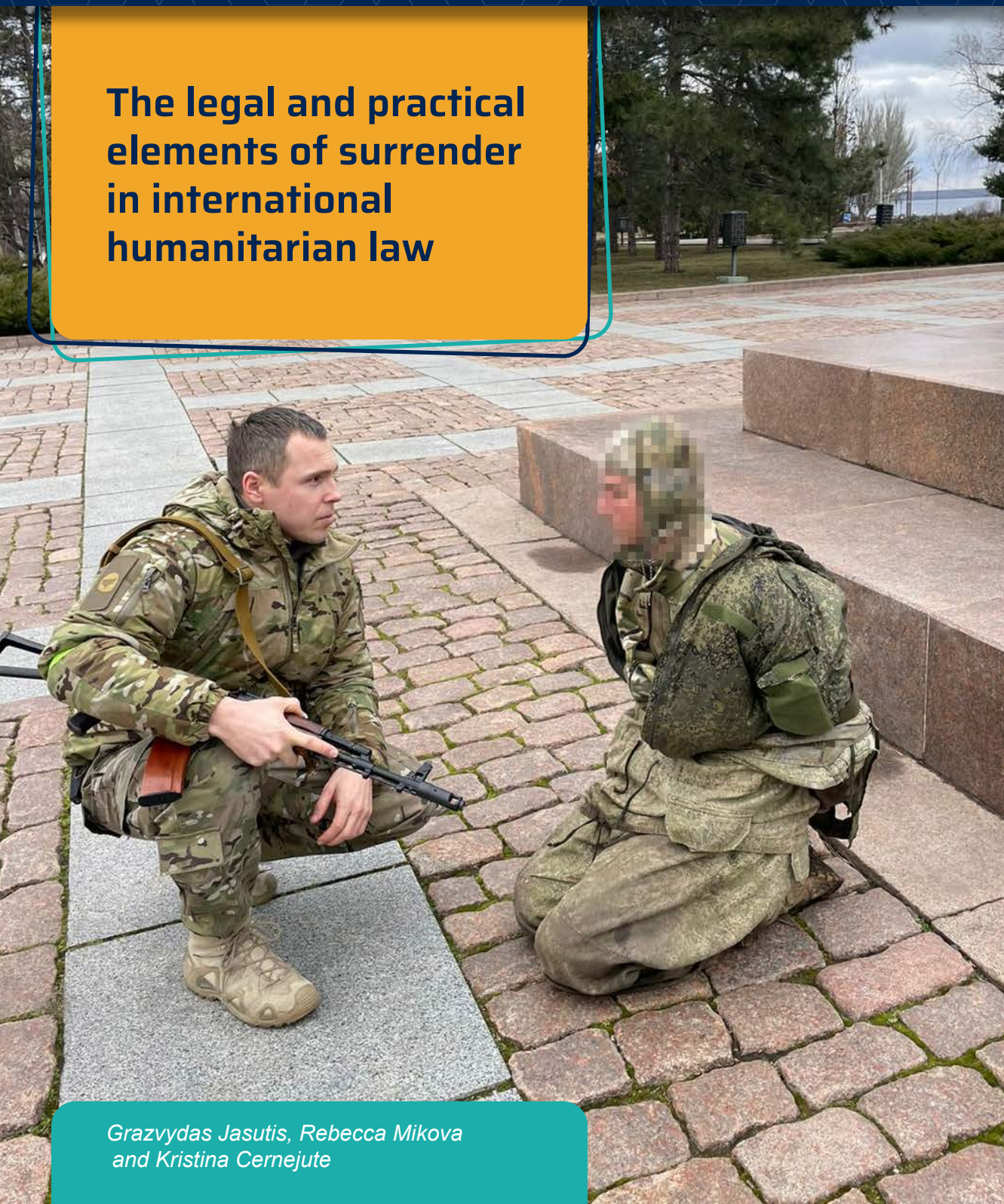


**The legal and practical
elements of surrender
in international
humanitarian law**



*Grazvydas Jasutis, Rebecca Mikova
and Kristina Cernejute*

About DCAF

DCAF – Geneva Centre for Security Sector Governance is dedicated to improving the security of states and their people within a framework of democratic governance, the rule of law, respect for human rights, and gender equality. Since its founding in 2000, DCAF has contributed to making peace and development more sustainable by assisting partner states, and international actors supporting these states, to improve the governance of their security sector through inclusive and participatory reforms. It creates innovative knowledge products, promotes norms and good practices, provides legal and policy advice and supports capacity-building of both state and non-state security sector stakeholders.

Publisher

DCAF - Geneva Centre for Security Sector Governance

Maison de la Paix, Chemin Eugène-Rigot 2E
CH-1202, Geneva, Switzerland



+41 22 730 94 00



info@dcaf.ch



www.dcaf.ch



@DCAF_Geneva

Authors

Dr. Grazvydas Jasutis, Rebecca Mikova and Kristina Cernejute

Copy-editor

Aravis Global Advisors

Design & layout

Ziad Rizkallah

ISBN

978-92-9222-695-4

Acknowledgements

DCAF would like to thank the Foreign, Commonwealth & Development Office of the United Kingdom for its generous support in making this publication possible.

The authors appreciate valuable comments provided by prof. William Schabas, prof. Rachel E. VanLandingham, Lt Col, USAF (ret.), LTC (ret.) Mick Wagoner and Jody Prescott, COL, USA (ret.).

Notes

The opinions expressed in this publication are those of the authors and do not reflect the opinions or views of the Foreign, Commonwealth & Development Office of the United Kingdom.

The URLs cited in this document were valid at the time of publication. Neither DCAF nor the authors take responsibility for subsequent changes to any URLs cited in this publication.

DCAF 2023.

