Down Is Not Always Out:

An Infantry Leader's Guide to Persons Hors De Combat Under the Law of War

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"A*fter I fired the first two shots, the man sat up 12 meters directly in front of me, swinging a machine gun in our direction. I released four more rounds, sending them into his chest. McCauley opened up just after me, firing his pistol, while Tayo simultaneously shot the man in the thigh. At that point, the man either fell back into his hole or ducked down into his position. We couldn't be sure, so we kept firing to keep his head down. I wasn't taking any chances.*

It wasn't but a few seconds before Ray came tearing in from the right … 'Cease Fire!' Ray yelled, and as I did, I also grabbed McCauley's pistol to make sure he did the same. Ray briefly halted, aimed, and fired three shots from his carbine. Then he yelled, 'Clear!'"[1]

The situation above illustrates a "gray area" inherent in modern combat operations. By pausing, aiming at, and engaging a downed enemy, were the Soldiers conducting a lawful attack or committing a war crime?[2] Were their actions in accordance with Army training, and how can leaders ensure their Soldiers have the confidence to operate in accordance with the law of war while maintaining lethality?[3] (Note: I do not intend to cast aspersions or second-guess the actions of these Soldiers, but merely employ this situation to illustrate the potential complexity and ambiguity inherent in combat. See end notes for more information.) The goal of this article is to equip infantry leaders with the knowledge required to train their Soldiers to make confident, split-second decisions in combat. While this article is not a substitute for legal advice from a unit's servicing judge advocate, it will provide basic information, dispel common myths, and serve as a starting point for leaders who want to improve training for their unit or conduct deeper research.[4]

The American military complies with the law of war during all armed conflicts and carries out all military operations consistent with the law of war's fundamental principles and rules, which include the principles of military necessity, humanity, distinction, proportionality, and honor.[5] The law of war principle of distinction, sometimes called discrimination, requires Soldiers to distinguish lawful targets from persons protected from attack.[6] Unless theater policy or rules of engagement (ROE) require it, under the law of war Soldiers do not need to wait for an enemy to exhibit hostile intent or commit a hostile act when conducting status-based targeting — they may attack and kill enemy troops on sight.[7] Enemy troops are lawful targets because of their status as members of an armed force or organized armed group and may be attacked unless their status changes to grant them protection.[8] Persons receiving protection include civilians but also include enemies classified as *hors de combat*. *Hors de combat* is the French term used in international treaties to mean an enemy who is out of the fight due to wounds, surrender, or capture.[9] Persons who are out of combat are protected from further attack, even if they are a member of enemy armed forces.[10] In addition to distinction, the principles of military necessity and humanity also prohibit engaging enemies who are out of the fight, as attacking them serves no valid military purpose and their suffering would therefore be unnecessary.[11]

Army doctrine specifically identifies "wounded personnel who are out of combat" as no longer being lawful targets, and Soldiers are trained not to engage enemies once those enemies are out of the fight.[12] This requirement applies throughout the range of military operations including large-scale combat operations and stability operations, and it may not be rescinded by policy or ROE because it is an obligation imposed by the law of war.[13] It applies to *all* enemies, from uniformed enemy soldiers to terrorist fighters.[14] However, not *all* wounded personnel are *automatically* out of combat.[15]

An enemy who is out of the fight is protected and cannot be attacked or reengaged, but whether an enemy is out of the fight is not always immediately obvious. An enemy who is wounded is not automatically out of the fight. Wounded combatants can continue to fight, and the tactic of "playing dead" is common in the current operating environment.[16-17] There are three factors that are required for an enemy to be considered out of combat due to wounds:

1) He must be wounded;

2) The wound must make him incapable of defending himself; and

3) He must abstain from any hostile act and may not attempt to escape.[18]

