

NO LONGER FOES BUT FRIENDS: *HORS DE COMBAT* IN HUMANITARIAN LAW*

Abstract

As a matter of general rule, combatants are lawful targets of military operations because of the combat function they undertake. This principle is not however absolute as the intendment of Humanitarian Law is not that wars should be fought in perpetuity but that there should be an end to wars. As such, where enemy combatants have been placed hors de combat, they cease to be legitimate targets of military operations and become the subject of protection. This is predicated on the fact that they no longer constitute military threat to the adverse Party. The Article seeks to demonstrate, through doctrinal method of legal research, that enemies hors de combat are no longer foes but 'friends'. The Article contended that since the purpose of International Humanitarian Law is to strike a balance between military necessity and concern for humanity, it serves no military purpose targeting persons who have been placed hors de combat and in fact defeats its very purpose. The Article nevertheless observed that more often than not, enemies hors de combat are rather considered as enemies in perpetuity. To obliterate this difficulty, the Article recommended among other things the constant dissemination of the rules of International Humanitarian Law particularly among armed forces, with a view to increasing their respect for Humanitarian Law.

Keywords: Humanitarian Law, *Hors de combat*, Military Necessity, Targeting, Protection

1. Introduction

The intendment of International Humanitarian Law is that there should be an end to war. This entails the restriction of attacks to persons taking active part in hostilities¹ and prohibition against ordering of no quarters.² The essence of this is to protect the disarmed man³ which underscores the Law of Armed Conflict. This is particularly why International Humanitarian Law requires a distinction between civilians and combatants⁴ and further requires that only combatants shall be targeted during military operations⁵ but not persons not taking active part in hostilities⁶ nor their objects.⁷ This position finds expression in the principle of distinction. Additionally, even where a target is military, International Humanitarian Law requires that only such force that is indispensable in achieving the intended legitimate military objectives⁸ should be employed.⁹ This is encapsulated in the principle of military necessity.¹⁰ Thus, in International Humanitarian Law, combatants are generally considered as legitimate targets of military operations¹¹ against the backdrop that they constitute military threat to the adverse Party while those not or no longer taking active part in hostilities are not legitimate targets.¹² However, combatants cease to be lawful targets as soon as they cease their hostile act or become incapable of discharging their combat function¹³ whether by choice or by circumstance. This flows from the

* By Anita NWOTITE, LL.M., LL.B., B.L., Lecturer, Faculty of Law, Nnamdi Azikiwe University, Awka, Nigeria
Email: nwoiteanita@gmail.com. Phone No.: 2348039574167.

¹ Protocol Additional to the Geneva Conventions, 1949 and Relating to the Victims Protection of International Armed Conflicts, June 1977, Articles 48 & 52(2).

² *Ibid*, Article 40.

³ Y Sandoz, Christophes Swinarski, Bruno Zimmermann(eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, p 480 at 1601<<https://www.ihl-databases.icrc.org>> accessed 31 August 2019; Protocol I, *op cit*, Articles 41 & 51.

⁴ Protocol I, *op cit*, Article 48.

⁵ *Ibid*.

⁶ *Ibid*, Articles 48 & 51.

⁷ *Ibid*, 52(1).

⁸ *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J paragraph 78; C Toscano, Friend of Humans: An Argument for Autonomous Weapon Systems' (2010) 8 *J. NAT'L SEC. L. & POL'Y*, 189.

⁹ Declaration of St. Petersburg, 1868, Preamble.

¹⁰ Oren Gross, 'The New Way of War: Is there a Duty to Use Drones?' (2016) 6 (1) *Florida Law Review*, 29.; V Sehwat, 'Legal Status of Drones Under LOAC and International Law (2017) 5 (1) *Penn State Journal of Law and International Affairs*, 180.

¹¹ Protocol I, *op cit*, Articles 48 and 52(2).

¹² Y Sandoz, *et. al.* (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), 480 at 1601.<<https://www.ihl-databases.icrc.org>>Accessed 31 August 2019; *Ibid*, Article 51; The Hague Regulations, 1907, Article 23(c).