Photo: Roman Kostenko

CONTENTS

INTRODUCTION	4
1. Legal Documents and the Consequences of Failing to Respect the Rules of Surrender	5
2. THE ELEMENTS OF SURRENDER	8
2.1 Attempted surrender (intent)	9
2.2 Processing surrender	14
2.3 Completed surrender	16
3. THE USE OF FORCE DURING SURRENDER	19
4. THE IMPACT OF TECHNOLOGY ON SURRENDER: THE CASE OF UKRAINE	20
CONCLUDING REMARKS	23
ANNEX	25

INTRODUCTION

The rule of surrender in international humanitarian law (IHL) is a fundamental principle intended to protect individuals in armed conflict and to promote respect for international human rights. It requires that combatants surrender to the opposing party and cease fighting, without being subjected to any punishment or mistreatment. The widespread recognition of the rule has also led to more humane treatment of prisoners of war, including their right to remain unharmed and to receive medical care, basic necessities, and humane living conditions. This has helped to prevent unnecessary suffering and deaths. Although it is widely accepted and applied worldwide, there are still cases of abuse and mistreatment against those who surrender. The rule of surrender needs, then, to be better respected and enforced to protect the rights and dignity of individuals in armed conflict.

The IHL sources impose obligations on the belligerent parties to accept an act of surrender and to further provide legal protection from attacks for those who have clearly indicated their intent to surrender. However, it does not provide comprehensive guidance on signals demonstrating an intent to surrender. Nor does it prescribe specific methods the surrendering soldiers must follow or, for that matter, the behaviour surrendering soldiers should follow during the process of surrender.

The objective of this paper is to address the deficit of information on combatant's behavior in the process of surrendering or while accepting a surrender and to provide practical advice relevant to combat situations. This document outlines the current *lex lata*. It also analyses and discusses international practice in surrender, based on well-reasoned arguments and real-life military examples, and the standards to which it should conform. It is divided into four sections: 1) the applicable international legal framework and legal norms on surrender during armed conflict under IHL; 2) the phases of surrender (attempted surrender, processing surrender, completed surrender); 3) the restrictions on the use of force applicable at a given stage; and 4) the impact of technology on surrender in the case of the war in Ukraine. Concluding remarks reflect on the main findings and considerations identified in this study. The Annex includes the three-stages test for effective surrender.

1. LEGAL DOCUMENTS AND THE CONSEQUENCES OF FAILING TO RESPECT THE RULES OF SURRENDER

Both Additional Protocols to the 1949 Geneva Conventions impose an obligation upon state parties to refrain from making a person who has expressed an intention to surrender the object of attack.¹ In the context of an international armed conflict, Article 40 of Additional Protocol I explains that ‘it is prohibited to order that there shall be no survivors’. Article 41(1) further explains that a person ‘*hors de combat* shall not be made the object of attack’; Article 41(2) states that a person is *hors de combat* if ‘he clearly expresses an intention to surrender’.

The Rome Statute establishing the International Criminal Court (ICC Statute) defines killing or wounding a combatant who, having laid down their arms or having no longer means of defence, has surrendered at discretion as a war crime.²

Rule 47 of the customary IHL study by the International Committee of the Red Cross (ICRC) explains that the rule of surrender is a principle of customary international law applicable during both international and non-international armed conflict.³ It states that:

1 UN OHCHR. “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)”. *United Nations*. 8 June 1977. Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-additional-geneva-conventions-12-august-1949-and>

2 “Rome Statute of the International Criminal Court”. *United Nations*. 17 July 1998. Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=_en

3 Henckaerts, Jean-Marie; Doswald-Beck, Louise. “Customary International Humanitarian Law – Volume 1: Rules”. *International Committee of the Red Cross*. 2009. Available at: <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>

Attacking persons who are recognized as *hors de combat* is prohibited. A person *hors de combat* is:

1. anyone who is in the power of an adverse party;
2. anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or
3. anyone who clearly expresses an intention to surrender, provided he or she abstains from any hostile act and does not attempt to escape.

Prof. Buchan in his research has concluded that treaties do not fully delineate the meaning of the rule of surrender. Military manuals, he acknowledges, overwhelmingly recognize that armed forces must not make surrendered persons objects of attack. But they generally fail to specify the conditions that constitute a legally effective surrender. Prof. Buchan argues that the crystallization of surrender as an IHL norm derives from the lack of military necessity to directly target persons who have placed themselves outside the theatre of armed conflict.⁴ According to the principle of military necessity, combatants may engage only in those measures that are indispensable for securing the ends of the war.⁵ There is no need to engage those who have been removed from the fighting. While military necessity was intended to be a principle of restraint, due to its broad definition virtually any conduct could be justified on the basis that it offered military advantage. As a result, the principle of military necessity became a permissive principle and failed to provide an effective mechanism for quelling the savagery and brutality associated with previous armed conflicts.⁶ The principle of humanity (the use of armed force – no matter the cause – is limited by a universal sense of human dignity), together with the principle of military necessity, better lay the grounds for the rule of surrender than military necessity alone.

ICRC sources state that surrender is a unilateral act. Isolated members of armed forces or members of a formation by putting their hands up, by throwing away their weapons, by raising a white flag or by other suitable acts, clearly express to the enemy their intention to cease fighting.⁷

The most serious consequence of committing an act of perfidy in the battlefield is that it can lead to a war crime conviction. Under the Geneva Conventions, those who commit an act

4 Buchan, Russell. "The Rule of Surrender in International Humanitarian Law." *Israel Law Review*, Volume 51 Issue 1. 21 February 2018. (pgs. 3–27). Available at: <https://www.cambridge.org/core/journals/israel-law-review/article/rule-of-surrender-in-international-humanitarian-law/714B1EAB954811EB2907A046EA069504#>

5 Ibid

6 Ibid

7 ICRC. "Surrender". *ICRC – How does Law Protect in War? (Online Casebook)*. 2023. Available at: https://casebook.icrc.org/a_to_z/glossary/surrender

of perfidy can be prosecuted for a war crime and be subject to a long prison sentence. For example, in the Hostages case (Wilhelm List) the accused were charged with war crimes and crimes against humanity during the Second World War. This related mainly to reprisal killings in occupied territory and to the summary execution of Italian troops after they had surrendered.⁸

Perfidy can also have serious consequences for the reputation of a military unit. Military units that are seen to have committed acts of perfidy are often viewed with suspicion and distrust by enemy units. These can put stumbling blocks in the way of surrender and the avoidance of casualties.