As a general rule, once a Soldier is reasonably certain that an enemy is a lawful target, that person remains a lawful target until the Soldier is convinced the enemy is out of the fight.[19] The applicable standard for determining whether an enemy is out of the fight is "common sense and good faith."[20] Lying still on the ground is insufficient to determine that a target has fallen out of the fight, especially if an individual's hands are not visible or there is reason to believe he may

be wearing a suicide vest. Also, the mere appearance of visible wounds is probably not enough, unless the nature of those wounds makes it clear the person is unable to defend himself or continue to fight. Clear indicators an enemy is out of combat include decapitation or an amount of pooling blood that makes it plain and obvious the enemy's wounds were mortal. If a Soldier is not convinced an enemy is out of the fight, that enemy continues to be a lawful target and can be attacked; however, the practice of automatic, *indiscriminate* attacks on downed enemies to include a technique or standard procedure of firing "security rounds," "double-taps," or "death checks" would be unlawful. Soldiers can employ controlled pair techniques so long as they discriminate and only engage individual targets after they make a good faith determination that those specific targets remain in the fight.[21]

Units must review and train standard operating procedures or techniques to ensure they do not train Soldiers to engage all downed enemy as they clear an objective, including those who are obviously out of combat.[22] A unit risks unlawful engagements if techniques are applied indiscriminately to all downed enemy without regard to the specific circumstances. Soldiers may lawfully engage targets if they are not convinced the targets are out of the fight, but they should be trained not to attack individuals they believe are out of the fight with indiscriminate "death checks," to include individuals who are obviously dead.[23] If the circumstances cause a Soldier to be reasonably certain an individual is an enemy but the Soldier is not reasonably convinced that enemy is out of the fight, that enemy remains a lawful target.[24]

Context is important, but there is no military necessity exception to the prohibition on deliberately targeting enemies out of the fight. The possibility of a theoretical, general threat is insufficient — Soldiers must have a good faith belief that each specific enemy may not be out of the fight to engage that specific enemy.[25] There is no requirement to provide an enemy with the opportunity to surrender before attacking him, but if viable surrender is offered it must be accepted.[26] Soldiers must understand that the presence of an enemy out of the fight does not furnish a "protective bubble" or "human shield" for other enemy who remain in the fight. Soldiers can engage the remaining enemy so long as their target is not the individual who is out of the fight, and so long as they take feasible precautions to avoid attacking the enemy who is out of combat.[27] Feasible precautions does not mean weapon effects are not permitted to impact the enemy out of the fight, just that the enemy who is out of the fight may not be targeted for *direct attack* and that the attacker must use practicable precautions to avoid effects on him.[28] For example, if Soldiers attacking an enemy bunker shoot an enemy who falls inside the bunker and the Soldiers are convinced that particular enemy fighter is out of combat, but other enemy fighters continue to engage the Soldiers from the same bunker, the Soldiers could employ direct fire, fragmentation grenades, a recoilless rifle, or close air support to silence the bunker, as the target of their attack is the enemy fighters who remain in the fight. Soldiers should take feasible precautions to reduce effects on the individual

Paratroopers assigned to the 173rd Airborne Brigade approach fallen enemy role players during a simulated ambush scenario at Dandolo Range in Pordenone, Italy, on 18 January 2018.
Photo by Davide Dalla Massara

who is out of combat, but his presence does not prevent them from winning the fight and he is not considered a civilian for proportionality purposes.[29]

Units should avoid standard operating procedures or techniques that tie the authority to reengage the enemy to a location on the objective or other administrative control measure. The calling of a "cease fire" or reaching a limit of advance (LOA) is not legally significant. A LOA is a control measure used to control the forward progress of an attack.[30] For dismounted formations, the LOA can be a designated linear terrain feature such as a road, but for small units it is frequently an imaginary line located one bounding movement past the last enemy position.[31] A LOA is generally employed in attacks such as ambushes. During an ambush, "an assault is launched into the kill zone with heavy fire and violence to complete destruction" of the enemy.[32] Typically, an assault element will clear through the kill zone to the LOA before establishing local security and conducting actions on the objective, such as searching enemy corpses.[33] The assault element will be prepared to move across the kill zone using individual movement techniques if there is return fire once they begin to search, but otherwise move by bounding fire teams, and should meter their violence of action to ensure dominance but avoid overkill.[34] If an assault force is clearing through an objective and observes an enemy lying on the ground, without wounds that are clearly mortal and with a weapon in reach, the members of the assault force could make a good faith determination that he remained a lawful target and could engage him to ensure he was killed or rendered out of combat, including the use of a controlled pair or other appropriate use of force. Regardless of the movement technique employed, Soldiers must employ individual target discrimination to determine whether downed enemy remain lawful targets but must avoid engaging those who are out of the fight.