¹³ Protocol I, *op cit*, Article 41.

provision of the Protocol I¹⁴ which prohibits attacks against ‘a person who is recognized or who, in the circumstances, should be recognized to be *hors de combat*’.

A person who is incapable of discharging his/her combat function is, in International Humanitarian Law, referred to as enemy *hors de combat*.¹⁵ Enemies *hors de combat* are on the same footing with civilians.¹⁶ Thus, ‘A person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack’.¹⁷ The requirement to protect enemies *hors de combat* is a cardinal principle of International Humanitarian Law which extends to both international and non-international armed conflicts.¹⁸ Thus, directing attacks against enemies *hors de combat* constitutes a serious violation of the Protocol¹⁹ and in fact a war crime.²⁰ After all, ‘the only legitimate object which states should endeavour to accomplish during war is to weaken the military force of the enemy.’²¹ Besides, ‘it is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis’.²²

It is in the light of the foregoing that this Article seeks to demonstrate through the eye of international treaties and conventions that enemies *hors de combat*, because they no longer constitute military threat to the adverse Party, are no longer foes but ‘friends’. The Article argued that attacking *hors de combat* does not serve any military necessity but over reaching. The Article first gave an overview of the subject matter by appraising the general rules on targeting and the basis for such rules. The second part of the Article defined the term ‘hors de combat’ and when a person could be said to have been rendered hors de combat. The third part, considered the protection accorded enemy hors de combat in International Humanitarian Law while the fourth part provided the basis for the prohibition of attacks against hors de combat. Under the fifth part, the exceptions to the general rule regarding the protection of hors de combat were considered whereas part six embodies the concluding remark and recommendations.

2. Defining Hors de Combat and Conditions under which a Person could be rendered *Hors de Combat*

Hors de combat are persons who have ceased to take active part in hostilities either by choice or by circumstance.²³ In International Humanitarian Law,²⁴ a person is said to be *hors de combat* if:

- a. he is in the power of an adverse party;
- b. he clearly expresses an intention to surrender; or
- c. he has been rendered unconscious or is otherwise incapacitated by wounds or sickness and therefore is incapable of defending himself; provided that in these cases he abstains from any hostile act and does not attempt to escape.²⁵

Persons in the Power of an Adverse Party

A person who finds himself in the power of an adverse Party is hors de combat.²⁶ A person is said to be in the power of an adverse party where the adverse party is able to impose its will upon him thereby making him a prisoner of war.²⁷ The wordings of Articles 4²⁸ and Article 44²⁹ refers to prisoners of war as persons who have ‘fallen into the power’ of the enemy. The question is whether the expression ‘being in the power of an adverse party’ as used in the Protocol I and the expression ‘fallen into the hands of

¹⁴ *Ibid*, Article 41(1).

¹⁵ *Ibid*.

¹⁶ *Ibid*, Articles 48 and 51.

¹⁷ *Ibid*, Article 41(1); The Hague Regulations, Respecting the Laws and Customs of War, 1907, Article 23(c).

¹⁸ Y Sandoz, *et. al.* (eds.), *op cit*, 483-4 at 1606-1607.

¹⁹ Protocol I, *op cit*, Article 85; Hague Regulations, *op cit*, Article 23(c).

²⁰ Statute of the International Criminal Court, 1998, Article 8(2)(b)(iv).

²¹ Declaration of St. Petersburg, 1868, *op cit*.

²² Protocol I, *op cit*, Article 40.

²³ *Ibid*, Article 41(2)(a)(b)and(c).

²⁴ *Ibid*, Article 41.

²⁵ Protocol I, *op cit*, 41(2); Y Sandoz, *et. al.* (eds.), *op cit*, 1610.

²⁶ *Ibid*, Article 41(2)(a).

²⁷ Y Sandoz, *et al* (eds.), *op cit*, 485 at 1614.

²⁸ Geneva Convention Relative to the Treatment of Prisoners of War, 1949 (hereinafter referred to as GC III).