During the 2003 Iraq war US Marine deaths occurred in at least two separate ambushes where Iraqis, some in civilian clothes, pretended to surrender, only to open fire when the Marines approached. In response American soldiers began exercising much greater caution and were far more likely to shoot Iraqi soldiers who failed to behave correctly during the mutually dangerous surrender process.⁹

Finally, perfidy can also have serious consequences for the morale of a military unit. Soldiers who are aware that acts of perfidy have been committed by their own side can become disillusioned and lose faith in their leaders. This can lead to a fall in morale and a decrease in their willingness to fight. This can have serious implications for a nation or group's ability to fight and win a war.

8 *Kononov v. Latvia* [GC], no. 36376/04, ECHR 2010, §125, 17 May 2010. Available at: <https://hudoc.echr.coe.int/fre#%22itemid%22:%22001-98669%22>]

9 Dillon, Dana. "Perfidy in Iraq: Their Tactics, Our Response." *The Heritage Foundation*. 26 March 2003. Available at: www.heritage.org/middle-east/commentary/perfidy-iraq-their-tactics-our-response

2. THE ELEMENTS OF SURRENDER

The tactical response on a battlefield to any specific security threat posed by a combatant intending to surrender, a wartime prisoner, or any detainee is, above all, a practical rather than a legal issue. The process of surrendering comprises certain risks and threats and poses insurmountable challenges to both parties in the conflict. The surrendering party can feign surrender and a tired, hungry, shocked soldier can react instinctively to the enemy soldier and not accept a surrender.

In February 2001, Sri Lanka was in the midst of a bloody civil war with the Liberation Tigers of Tamil Elam (LTTE). The Sri Lankan army reported a large number of LTTE killed, but very few prisoners. The chief of the Sri Lankan army said the LTTE frequently used surrender as a ruse, mixing armed terrorists and suicide bombers among surrendering parties. As a result, he said, few Sri Lankan soldiers were willing to risk their lives taking a LTTE prisoner. Rather than give Tigers the opportunity to surrender, they'd simply shoot Tigers on sight.¹⁰

While internationally recognized IHL sources provide some guidance on the act of surrender, the use of force and legal protection by those who decide to surrender, and the practical modalities of the process need further clarification. The Commentary on the Additional Protocols (I) states that:

In land warfare, surrender is not bound by strict formalities. In general, a soldier who wishes to indicate that he is no longer capable of engaging in combat, or that he intends to cease combat, lays down his arms and raises his hands. ... If he is surprised, a combatant can raise his arms to indicate that he is surrendering, even though he may still be carrying weapons.¹¹

10 Ibid

11 ICRC – International Humanitarian Law Database. “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977”. ICRC. 1987. Available at: <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-41/commentary/1987>

If the intention to surrender is indicated in an absolutely clear manner, the adversary must cease fire immediately; it is prohibited to refuse unconditional surrender.¹² Surrender must be unconditional and under certain circumstances it confers the status of *hors de combat* with limited legal protection. According to the Rule 47, attacking persons who are recognised as *hors de combat* is prohibited. A person *hors de combat* is amongst other (c) anyone who clearly expresses an intention to surrender; provided he or she abstains from any hostile act and does not attempt to escape. If a person has already surrendered, the force against him can only be used to subdue any threat: what a combatant would reasonably need in those circumstances. When a detainee is posing an imminent deadly threat, deadly force as a last resort is allowed — that which is necessary (using reasonableness as a guide) to neutralize that threat. Therefore, although a fundamental rule of international humanitarian law is that persons who are *hors de combat* must not be attacked and must be treated humanely, their status can change rapidly should he or she not comply with the established rules.

For the purpose of clarity, the act of surrender is divided into three stages: attempted surrender; processing surrender; and completed surrender. Each stage requires different actions and the use of force against combatants intending to surrender needs to be authorized and is context dependent.

2.1 Attempted surrender (intent)

During attempted surrender, the burden is upon the surrendering party to make their intentions clear, unambiguous, and unequivocal to the capturing unit. There is no definitive list of signs that clearly demonstrates a soldier's intent to surrender. It is widely accepted in international legal opinion that in order to produce legal effects such as the protection of common Article 3, any intention to surrender needs to be signaled in a clear and unequivocal way. This means **laying down arms and raising hands; or at the very least raising hands**.¹³ Other types of combatant signal surrender in other ways: a tank commander, for instance, might direct the main gun away from the capturing soldiers and have their crew exit the vehicle. A pilot who remains in their aircraft cannot be said to have "laid down his arms" or to have "no longer a means of defence". A clear expression of surrender is, then, challenging for

12 Ibid

13 *Korbely v. Hungary* [GC], no. 9174/02, ECHR 2008, 19 September 2008. Available at: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%7B%22001-88429%22%7D%7D>

said pilot. However, if a combatant wants to surrender they should do everything they can to communicate their intentions to enemy forces: for instance, getting on the radio stating their desire to surrender, jettisoning weapons, putting landing gear down etc. But there is no universally accepted standard for how an aircrew should surrender. Of course, they can parachute out: parachuting airmen cannot be targeted under IHL.

In 1971, 93,000 Pakistani soldiers surrendered to the Indian Army (by laying down their weapons) resulting in the largest surrender of any military in the world since the Second World War.¹⁴

Some countries agree that **white flag and voice messages** could be indicative of intent to surrender. In his work, Prof. Buchan gives the example of the Dominican Republic's Military Manual which states that 'the enemy soldier may reach a point where he would rather surrender than fight. He may signal to you with a white flag, by emerging from his position with arms raised or yelling to ceasefire'.¹⁵ However, not all states identify the white flag as being indicative of an intention to surrender. In fact, a number of states expressly reject the contention that waving a white flag is constitutive of surrender. The white flag traditionally means "I wish to enter into communication or to negotiate with you". It does not necessarily mean "I want to surrender". The party showing the white flag must stop firing. Once it does, your side should follow suit. The enemy forces might then surrender by throwing down their weapons and raising their hands in the air.