Techniques that tie engagement decisions to proximity to the LOA or that falsely suggest all engagements are lawful so long as the shooter has not assaulted past the enemy's location are counterproductive, as the enemy's location in relation to the LOA and whether the assault element has moved past the enemy are not legally significant. The key is making informed, individual decisions about whether or not an enemy is out of the battle. Incorporating vignettes and scenarios into training are best practices for inculcating the muscle memory and confidence necessary to make rapid, lawful decisions in combat.

Another training technique is to involve the unit's servicing judge advocate or paralegal in conducting mock investigations into *hors de combat* incidents as part of planned training vignettes or incidents that develop organically during training.[35] Many commanders recoil from incorporating investigations into training in this manner, lamenting that the military is already over-lawyered and tends to investigate unnecessarily.[36] However, all U.S. personnel are required to report alleged law of war violations, and commanders are required to conduct an appropriate investigation or inquiry into credible allegations of war crimes.[37] Incorporating investigations as training injects has the benefit of de-mystifying the investigative process for Soldiers, as well as providing training for the legal team and potential investigating officers from the unit. The conduct of war crimes investigations is incorporated as a "best practice" at the Army's Combat Training Centers.[38] Soldiers will gain an understanding of the investigative process, and their faith that they will be treated professionally and fairly will increase. In particular, Soldiers will learn that investigations are designed to protect them and the institution.[39]

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Under the so-called Rendulic Rule, the standard for a war crimes investigation is whether actions were reasonable under the conditions as they appeared at the time, taking into account the split-second nature of decisions and the imperfect information available during combat.[40] Under international law, the standard for determining whether a target is out of the fight is whether, given the information available to the attacker in the moment, the target "should be recognized by a reasonable [person] as being *hors de combat*."[41] Soldiers will not be held criminally responsible for "a mere error in judgment."[42]

In a future characterized by compressed decision cycles and reaction times, it is critical that Soldiers maintain the confidence and legal maneuver space to operate in accordance with the law of war while maximizing lethality.[43]

Author's Note

The views expressed in this article do not constitute legal advice, nor do they reflect the views of the Department of Defense, although I have attempted to harmonize the article with existing DoD policy. Wherever possible, hyperlinks to digital resources are provided to assist leaders in conducting research and preparing training, although the pagination of the electronic resources will not always match the article's pinpoint citations.

Notes

[1] Andrew Exum, *This Man's Army: A Soldier's Story from the Front Lines of the War on Terrorism* (NY: Gotham Books, 2004), 169-170.

[2] I do not intend to cast aspersions or second-guess the actions of these Soldiers, but merely to employ this situation to illustrate the potential complexity and ambiguity inherent in combat. The author believes this was a lawful re-engagement, and a contemporaneous command investigation appears to have reached the same conclusion. See Exum, *This Man's Army*, 197-199.

[3] For a deeper discussion of the effectiveness (or not) of the Army's Law of War training regime, see Chris Jenks, "The Efficacy of the U.S. Army's Law of War Training Programs," *Articles of War*, 14 October 2020, https://lieber.westpoint.edu/efficacy-u-s-armys-law-of-war-training-program/.

[4] Leaders should consult with their servicing operational law attorney, especially when conducting multinational operations. Many nations have differing interpretations of international law, and U.S. forces need to be aware of and account for such differences during planning for training and operations. See U.S. Department of Defense [DoD], Joint Publication 3-16, *Multinational Operations*, 1 March 2019, chap. III, para. 5.