²⁹ Protocol I, *op cit*, Article 41(1) (b).

the enemy’ as used under the 3rd Geneva Convention mean one and the same thing. It is opined that the two expressions overlap although with slight difference.³⁰ Hence, the expression ‘being in the power of an adverse party could mean having fallen into enemy hands, i.e. a situation where an enemy party has control over the combatant or even a situation where he/she has been apprehended.³¹ However, formal surrender may not always be obtainable especially as most Rules of engagements prohibit it such.³²

A person who expresses a clear intention to Surrender

Surrender is another ground on the basis of which a person could be placed *hors de combat*.³³ A person is said to have surrendered or have expressed an intention to surrender where unilaterally and unconditionally he ‘indicates that he is no longer capable of engaging in combat or that he intends to cease combat’.³⁴ This is often indicated in land warfare by such acts as putting up one’s hands, throwing away one’s weapons, raising a white flag or by any other appropriate gestures by which isolated members of armed forces or members of a formation clearly express to the enemy party their intention to cease fighting.³⁵ In air warfare, such act as wagging the wings while opening the cockpit is a common sign.³⁶ In naval warfare, the intention to surrender could be indicated by ceasing fire and lowering the flag or by radio signals.³⁷ To be effective however, the surrender must be clear, unconditional and timely. This is to avoid surrendering at a time when it may be very difficult to accept surrender. However, International Humanitarian Law generally prohibits refusal of unconditional surrender whereby a Party to armed conflict orders that there will be no quarter.³⁸ Feigning surrender in order to outsmart the enemy is perfidious and therefore prohibited under International Humanitarian Law.³⁹

A Person incapacitated by Wound and Sickness; and the shipwrecked

A person who becomes defenseless as a result of sickness or wound or by reason of any other incapacitation is recognized as enemy *hors de combat*.⁴⁰ A person is said to be wounded or sick where he or she needs medical care as a result of trauma, disease or other physical or mental disorder or disability, and has as such refrained from any act of hostility.⁴¹ Persons who find themselves in peril at sea or in some other waters as a result of misfortune affecting them or the vessel or aircraft carrying them (the shipwrecked) are *hors de combat* provided they have ceased any hostile act.⁴² This class of persons are defenseless within the meaning of Article 42(2)(c)⁴³ and are therefore entitled to protection no matter the party they belong to.⁴⁴ The obligation to protect this class of persons does not arise from the fact that they are wounded, sick or shipwrecked but from the fact that they are no longer capable of defending themselves.⁴⁵ This draws from the provisions of the Hague Regulations Respecting the Laws and Customs of War, 1907⁴⁶ which forbids the ‘killing or wounding of an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion’.

3. Protection Accorded to Enemy *Hors de Combat* in Humanitarian Law

‘A person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack’.⁴⁷ This protection takes effect from the time of such capture,

³⁰ Y Sandoz, *et. al.* (eds.), *op cit*, 484 at 1612.

³¹ *Ibid.*

³² *Ibid.*

³³ Protocol I, *op cit*, Article 41(2)(b).

³⁴ Y Sandoz, *et. al.* (eds.) *op cit*, 486 at 1618.

³⁵ *Ibid.*, 487 at 1619.

³⁶ *Ibid.*

³⁷ Y Sandoz, *et. al.* (eds.) *op cit*, 487 at 1619.

³⁸ Protocol I, *op cit*, Article 40.

³⁹ *Ibid.*, Article 37.

⁴⁰ Protocol I, *op cit*, Article 41(2)(c); Y Sandoz, *et. al.* (eds.) *op cit*, 487 at 1620.

⁴¹ *Ibid.*, Article 8 (a); Y Sandoz, *et. al.* (eds.), *ibid.*

⁴² *Ibid.*, Article 8(b); Y Sandoz, *et. al.* (eds.), *ibid.*

⁴³ Protocol I, *op cit*.

⁴⁴ *Ibid.*, Article 10; Y Sandoz, *et. al.* (eds.), *ibid.*

⁴⁵ Y Sandoz, *et. al.* (eds.), 487 at 1620.

⁴⁶ Article 23(3).