During the Battle for Goose Green, some Argentinean soldiers raised a white flag. A British lieutenant and two soldiers advanced to accept what they thought was a proffered surrender. They were killed by enemy fire in a disputed incident. Apparently, one group of Argentines was attempting to surrender, but not the other group. The Argentine conduct was arguably if those raising the white flag killed the British soldiers. But it is a quite different matter if other Argentines fired unaware of the white flag. This incident emphasizes the rule that the white flag indicates merely a desire to negotiate, and the combatants who hoist the flag have the burden to come forward.¹⁶

A significant number of military manuals produced by states identify the laying down of weapons and the raising of hands as an acceptable means of expressing an intention

14 Viewpoint Geography. "World's Biggest Surrender Ever!". *YouTube*. 22 July 2020. Available at: <https://youtu.be/CT6WvyK7048>

15 Buchan, Russell. "The Rule of Surrender in International Humanitarian Law." *Israel Law Review*, Volume 51 Issue 1. 21 February 2018. (pgs. 3–27). Available at: <https://www.cambridge.org/core/journals/israel-law-review/article/rule-of-surrender-in-international-humanitarian-law/714B1EAB954811EB2907A046EA069504#>

16 Ibid

to surrender. They acknowledge that these steps garner enough support among states to constitute a legally recognisable act of surrender under relevant treaty and customary international humanitarian law.¹⁷ The role of clear accepted expressions of surrender may, over time, gain increasing relevance depending on developments in autonomous lethal weapons systems.¹⁸

Regardless, soldiers must make their intent to surrender clear and unequivocal, and do so rapidly. Fighting from fortified emplacements is not a manifestation of an intent to surrender, and soldiers who fight until the very last possible moment take on certain risks. Their opponent either may not see their surrender, may not recognize their actions as an attempt to surrender in the heat and confusion of battle, or may find it difficult (if not impossible) to halt an onrushing assault to accept a soldier's last-minute surrender.¹⁹ New Zealand's military doctrine specifies that opposing forces do not dictate the time and place of their surrender. Enemy combatants can be required to wait for a lull in combat activity or for the arrival of more friendly forces before their surrender is accepted.²⁰ The US Military Manual states that for an offer of surrender to render a person hors de combat, it must be feasible for the opposing party to accept the offer.²¹ The feasibility of accepting surrender refers to whether it is practical and safe for the opposing force to take custody of the surrendering persons.²² Consider the example of enemy soldiers who man an anti-aircraft gun and shoot at an enemy aircraft, and who then raise their hands to surrender seconds before a second aircraft attacks their position. In the circumstances, it would not be feasible for the crew of the attacking aircraft to land and accept their surrender. Similarly, a soldier fifty meters from an enemy defensive position in the midst of an infantry assault by their unit could not throw down their weapon and raise their arms (as if to indicate their desire to surrender) and reasonably expect that the defending unit

17 Ibid

18 Trabucco, Lena; Heller, Kevin Jon. "Beyond the Ban: Comparing the Ability of 'Killer Robots' and Human Soldiers to Comply with IHL". 46 *Fletcher Forum of World Affairs* 15. 21 April 2022. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4089315

19 Liivoja, Rain; McCormack, Tim. "Routledge Handbook of the Law of Armed Conflict". *Routledge*. 30 June 2020. ISBN 9780367581640.

20 Directorate of Legal Services, Headquarters New Zealand Defence Force. "Manual of Armed Forces, Volume 4: Law of Armed Conflict". *New Zealand Defence Force*. 2017. Available at: <https://www.onlinelibrary.ihl.org/wp-content/uploads/2021/05/NZ-Manual-Law-of-Armed-Conflict.pdf>

21 *Office of General Counsel, Department of Defense*. "Department of Defense Law of War Manual". Department of Defense of the United States of America. June 2015 (updated December 2016). Available at: <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190>

22 Ibid

would be able to accept and accomplish their surrender while resisting the ongoing assault.²³

All parties should ensure that the procedures for surrender are properly enforced. This means that those who surrender should be treated in accordance with agreed upon terms, and that all parties should take responsibility for the safety of those who surrender. However, surrender situations are highly contextual. It is, therefore, very difficult to provide definitive answers. Several practical steps/actions should, though, be taken into account.

Use of force: authorized

Actions:

1. stop shooting at the enemy, if they are giving signs that they wish to surrender
2. guns remain pointed towards the enemy and at the ready to act immediately
3. one's fellow soldiers should control the perimeter of engagement at gun point

Test question:

The distance between you and opposing forces is 50 meters. Several enemy combatants yell that they surrender. They leave the trenches, lay down weapons, and raise their hands. Several soldiers keep shooting from their side.

Answer:

A combatant who has clearly expressed an intention to surrender cannot be made the object of an attack. This rule is set out in article 41 of Protocol I and is not in any way conditional on the suggestion that it be 'feasible ... to accept the offer', as the US military manual suggests. The use of the word 'offer' in the US military manual suggests that combatants are free to accept or reject an 'offer' of surrender. However, from the point where the intention to surrender has been 'clearly expressed', the combatant is deemed to be *hors de combat* and cannot be attacked. Obviously, in the scenario described above, the fighting will continue with those who have not surrendered. Those who are *hors de combat* may find themselves 'caught in the crossfire'. In that sense, they are in no different a position than an enemy soldier who has been wounded on the battlefield. The soldier may well be *hors de combat*, yet the battle continues. The wounded soldier will only obtain medical treatment when this can be done safely.

CASE OF KORBELY v. HUNGARY (ECHR)

There were demonstrations and gunfights in Budapest on 23 October 1956. On 24 October martial law was introduced, providing, inter alia, that any person bearing arms without authorisation could be killed on the spot. Tamás Kaszás informally assumed the leadership of the insurgents in the incident in question. During the action, the officers aimed their sub-machine guns at the insurgents. One of the insurgents, István Balázs, stated that they were unarmed. However, one of the disarmed police officers said that Tamás Kaszás had a gun. István Balázs asked Kaszás to surrender the weapon. Thereupon, a heated dispute broke out: about what we do not know. Tamás Kaszás drew his handgun from a coat pocket. The police responded by resolutely ordering their men to fire.