[5] DoD Directive 2311.01, *DoD Law of War Program*, 2 July 2020, para. 1.2a, https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/231101p.pdf. This article primarily uses DoD's preferred term "law of war" to refer to the treaties and customary international law binding on the United States that regulate: the resort to armed force; the conduct of hostilities and the protection of war victims in international and non-international armed conflict; belligerent occupation; and the relationships between belligerent, neutral, and non-belligerent States. The law of war is sometimes called the law of armed conflict, the law of land warfare, or international humanitarian law.

[6] DoD, *Law of War Manual*, December 2016, https://www.defense.gov/Newsroom/Publications/, select "filter," select "keywords," enter "law of war manual," para. 2.5; see also U.S. Army, the Judge Advocate General's Corps Legal Center and School, National Security Law Department, *Operational Law Handbook*, 2020, https://tjaglcspublic.army.mil/tjaglcs-publications, select "deskbooks and handbooks," select "national security law," select "Operational Law Handbook 2020," chap. 3, para. V.B.

[7] Remarks by LTG Charles N. Pede, the Judge Advocate General, at Duke University Center for Law and Ethics in National Security, 25th National Security Law Conference, 7 March 2020, https://sites.duke.edu/lawfire/2020/03/07/ltg-pede-on-the-coin-ct-hangover-roe-war-sustaining-targets-and-much-more/. There are nuances between status-based targeting and conduct-based targeting which are beyond the scope of this article, to include the fact that classifying "enemy" may turn on their membership in an organized armed group or the degree of their direct participation in hostilities, both of which are separate and legally complicated tests applied above the level of close combat. See E. Corrie Westbrook Mack & Shane Reeves, "Tethering the Law of Armed Conflict to Operational Practice: 'Organized Armed Group' Membership in the Age of ISIS," *Berkeley Journal of International Law*, Vol. 36, 3 November 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3315725.

[8] Geoffrey Corn, Ken Watkin, and Jamie Williamson, *The Law in War A Concise Overview* (NY: Routledge, 2018), 88-89 ("…the law permits the use of highly lethal combat power against all members of the enemy armed group, but that authority terminates once an individual member of that group is rendered *hors de combat* by wounds… .") (italics in original).

[9] DoD, *Law of War Manual*, para. 5.9.1. This article employs and interchanges the terms "out of the fight" and "out of combat" in place of the French term of art *hors de combat*.

[10] Hague Convention (IV) Respecting the Laws and Customs of War on Land, October 18, 1907, https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0631.pdf, Article 23(c) ("…it is especially forbidden … [t]o kill or wound an enemy … having no longer means of defence...").

[11] Field Manual (FM) 6-27, *The Commander's Handbook on the Law of Land Warfare*, August 2019, para. 1-29 ("… if an enemy has been incapacitated (rendered *hors de combat)* by being severely wounded or captured, no military purpose is served by continuing to attack that incapacitated enemy.").

[12] Army Techniques Publication (ATP) 3-21.8, *Infantry Platoon and Squad*, April 2016, para. 1-30.

[13] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 311949, https://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-970-English.pdf, art. 3(1).

[14] FM 6-27, para. 1-70 ("…unprivileged belligerents who are *hors de combat* may not be made the object of attack and must be treated humanely.").

[15] Even the International Committee for the Red Cross (ICRC), an international organization that frequently takes positions on issues of international law distinct from those of the United States, finds uncontroversial the notion that wounded and *hors de combat* are not the same. See ICRC, Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 2nd edition, 2016, https://ihl-databases.icrc.org/ihl/full/GCI-commentary, para. 1344 (acknowledging that individuals can be "wounded or sick, whether severely or not, but who are not (yet) incapacitated by their medical condition.").