⁴⁷ Protocol I, *op cit*, Article, Article 41(1).

surrender or incapacitation to when the hostilities cease.⁴⁸ The protection accorded persons placed *hors de combat* is recognized under Rule 47 of Customary International Humanitarian Law which provides that ‘Attacking persons who are *hors de combat* is prohibited.’⁴⁹ The Lieber Code⁵⁰ also recognizes this protection as it forbids intentional wounding or killing of persons who have been rendered *hors de combat*. On the other hand, the Hague Regulations⁵¹ prohibits ‘killing or wounding of an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion.’ This basic rule is also implied in the GC III⁵² as it requires persons covered by the said Convention to be treated humanely where they ‘have fallen into the power of an enemy.’ The Rule 47 of Customary International Humanitarian Law is codified under Protocol I⁵³ as it provides that ‘a person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack’. The Protocol further strengthens this protection by stipulating that ‘making a person the object of attack in the knowledge that he is *hors de combat*’ constitutes grave breach of the Protocol.⁵⁴ Over and above all, the Statute of the International Criminal Court considers attacks against persons who have been rendered *hors de combat* a war crime.⁵⁵

Again, in international armed conflict, an enemy *hors de combat* who meets the requisite conditions, becomes a prisoner of war⁵⁶ and entitled to humane treatment in all circumstances.⁵⁷ To that effect, he shall be accorded respect for his person and honour.⁵⁸ He shall not be adversely treated on the basis of sex, religion, and race or on any other basis.⁵⁹ He shall have the right to enjoy complete liberty in the exercise of his religion, intellectual and physical activities.⁶⁰ He is also protected from embarking on dangerous; humiliating and unhealthy works.⁶¹ He shall be entitled to all the judicial guarantees required for his trial in order to ensure fair hearing.⁶² Willfully depriving a prisoner of war the right of fair and regular trial constitutes a war crime.⁶³ An enemy *hors de combatant* shall not be made the object of reprisal. Compelling a prisoner of war to serve in the forces of a hostile Power is also a war crime.⁶⁴ Over and above all, *hors de combat* who also measures as a prisoner of war shall be entitled to release and repatriation as soon as hostilities are over.⁶⁵

4. Basis for the Prohibition of Attacks against *Hors de Combat*

From time immemorial, there have been rules of warfare limiting attacks to only persons taking active part in armed conflicts. The basis for this restriction is to the effect that ‘while the object of warfare is to achieve the submission of the enemy, which may require the disabling of as many enemy combatants as possible, this should only be achieved in a manner that does not cause any unnecessary suffering or damage’.⁶⁶ The Prophet Elijah, for instance, prohibited the then King of Israel against killing captured

⁴⁸ Y Sandoz, *et. al.*, (eds.)*op cit*, 488 at 1623.

⁴⁹ <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule47>. Accessed 4 August 2020.

⁵⁰ Article 71.

⁵¹ Hague Regulations, *op cit*, Article 23(c).

⁵² GC III, *op cit*, Article 13.

⁵³ Protocol Additional to the Geneva Conventions, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1977, Article 41(1).

⁵⁴ Articles 85(3)(e).

⁵⁵ Statute of the International Criminal Court, *op cit*, Article 8(2)(b)(vi)

⁵⁶ Protocol I, *op cit*, Article 44 (1).

⁵⁷ GC III, *op cit*, Article 13.

⁵⁸ *Ibid*, Article 14.

⁵⁹ *Ibid*, Article 16; S P Mackenzie, ‘Treatment of Prisoners of War in World War II’, (1994) 66, 3, *Journal of Modern History*, 512. <<https://www.jstor.org/stable/2124482>> accessed 30 May 2020.

⁶⁰ GC III, *op cit*, Article 34-38.

⁶¹ *Ibid*, Article 50-53.

⁶² *Ibid*, Articles 82-108.

⁶³ Statute of the International Criminal Court, *op cit*, Article 8 (2)(a)(vi).

⁶⁴ *Ibid*, Article 8 (2)(a)(v).

⁶⁵ GC III, *op cit*, Article 118-119.

⁶⁶ C Forrest, ‘The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts’(2007) 37 (2), California Western International Law Journal, 177, 183; C Greenwood, *Historical Development and Legal Basis, in The Handbook of Humanitarian Law in Armed Conflict* 1, 30-31 (Dieter Fleck ed, 1995).