The question therefore arises whether Tamás Kaszás was a member of the insurgent forces who had “laid down his arms”, thereby taking no further part in the fighting. In this connection, the Court finds it to be crucial that, according to the domestic court’s ruling, Tamás Kaszás was secretly carrying a handgun, a fact which he did not reveal when facing the applicant. When this circumstance became known, he did not seek to surrender in a clear manner. The Court notes that it is widely accepted in international legal opinion that in order to produce legal effects such as the protection of common Article 3, any intention to surrender in circumstances such as those set out here needs to be signalled in a clear and unequivocal way. Arms must be laid down and hands raised or, at the very least, hands must be raised (see, for example, the Commentary on Additional Protocol I to the Geneva Conventions, published by the ICRC (see paragraph 50 above); the proposed Rule 47 of the ICRC’s study on customary international humanitarian law (2005) (see paragraph 51 above); and the Report of the [United Nations] Secretary-General on respect for human rights in armed conflict, UN Doc. A/8052, 18 September 1970, § 107). For the Court, it is reasonable to assume that the same principles were valid in 1956.

However, there is no element in the findings of fact established by the domestic courts which leads to the conclusion that Tamás Kaszás expressed any intention to surrender doing these things. Instead, he embarked on an animated quarrel with the applicant, at the end of which he drew his gun with unknown intentions. It was precisely in the course of this act that he was shot. Given the circumstances the Court is not convinced that in the light of the commonly accepted international law standards applicable at the time, Tamás Kaszás could be said to have laid down his arms within the meaning of common Article 3.

Source: *Korbely v. Hungary* [GC], no. 9174/02, ECHR 2008, 19 September 2008. Available at: <https://hudoc.echr.coe.int/fre#%22itemid%22:%22001-88429%22>

2.2 Processing surrender

Both the surrenderers and the combatants accepting them are in grave risk during the moments just before and after capture. Members of Armed Forces are required to take all practical precautions to prevent unnecessary risk exposure while taking detainees. When enemy combatants are known to engage in underhand tactics, such as detonating disguised explosive vests or grenades, a greater degree of searching and physical control will be necessary. Soldiers must make their intent to surrender clear and unequivocal and their behavior must not create any ambiguity and must not challenge the opposing party whatsoever. Soldiers that have expressed their desire to cease combat must follow fully the instructions provided by the opposing party.

In 2017 during the liberation of Mosul by Iraqi forces from ISIS, ISIS fighters feigned surrender to Iraqi security forces in order to conduct a mass suicide attack. Iraqi forces demanded the fighters present themselves in small groups, which was refused by ISIS, thus breaching the requirement of unconditional surrender.²⁴

Slowly walking with hands up/behind head, laying down on the ground or crawling on knees without weapons are examples of safe ways to surrender. The enemy must drop their weapons. They approach the contact line with the opposing party or alternatively they are approached by the opposing party. Restraints must be employed immediately. Depending on context, use of force and instruments intended to restrain and limit the freedom of movement of a combatant are authorized. Upon having been restrained, the combatants must be searched for concealed weapons, equipment and documents with intelligence value. The dignity of the person being searched is to be protected to the greatest degree possible in the circumstances.²⁵ Do not blindfold them or put bags over their heads as detainees may think they are about to be executed and start fighting or screaming to others not to surrender.

24 Kolinovsky, Sarah. "Mosul ISIS fighters feigning surrender in order to attempt suicide attacks". *ABC News*. 11 July 2017. Available at: <https://abcnews.go.com/International/mosul-isis-fighters-feigningsurrender-order-attempt-suicide/story?id=48573098>

25 The Basic School. "Enemy Prisoners of War/Detainees W260001 Student Handout". *United States Marine Corps*. 2018. Available at: [W260001XQ - Enemy Prisoners Of War And Detainees.pdf](#) (marines.mil)

Use of force: authorized

Actions:

1. Instruct them to approach slowly and not to run
2. Instruct them to lay down weapons before they start approaching
3. Guns remain pointed at the enemy, but you do not engage unless in response to a hostile act or a demonstration of hostile intent (attempt to escape, sudden moves indicating that he/she can reach concealed weapon, etc.)
4. Soldiers control perimeter of engagement at gun point
5. Depending on the geographical area, the surrendering soldier can be instructed to lay down on the ground, stand up next to a wall etc.)
6. Employ restraint means
7. Search
8. Do not blindfold them or put bags over their heads

Initial Actions Upon Capture: The US

The commanding officer of the capturing unit will ensure that as soon as an enemy prisoner of war is captured or turned over, the following routine security guidelines are followed. These guidelines are:

Search

Tag

Report

Evacuate

Segregate

Safeguard

They are commonly referred to as the “STRESS.”

Previously referred to as “5 S’s and a T.”

Source: The Basic School. “Enemy Prisoners of War/Detainees W260001 Student Handout”. United States Marine Corps. 2018. Available at: W260001XQ - Enemy Prisoners Of War And Detainees.pdf (marines.mil)

Test questions:

Situation 1 - 40 combatants decided to surrender. The distance between you and opposing forces is 200 meters and you observe them with binoculars. They lay down their weapons and unarmed start approaching your trenches. When at 50 metres of distance, 20 of the 40 combatants start running towards you.

Situation 2 – 20 pax decided to surrender. When restraints are being employed, two combatants resist. One enemy soldier pulls out a concealed weapon and uses a fellow (a third soldier) as shield. Another remains unarmed but physically resists the opposing party as he is being restrained.

Answers:

Situation 1. The difficulty here is in interpreting the intent of those who have started to run. For example, it is conceivable that they are running in order to escape danger, including attacks by their own forces who have not attempted to surrender. It is relevant here to know whether or not they were instructed to approach slowly, and not to run. The context may suggest that the attempt to surrender was a trick, and that the running marks a resumption in hostilities. As such the 20 combatants who start to run can be attacked. An assessment must be made as to whether the other 20 clearly intended to surrender or whether they are participating in the perfidy. If it is clear that the other 20 intend to surrender, they cannot be made the object of an attack.

Situation 2. The two soldiers who resist appear to have done so after they have become *hors de combat*. Thus, they must not be 'attacked'. However, all reasonable and necessary means to restrain them may be employed.

2.3 Completed surrender

Once the adversary has determined that the surrender is **genuine and unconditional**, that the surrendering combatants **are no longer a threat, and that they are no longer willing or able to participate in hostilities or defend themselves**, the surrendering combatants are said to have 'fallen into the power' of the opposing forces. From this point onwards, the surrendering combatants cannot be attacked. An act of surrender is complete. It is 'especially forbidden' to kill or wound an enemy who, having laid down his or her arms, or having no longer means

of defence, has surrendered. (Hague Convention, art. 23c).²⁶ This would be a war crime punishable under the Rome Statute. According to JSP 383: Manual of the Law of Armed Conflict, a combatant is entitled to continue fighting up to the moment of their surrender without losing the benefits of quarter and their rights as a prisoner of war. No vengeance can be taken since that person has simply done their duty up to the moment of their surrender.²⁷

Whether or not the surrendering combatants are entitled to prisoner of war status will then be determined under the terms of the third Geneva Convention.