[16] See U.S. Army, Official Citation SSG Clinton L. Romesha Medal of Honor Operation Enduring Freedom, https://www.army.mil/medalofhonor/romesha/citation.html ("Undeterred by his injuries, Staff Sergeant Romesha continued to fight…"); see also U.S. Army, Official Citation SFC Leroy A. Petry Medal of Honor Operation Enduring Freedom https://www.army.mil/medalofhonor/petry/citation.html ("...wounded in both legs, Staff Sergeant Petry led the other Ranger to cover …. Despite the severity of his wounds, Staff Sergeant Petry continued to maintain [his] presence of mind…").

[17] Alex Chadwick, "No Court-Martial for Marine Taped Killing Unarmed Iraqi," *National Public Radio*, 10 May 2005, https://www.npr.org/templates/story/story.php?storyId=4646406; Jerry Meyer and Carter Malkasian, *Insurgent Tactics in Southern Afghanistan 2005-2008* (Arlington: CNA Strategic Studies, 2009) ("In Farah province in 2007, a large group of insurgents played dead and held their fire after airstrikes, and then opened fire…"). Of note, pretending to be *hors to combat* to launch an attack constitutes the war crime of perfidy.

[18] *Law of War Manual*, para. 5.9.4; see Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, https://ihl-databases.icrc.org/ihl/INTRO/470, select "Art. 41," Art.41(2). This article is focused on persons *hors de combat* due to wounds, but individuals can also come out of the fight due to surrender or capture. See Law of War Manual, paras. 5.9.2-5.9.3.

[19] International law tends to speak in terms of "good faith," but I have chosen to use the more familiar construct of reasonable certainty — the concepts are co-extensive.

[20] ICRC, Commentary on the First Geneva Convention, para. 1347.

[21] Matthew Milikowsky, "There are No Enemies after Victory: The Laws Against Killing the Wounded," *Georgetown Journal of International Law*, Vol. 47, 1221 (Summer 2016), available at SSRN: https://ssrn.com/abstract=2745222.

[22] David B. Mercer, answer to "Is it a war crime to shoot dead enemy soldiers to verify they're dead?," 20 March 2017, https://www.quora.com/Is-it-a-war-crime-to-shoot-dead-enemy-soldiers-to-verify-theyre-dead ("If you have no friendly troops in front of you, then you are the forward line of battle, and anyone in front of you, even if lying down appearing dead, we were instructed to double-tap (shoot twice) in the head before we passed them. Once we passed them, they are to be considered EPWs (enemy prisoners of war) if they are still alive, and we don't want to have to deal with them."). This internet site contains numerous opinions on the question presented, many of them wrong, several of them advocating war crimes, and none of them a substitute for advice from a competent operational lawyer.

[23] A dead person is not *hors de combat*, he is dead. That said, corpses are entitled to respect and protection from being despoiled. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick, Art. 18.

[24] ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Eds. Yves Sandoz et. al. (Geneva: ICRC, 1987), 491 ("…the prohibition extended only to attacks directed against persons who were, in fact, recognized to be *hors de combat* and those who, under the circumstances, should have been recognized by a reasonable man as *hors de combat*.").

[25] Blackman v. Regina, 2014 EWCA Crim 1029 (22 May 2014) (affirmed as manslaughter by 2017 EWCA Crim 190 [15 March 2017]), https://www.bailii.org/ew/cases/EWCA/Crim/2014/1029.html ("We cannot accept the submission, in connection with the circumstances of the shooting, that the fact that the patrol was under threat from others has any real bearing on the finding of the Court Martial that there was no threat from the wounded Afghan insurgent. We accept, of course, that the patrol was certainly at risk from other insurgents and that if the Afghan insurgent had attempted to shoot or in any way injure the appellant or those under his command, he would have been lawfully entitled under the rules of engagement to return the fire with equal force. However, that was not the position. It is evident from the findings of the Court Martial and from the video that there was no threat from the wounded Afghan insurgent. He was plainly very seriously injured and had been disarmed. True it may be that there may have been other insurgents in the vicinity, but that played no causative effect in the appellant's decision to fire at the wounded insurgent and kill him.").