⁶⁶ *Ibid*.

persons but rather enjoined him to feed and send them back to their masters.⁶⁷ The Koran also had some rudimentary provisions that forbade the molestation of vulnerable persons such as women, children, the aged, Monks, the insane and other persons not taking part in hostilities.⁶⁸ It further prohibited mutilations and killing of little children.⁶⁹ Again, the Code of Manu⁷⁰ prohibited the use of barbed or poisoned weapons or weapons with blazing fire points. The striking of a eunuch or an enemy who folds his hands in supplication, or one who sleeps, or one who is disarmed or naked or one who looks on without taking direct part in hostilities, were also forbidden.⁷¹ The Code further imposed on the warring parties the responsibility to care for the wounded and sick.⁷² On the other hand, the *Art of War*⁷³ limited attacks to only persons participating actively in warfare while forbidding attacks against the wounded, sick, prisoners of war and innocent civilians.

Between the 16th and 18th centuries too, persons such as Hugo Grotius,⁷⁴ in his work *De Jure Belli Ac Pacis*, set a limit on the killing of enemies in lawful and just wars. In the same vein, Rousseau⁷⁵ in his *Portalis Doctrine* opined that the citizens of belligerent States are only enemies as soldiers, neither as men nor even citizens of their country but as defenders.

In Humanitarian Law therefore, combatants have the right to take active part in hostilities⁷⁶ and to commit lawful acts of war such as killing and wounding of enemy combatants.⁷⁷ On the other hand, they could also be wounded or killed by the enemy combatants, as part of the liability of engaging in warfare.⁷⁸ However, combatants are only lawful targets as long as they engage in combat.⁷⁹ Once they cease their combat function either by choice or circumstance, they also cease to be lawful targets.⁸⁰ The simple reason is that they no longer constitute military threat to the adverse Party; and because they no longer constitute military threat, they also cease to be legitimate targets. After all, ‘the only legitimate object which states should endeavour to accomplish during war is to weaken the military force of the enemy.’⁸¹ Hence, where an enemy combatant has been placed *hors de combat*, the legitimate military objective has been achieved; the infliction of additional harm or injury does not serve any military purpose and therefore becomes unlawful.⁸²

Permitting attacks against persons rendered *hors de combat* defeats the spirit of Humanitarian Law which requires the protection of persons not taking active part in hostility.⁸³ This is where the principle of military necessity comes in to mitigate the hardship. The principle of military necessity has been described as ‘a basic principle of the law of war, so basic, indeed, that without it, there could be no law of war at all.’⁸⁴ The principle permits the employment of only such a force that is lawful and imperative

⁶⁷ The Holy Bible, King James Version, New York: American Bible Society, 1999, Bartley.com, 2000, II Kings 6:21-23.

⁶⁸ Khadduri and Majid, *War and Peace in the Land of Islam*, (New York: Law Book Exchange 2006), 103-4.

⁶⁹ Hashim, Sohail H., *Islamic Political Ethics: Civil Society, Pluralism, and Conflict*, (Princeton: Princeton University Press, 2002), p 211.

⁷⁰ Manu, & Biihler, G (1993), *The Laws of Manu*, Delhi: Motilal Banarsidass.VII, 90.

⁷¹ *Ibid.*

⁷² *Ibid.*, 91-92.

⁷³ S Tzu, *The Art of War*, cited in ET Jensen, *op cit*, 245.

⁷⁴ Hugo Grotius, *De Jure Belli Ac Pacis* cited in J Meurant, ‘Inter Arma caritas: Evolution and Nature of International Humanitarian Law’, (1987) 24 No. 3, *Journal of Peace Research*, Special Issue on Humanitarian Law of Armed Conflict, 239.

⁷⁵ J Meurant, *op cit*, 239. See also Ikenga K.E.Oraegbunam, ‘Just War Theory and Global Peace: Jurisprudence of the Effects of Contemporary Armed Conflicts on Human Dignity’, *Journal of Policy and Strategic Studies*, Vol. 2 No. 1, 2012, pp.99-113. Available at <http://www.sachajournals.com/documents/SJPSS2012IKENGA001002.pdf>.