Should the combatant who has ‘fallen into the power’ of the adversary attempt to escape, the prohibition on the use of force ceases. Nevertheless, only the force needed to put an end to the escape is justifiable. According to the Military Manual of New Zealand, persons who indicate an intention to surrender but who then carry out any hostile act lose their immunity and may be attacked. Hostile acts include attacks on the capturing force or attempts to send radio messages, destroy codes or damage military equipment.²⁸

Also, while surrendered persons cannot be made the object of attack, they can be the victims of incidental injury as a result of attacks against lawful targets. This is provided that the collateral damage is not excessive in relation to the concrete and direct military advantage anticipated: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (entered into force 8 June 1977).

Use of force: limited

Actions:

1. Document them
2. Turn them over to military police or put in the safe place

26 International Conferences (The Hague). “Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land”. 18 October 1907. Available at: <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907?activeTab=default>

27 Chiefs of Staff. “The Joint Service Manual of the Law of Armed Conflict”. *Ministry of Defence of the United Kingdom*. 10 February 2011. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf

28 Directorate of Legal Services, Headquarters New Zealand Defence Force. “Manual of Armed Forces, Volume 4: Law of Armed Conflict”. *New Zealand Defence Force*. 2017. Available at: <https://www.onlinelibrary.ihl.org/wp-content/uploads/2021/05/NZ-Manual-Law-of-Armed-Conflict.pdf>

Test question:

60 combatants surrendered to a platoon. There is not enough room in the platoon's trenches and the commander sends them to a building, which is located at 500m. Four persons accompany the detainees. The battle abruptly begins, and the platoon commander demands that four guards return to their previous positions and make sure that the detainees do not pose any threat. What should the guards do? If they bring their prisoners back to the trenches, the detainees potentially become easy targets/human shields. If the guards leave their detainees in the building, they can re-join the enemy formations.

Answer:

According to the Manual on International Law Applicable to Air and Missile Warfare produced by the Program on Humanitarian Policy and Conflict Research at Harvard University, 'Enemy personnel who surrender will normally be taken into the custody - and placed under the protection - of the Belligerent Party. However, this is not always feasible. If the military unit, in whose custody the surrendering personnel are, is incapable...to escort them to a POW camp, they must be released without harm. Thus, the obligation on the Belligerent Party is not necessarily to detain surrendering enemy personnel, but to desist from further attack ...'

The four guards, then, must re-join the battle in compliance with the order they have been given. They cannot in any way harm the prisoners simply because they are unable to supervise them: this is even if there is a real possibility that they re-join the enemy. The guards cannot bring them back to the trenches without violating the obligation to put the prisoners out of danger. According to the ICRC Commentary on article 19(1) of the third Convention, 'It is implicitly recognized that there may be a delay before evacuation takes place, but any such delay must be short. The fighting units which have taken prisoners do not usually have the means to evacuate prisoners to the rear and some time will inevitably elapse between the time of capture and final evacuation... the captors are not relieved of the obligation to take all measures within their power for the protection of prisoners...' According to the Commentary on article 19(3), 'The practical steps to be taken during this waiting period will depend on the combatant units which captured the prisoners; but prisoners of war would be "unnecessarily exposed" if they came under enemy fire when it was possible to provide them with shelter.'

3. THE USE OF FORCE DURING SURRENDER

The IHL sources states clearly that it is a war crime to attack or kill a soldier who has been rendered *hors de combat* through surrender, capture, injury, or illness. However, the ICRC has stated, ‘Any hostile act gives the adversary the right to take countermeasures until the perpetrator of the hostile act is recognized, or in the circumstances, should be recognized, to be “hors de combat” once again. ...’ so, a soldier *hors de combat* loses protection from attack if they engage in a hostile act, and deadly force can be used when they pose an imminent threat — the force necessary to subdue the threat.²⁹ Generally, the use of force should be limited to the minimum amount necessary to control a situation. It should be used in a manner that does not cause unnecessary or excessive injury or damage. Militaries should not use force to punish a surrendering combatant, nor should they retaliate for the combatant’s behavior. The use of force should be reasonable and proportional to the threat posed by the surrendering combatant.

In December 1944, 84 US soldiers were surrendering to Germans, when one German officer started shooting at the surrendering soldiers. Before he was stopped, the surrendering soldiers began panicking and running away. In turn the German soldier responded by shooting all of the escaping soldiers, in what is remembered today as the Malmedy Massacre.

If other combatants are accidentally shot in the process, as long as the amount of force being used was that reasonably necessary to counter an imminent threat, then there is no criminal behavior. If the shooting soldier was holding another soldier in front of him as a shield, it may very well be reasonably necessary to shoot both the “shield” and shooter to neutralize the threat. Therefore, the use of force is authorized but each situation is context driven.

29 ICRC – International Humanitarian Law Database. “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977”. ICRC. §1621. 1987. Available at: <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-41/commentary/1987>

4. THE IMPACT OF TECHNOLOGY ON SURRENDER: THE CASE OF UKRAINE

The war between Ukraine and the Russian Federation has been ongoing since 2014, when Russia annexed the Crimean Peninsula and later began to support separatists in Eastern Ukraine. With the Russian military maintaining a large presence in the region, it has been difficult for the Ukrainian military to effectively counter enemy advances from various directions. In recent months, however, the Ukrainian Armed Forces has increasingly advanced in the military field and turned to the use of drones to counter Russian forces. Drones have been used to monitor Russian military activity, target their forces with precision strikes, and even invite Russian soldiers to surrender.