[26] *Law of War Manual*, para. 2.2.3.1.

[27] Ibid, para. 5.10.2.

[28] See Scott R. Adams, "Lancelot in the Sky: Protecting Wounded Combatants from Incidental Harm," *Harvard Law School National Security Journal*, 8 August 2017, https://harvardnsj.org/2017/08/lancelot-in-the-sky-protecting-wounded-combatants-from-incidental-harm/ ("The *hors de combat* concept, rather than converting a combatant to a civilian or noncombatant, is a situation-specific standard where an enemy combatant is protected by the law from direct attack.").

[29] *Law of War Manual*, para. 17.14.1.2 ("Persons who are part of armed forces or groups, however, are deemed to have accepted the risk of harm due to deliberate proximity to military objectives. Although the presence of such persons does not serve to exempt nearby military objectives from attack due to the risk that such persons would be incidentally harmed, feasible precautions to reduce the risk of harm to such persons … must be taken."). As discussed in note 5, some U.S. interpretations of international law are not universal, and this is a good example of an issue where multinational partners may differ in opinion and practice. See Commonwealth of Australia, Australian Defence Forces, Australian Defence Doctrine Publication 06.4 *Law of Armed Conflict* (Canberra: Australian Defence Headquarters, May 11, 2008), para. 7.8 ("Soldiers who are 'out of combat' and civilians are to be treated in the same manner and cannot be made the object of attack."). The United States agrees that neither civilians nor persons *hors de combat* may be targets of direct attacks but treats civilians and persons *hors de combat* differently for proportionality purposes.

[30] FM 1-02.2, *Military Symbols*, 10 November 2020, Table 5-9.

[31] FM 3-90.1, *Offense and Defense*, Volume 1, 22 March 2013, para. A-80.

[32] Marine Corps Tactics Publication 3-01A, *Scouting and Patrolling*, 24 July 2020, para. 3-9.

[33] ATP 3-21.8, para. 6-133.

[34] Ibid, para. 6-156.

[35] See Jenks, "The Efficacy of the U.S. Army's Law of War Training Programs."

[36] See generally Arthur L. Rizer, "Lawyering Wars: Failing Leadership, Risk Aversion, and Lawyer Creep Should We Expect More Lone Survivors?," *Indiana Law Journal* Vol. 90, Iss. 3 (2015), https://www.repository.law.indiana.edu/ilj/vol90/iss3/1; see also William G. Hyland Jr., "Law v. National Security: When Lawyers Make Terrorism Policy," *Richmond Journal of Global Law & Business*: Vol. 7, Iss. 3 (2008), https://scholarship.richmond.edu/global/vol7/iss3/2/.

[37] DoD, Directive 2111.01, para. 4.2a(2).

[38] Telephone conversation with Legal observer-controller-trainer, Joint Readiness Training Center, 24 November 2020.

[39] Dan Mahanty, "In Search of Answers: U.S. Military Investigations and Civilian Harm," *War on the Rocks*, February 20, 2020, https://warontherocks.com/2020/02/in-search-of-answers-u-s-military-investigations-and-civilian-harm ("For military commanders, an investigation can help to ensure unit and soldier discipline, and provide operational or tactical insights to prevent such incidents from recurring. Several military sources of guidance also emphasized the value of investigations in exonerating involved servicemembers of wrongdoing.").

[40] United States v. List, et al., (The Hostage Case), 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, Oct. 1946–Nov. 1949, at 1297, https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-8.pdf.

[41] ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Eds. Yves Sandoz et. al. (Geneva: ICRC, 1987), 491.

[42] U.S. Army Office of the Judge Advocate General, Law of War Compliance Administrative Investigations and Criminal Law Supplement (Charlottesville, VA: The Judge Advocate General's Legal Center and School, 10 September 2018), para. 6a (citations omitted).

[43] The Army Strategy (2018), para. II, https://www.army.mil/e2/downloads/rv7/the_army_strategy_2018.pdf.

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