⁷⁶ Protocol I, *op cit*, Article 43(2).

⁷⁷ Y Distein, ‘Unlawful Combatants and War Criminals in Distein & Tabory; International Law in a Time of Perplexity’, *Essays in Honour of Shabtai Rosenne*; (Martinus Nijhoff Publishers; 1989), 148.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, Article 52(2).

⁸⁰ *Ibid.*, Article 41.

⁸¹ Declaration of St. Petersburg, *op cit*, Preamble.

⁸² Protocol I, *op cit*, Articles 35(2), 41(1) and 85(3)(e); Hague Regulations, *op cit*, Article 23(c); and Statute of the International Criminal Court, *op cit*, Article 8(2)(b)(iv).

⁸³ Protocol I, *ibid.*, Articles 48 and 51.

⁸⁴ W O’Brien, ‘The Meaning of Military Necessity in International Law’, *I World Polity*, (1957)130.

in securing the submission of enemy combatants.⁸⁵ Luban caps it up when he asserts that ‘terrible things happen in wars. The point of the law cannot be to abolish those things. The point can only be to shrink them to what is necessary...’⁸⁶

International Humanitarian Law aims at striking a balance between military necessity and concern for humanity, thus permitting measures which are actually necessary to accomplish a legitimate military purpose and which are not otherwise unlawful.⁸⁷ Hence, where an enemy soldier has been placed *hors de combat*, it is no longer militarily necessary to attack him. To do so will defeat the idea of balancing military necessity against the concern for humanity. It is for this reason that the United Nations asserts as follows:

It should be prohibited to kill or harm a combatant who has obviously laid down his arms or who has obviously no longer any weapons, without need for any expression of surrender on his part. Only such force as is strictly necessary in the circumstances to capture him should be applied.⁸⁸

5. Exceptions to the Safeguard Accorded Enemy *Hors de Combat*

The proviso to Article 41⁸⁹ provides two contingencies under which the safeguards accorded enemy *hors de combat* will cease to have effect in International Humanitarian Law. The proviso is to the effect that enemies *hors de combat* are protected provided that: (a) they do not resume their hostile act; or (b) attempt to escape.

What Constitutes Resumption of Hostile Act in International Humanitarian Law

Neither the Protocol I nor the Commentary on the Protocols⁹⁰ defined what a ‘hostile act’ is. Nevertheless, Melzer⁹¹ defined ‘hostile acts’ as specific act qualifying as direct participation in hostilities. ‘Hostile act’ is synonymous with ‘hostilities’. ‘Hostilities’ means ‘acts of violence by a belligerent against an enemy in order to impose obedience’.⁹² On the other hand, Melzer⁹³ defined ‘hostilities’ as ‘the (collective) resort by the Parties to the conflict to means and methods of injuring the enemy’. Furthermore, the Commentary⁹⁴ defines ‘hostilities’ as ‘acts of war which are intended by their nature and purpose to hit specifically the personnel and the material of the armed forces of the adverse party’. In other words, ‘hostile acts’ are acts of violence geared to destroying the armed forces or facilities of an adverse party or its facilities. Enemies *hors de combat* are said to have resumed their hostile acts where, after they have been subdued by the armed forces of an adverse Party, they re-engage themselves in violent acts aimed at injuring the adverse Party or its facilities. The Commentary⁹⁵ gave instances of acts qualifying as hostile acts. These include the destruction of installations in the possession of combatants who have surrendered or their own military equipment.⁹⁶ Again, attempting to communicate with the party to the conflict to which they belong, unless this concerns the wounded and the sick that require assistance from this party’s medical service,⁹⁷ also constitute a hostile act. Enemy *hors de combat* cease to benefit from the protection accorded such persons and become legitimate targets where they resume their hostile acts.⁹⁸

⁸⁵ A Finn and S Sheding, ‘Development and Challenges for Autonomous Unmanned Vehicles: Compendium (2010) 172.

⁸⁶ Luban....323.

⁸⁷ Declaration of St. Petersburg, 1868, Preamble.