Photo: Roman Kostenko

The use of drones to request surrender has become the latest tool in the Ukrainian-Russian war. This effort takes place under the auspices of “I Want to Live” project. These drones, known as “surrender boxes”, are equipped with loudspeakers that broadcast a recorded message in both Russian and Ukrainian, inviting the troops to put down their arms and surrender. The drones fly over the Russian-controlled areas, allowing the Ukrainian troops to distance themselves from the front lines. Russian soldiers who decide to surrender have to contact a hotline based out of a secure secret facility which many officials and military staffers are not allowed to enter. The operators use only computers, headphones and special software to accept and record calls. The operators upon recording the personal information of the Russian combatant pass it to the relevant state bodies and special military units. Each case is evaluated differently, taking into account the individual’s age, origin and military experience. High-level military personnel are treated as priority, as they may possess valuable intelligence. The project also evaluates people based on the region where they are surrendering, on their education level and how the person was captured, if they were.³⁰

Soldiers who want to surrender receive instructions and coordinates for where they will hand themselves over. As the flight time of a drone is short, accuracy and the timeliness of the surrendering soldiers is critical. Once the Russian soldier arrives at the agreed upon location they should wait for the drone to arrive, establish a visual contact with the drone and raise their hands. At this point the Ukrainian operator will acknowledge the soldier’s surrender by moving the drone up and down, after which the drone will begin slowly guiding the surrendering soldier until he makes contact with Ukrainian soldiers nearby. If the soldier loses contact with the drone, the soldier must wait for a new one and follow that. In addition to inviting the soldiers to surrender, the drone’s message also includes a reminder of their rights and promises of safe passage back to the mainland if they comply. It should be noted that Russians also launched an initiative where Russia’s drone operators send SMS messages with calls for Ukrainians to lay down their arms and surrender.³¹

The Russia-Ukraine war is not the first instance of drones facilitating the surrender of enemy combatants. The U.S. Army, U.S. Navy and U.S. Marine Corps flew propeller-driven Pioneer drones as part of the air campaign over Kuwait and Iraq in 1991. Navy Pioneers, working from the deck of the battleship USS Missouri, spotted targets for Missouri’s 16-inch guns. While one Pioneer was assessing damage from naval bombardment targeting Iraqi positions on Faylaka Island near Kuwait City, several Iraqi soldiers “signaled their intention to surrender to

30 Drozd, Julia; de la Cuetara, Ines. “Ukraine offers Russian soldiers a hotline to surrender”. *ABC News*. 3 January, 2023. Available at: <https://abcnews.go.com/International/ukraine-offers-russian-soldiers-hotline-surrender/story?id=95918999>

31 “Russia’s drone operators send SMS calls for surrender to Ukrainian troops”. *TASS Russian News Agency*. 10 November 2022. Available at: <https://tass.com/politics/1534913>

the aircraft during a low pass,” Coalition ground troops landed on the island and took the Iraqis into captivity.³²

Ukraine’s “surrender box” initiative has been a great success, with many soldiers choosing to accept the offer of surrender and these have been returned safely to their homes. As of 3 January, 2023, Vitaliy Matvienko, the project’s spokesperson said that the hotline has received, roughly, 200 to 300 daily calls since September, exceeding together other means such as the use of encrypted messages via Telegram more than 4000 requests of surrender.³³

It should be noted that the drones are operated by Ukrainian operators rather than by artificial intelligence. Were AI to be used it would be important to establish whether the AI system can interpret actions expressing the intention to surrender. With the increasing automatization of lethal weapons and non-lethal military equipment additional questions related to AI use and the application of IHL will arise.

32 Axe, David. “Russian Soldiers Are Surrendering to Ukrainian Drones. This Has Happened Before”. *Forbes*. 18 November 2022. Available at: <https://www.forbes.com/sites/davidaxe/2022/11/18/russian-soldiers-are-surrendering-to-ukrainian-drones-this-has-happened-before/?sh=17dfcfe166e6>

33 Drozd, Julia; de la Cuetara, Ines. “Ukraine offers Russian soldiers a hotline to surrender”. *ABC News*. 3 January, 2023. Available at: <https://abcnews.go.com/International/ukraine-offers-russian-soldiers-hotline-surrender/story?id=95918999>

CONCLUDING REMARKS

The rule of surrender is a set of principles that dictate when and how a soldier can surrender on the battlefield. The rule is a vital part of the laws of war and is intended to protect the lives of combatants and non-combatants alike.

A clear intent to surrender must be demonstrated by combatants. This intent should be communicated in an unambiguous and unmistakable way, such as by raising hands, by shouting “I surrender” or by putting down weapons. Hoisting a white flag can be controversial because it rather demonstrates the willingness of opposing party to start negotiations. Furthermore, once the intent to surrender has been declared, the combatant must remain in a clearly passive stance. They should avoid sudden movements that could be perceived as hostile and follow instructions. It is important for the surrendering forces to make it clear that they intend to withdraw from the conflict.

Combatants who surrender are considered to have “fallen into the power” of the opposing forces. This is so once the adversary has concluded that the surrender is sincere and unconditional, that the surrendering combatants are no longer a threat, and that they are unable or unwilling to engage in hostilities or defend themselves. The surrendering combatants are now safe from harm.

The use of force is authorized through the entire surrender process. A soldier who engages in a hostile act loses protection from attack, and deadly force can be used when they pose an immediate threat — that necessary to subduing the threat. In general, force should only be used when it is absolutely essential and should never be employed in a way that results in unwarranted or disproportionate harm. Force should not be used by the military to punish or to take revenge on a combatant who has committed crimes. Under certain circumstances, soldiers will be unintentionally killed during the surrender process, and this is not illegal so long as the degree of force employed is deemed to be reasonable for thwarting the immediate

threat. It might be logically necessary to shoot both the shooter and the shield if the soldier who opens fire is using another soldier as a shield in front of him. Force can, therefore, be used, but all depends on context.

As technology advances, the use of autonomous weapons and non-lethal military equipment is becoming more commonplace. This raises further questions regarding compliance with IHL. We gave the example of drones used in the Russia-Ukraine war to encourage surrender. These are operated, note, by Ukrainian operators and not by any form of artificial intelligence. If artificial intelligence were to be used then it would be important to ask whether or not the AI system in question could identify and interpret signs of surrender in order to decide whether to accept or decline the same.