⁸⁸ UN Secretary-General, Report on Respect for Human Rights in Armed Conflict, UN Doc. A?8052, 18 Sept.1970 at 35-36, Para. 107.

⁸⁹ Protocol I, *op cit*.

⁹⁰ Y Sandoz, *et. al*, (eds.)*op cit*.

⁹¹ N Melzer, *International Committee of the Red Cross Interpretative Guidance on the Notion of Direct Participation in Hostilities*, (Geneva; International Committee of the Red Cross, 2009), 44 foot note 88.

⁹² Verri, *Dictionary of the International Law of Armed Conflict* (Geneva: International Committee Red Cross, 1992), 57.

⁹³ N Melzer, *op cit*, 44, foot note 88.

⁹⁴ N Melzer, *op cit* cited in A Nwotite, ‘The Principle of Distinction in the Light of Civilian Protection in International Armed Conflict’, (2020) 4(2) *African Journal of Law and Human Rights*, 78-89, 84. Available at <<https://www.journals.eyenwaohaetorc.org>>. Accessed 30 July 2020.

⁹⁵ Y Sandoz, *et. al*, (eds.), *op cit*.

⁹⁶ *Ibid*, 488 at 1622.

⁹⁷ Y Sandoz, *et. al*, (eds.)*op cit*, 488 at 1622.

⁹⁸ Protocol I, *op cit*, Article 41(2), proviso.

Attempt to escape

An attempt to escape is a ground on the basis of which the protection accorded *hors de combat* will cease to operate in International Humanitarian Law.⁹⁹ Attack against *hors de combat* resumes the moment they attempt to escape. The phrase ‘attempt to escape’ is neither defined by the Protocol I nor the ICRC Commentary. However, this covers among other things a situation where a person in the power of an adverse Party¹⁰⁰ takes a step to regain his freedom of movement so as to rejoin his troop and continue the hostilities. In such a circumstance, the adverse is permitted to use such a force that is proportionate¹⁰¹ and not excessive in relation to the military objectives sort to be achieved. The use of force against the escaping person is further subject to the provisions of Article 35(2) of the Protocol I which forbids the employment of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. However firing or killing is unlawful except there is no other means of preventing his escape.¹⁰²

6. Conclusion and Recommendations

International Humanitarian Law is among other things founded on the prohibition of attacks against those placed *hors de combat*. This position is re-echoed in the opening remarks to Article 41 of the Protocol I¹⁰³ as follows:

The reason that the Red Cross has been able for more than century to pursue its course through all obstacles is that it is solely concerned with the suffering of man, alone and disarmed....Similarly, one might argue that the whole secret of the law of war lies in the respect for a disarmed man.

This protection is informed by the fact that ‘while the object of warfare is to achieve the submission of the enemy, which may require the disabling of as many enemy combatants as possible, this should only be achieved in a manner that does not cause any unnecessary suffering or damage’.¹⁰⁴ Thus, where an enemy combatant has been rendered *hors de combat*, he ceases to be lawful target and becomes a subject of protection. Directing attacks against such a person serves no military necessity as he no longer constitutes military threat and in fact constitutes a grave breach of the Protocol I¹⁰⁵ and therefore a war crime.¹⁰⁶ To that end, combatants remain lawful targets only when they constitute military threat. The moment they are placed *hors de combat*, they become the subject of protection.

⁹⁹ *Ibid*, Article 41.

¹⁰⁰ Y Sandoz, *et. al.*, (eds.) *op cit*, 485 at 1614.

¹⁰¹ Y Sandoz, *et. al.*, (eds.) *op cit*, 489 at 1624.

¹⁰² *Ibid*, 488 at 1623.

¹⁰³ *Ibid*, 480 at 1601.

¹⁰⁴ C Forrest, ‘The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts’ (2007) 37 (2), California Western International Law Journal, 177, 183; C Greenwood, *Historical Development and Legal Basis, in The Handbook of Humanitarian Law in Armed Conflict* 1, 30-31 (Dieter Fleck ed, 1995).

¹⁰⁵ Protocol I, *op cit*, Article 85(3)(e).

¹⁰⁶ Statute of the International Criminal Court, *op cit*, Article 85(2)(e).