ANNEX

THREE-STAGE TEST FOR EFFECTIVE SURRENDER

There are three parts that all officers and soldiers must be trained to recognize and apply in conducting surrendering operations. It requires a clear and unambiguous declaration of surrender and guarantees that the surrender is accepted by the opposing party.

1. Have persons who are attempting to surrender engaged in a positive act which clearly indicated that they no longer intend to directly participate in hostilities?

Combatants who wish to surrender must act purposively in order to repudiate the assumption that they represent a threat to military security. In the words of the United States Law of War Deskbook (which is distributed as part of the Judge Advocate Officer Graduate and Basic Courses), ‘the burden is upon the surrendering party to make his intentions clear, unambiguous, and unequivocal to the capturing unit’.³⁴ IHL treaties impose an obligation upon opposing forces to accept valid offers of surrender.

34 International and Operational Law Department of the USA. “Law of Armed Conflict Deskbook”. *The United States Army Judge Advocate General’s Legal Center and School*. 2016. Available at: [https://www.jagcnet.army.mil/Sites%5C%5Cio.nsf/0/EEF9422EB2C293B68525805A0063ABED/%24File/LOAC%20Deskbook%20final%20with%202016%20index%20\(20%20Sep\).pdf](https://www.jagcnet.army.mil/Sites%5C%5Cio.nsf/0/EEF9422EB2C293B68525805A0063ABED/%24File/LOAC%20Deskbook%20final%20with%202016%20index%20(20%20Sep).pdf)

Conduct amounting to direct participation in hostilities includes ‘acts of war which by their nature or purpose are likely to cause actual harm to the personnel or materiel of the enemy armed forces’.³⁵

2. Is it reasonable in the circumstances for the opposing force to discern and respond to the offer of surrender?

An interesting incident came to light in October 2010 as a result of classified US military logs being published by the whistle-blower website Wikileaks.³⁶ The logs revealed that during the Second Gulf War a US Apache helicopter engaged a truck containing two Iraqi insurgents. The US pilots then radioed military headquarters, explaining that the two insurgents ‘came out [of the truck] wanting to surrender’. Military headquarters subsequently communicated to the pilots the legal advice of a US military lawyer: ‘Lawyer states they cannot surrender to aircraft and are still valid targets’. The Apache helicopter opened fire on the insurgents, eventually killing them both. Commenting upon the incident, Roberts correctly notes that while ‘[s]urrender is not always a simple matter’, the legal advice of the US military lawyer that ground forces cannot surrender to aircraft, and that thus **offers of surrender in such circumstances can be permissibly refused** was ‘dogmatic and wrong’. The issue is that ground forces in such circumstances **need to surrender in ways that are clear and unequivocal**’.

During war, it may be the case that an enemy expresses the intention to surrender but the circumstances existing at the time prevent the opposing force from discerning that offer of surrender. During the First Gulf War, US tanks equipped with earthmoving plough blades breached Iraqi defences and then turned and filled in trenches, entombing Iraqi soldiers who had sought to surrender. A US report into the incident explained: The opponent ‘may not refuse an offer of surrender when communicated, but that **communication must be made at a time when it can be received and properly** acted upon – an attempt to surrender in the midst of a hard-fought battle is neither easily communicated nor received. The issue is one of **reasonableness**.’³⁷

35 *Prosecutor v Galić*, Judgment, ICTY Case No. IT-98-29-T, Trial Chamber, 5 December 2003, [48].

36 Leigh, David. “Iraq War Logs: Apache Crew Killed Insurgents Who Tried to Surrender”. *The Guardian*. 22 October 2010. Available at : <https://www.theguardian.com/world/2010/oct/22/iraq-war-logs-apache-insurgents-surrender>.

37 Secretary of Defense of the United States of America. “United States: Department of Defense Report to Congress on the Conduct of the Persian Gulf War – Appendix on the Role of the Law of War”. *International Legal Materials* 31, no. 3. 1992. Available at: <https://www.jstor.org/stable/20693692>

IHL requires the commander to take all reasonable and feasible measures to ensure that the targets remain permissible objects of attack before launching an offensive. It may be reasonable, for example, for the commander to employ readily available equipment (such as night vision goggles or high performance binoculars) to check whether the enemy has expressed an intention to surrender before they are engaged, provided, of course, that the time spent preparing the equipment or using it does not compromise military objectives.³⁸

3. Have persons who are surrendering unconditionally submitted to the authority of their captor?

Article 41(2) of Additional Protocol I and Rule 47 of the ICRC Study stipulate that a person who surrenders but subsequently engages in a 'hostile act' or 'attempt[s] to escape' is no longer regarded as hors de combat and again becomes liable to direct targeting.³⁹ The Commentary to the Additional Protocol provides examples, such as **resuming combat functions if the opportunity arises, attempting to communicate with their own party, and destroying installations and equipment belonging to their captor or to their own party.**⁴⁰

The act of surrender is a continuing obligation insofar as the persons surrendering must continually comply with the demands of their captor. Thus, persons who refuse to obey demands to kneel or to lie on the ground, place their hands behind their back, remain silent, stand still and so on, do not submit to the authority of their opponent and do not surrender for the purpose of IHL. Presumably, surrendered persons have only to comply with reasonable demands of their captor: captors cannot require their captives to undertake conduct that exposes them to danger and, if they refuse to comply, determine that they have committed a hostile act and that they are, therefore, liable to attack.

38 Buchan, Russell. "The Rule of Surrender in International Humanitarian Law." *Israel Law Review*, Volume 51 Issue 1. 21 February 2018. (pgs. 3–27). Available at: <https://www.cambridge.org/core/journals/israel-law-review/article/rule-of-surrender-in-international-humanitarian-law/714B1EAB954811EB2907A046EA069504#>

39 *Office of General Counsel, Department of Defense*. "Department of Defense Law of War Manual". Department of Defense of the United States of America. June 2015 (updated December 2016). Available at: <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190>

40 ICRC – International Humanitarian Law Database. "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977". *ICRC*. §1621-1622. 1987. Available at: <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-41/commentary/1987>

DCAF - Geneva Centre for Security Sector Governance

Maison de la Paix, Chemin Eugène-Rigot 2E

CH-1202, Geneva, Switzerland



+41 22 730 94 00



info@dcaf.ch



www.dcaf.ch



@DCAF_Geneva
