

# Special Operations Commando Raids and Enemy *Hors de Combat*

Commander Gregory Raymond Bart\*

## Executive Summary

United States Special Operations Forces (SOF) conduct commando raids resulting in defeated enemy soldiers who are either wounded or neutralized as effective fighting forces. Some scholars indicate that the law of war provides only two alternative statuses for them: *prisoners of war* or *capitulated forces*. If true, this conclusion could dramatically impact operations planning. The defeated soldiers' prisoner of war (POW) status would impose on SOF teams significant duties that would impede the accomplishment of commando missions. These duties include absolute obligations to protect, evacuate, and provide medical care, food, and clothing to the defeated soldiers. Alternatively, their capitulated-force status would impose on SOF teams duties that vary with the nature of the capitulation agreement. These duties might range from simply honoring a temporary ceasefire to providing complete POW protections.

Neither the POW nor capitulated force statuses accurately reflect the relationship between SOF teams and the enemy soldiers they defeat during commando raids. Prisoner of war status begins with physical custody, but SOF teams lack effective control over the defeated enemy. Often, SOF teams release enemy soldiers from any temporary custody. The release occurs on the field and not through an authorized repatriation or parole program. These two statuses do not account for this reality. They can lead to confusion and therefore do not clearly describe the duties owed by SOF teams to defeated enemy soldiers.

However, the law of war provides a third possible status for these soldiers: *hors de combat*. This status recognizes that they have laid down their arms and are no longer capable of defending themselves, and that SOF teams lack effective control over them. It imposes clear duties that fall between those owed to POWs and those owed to capitulated forces in terms of their logistical impact on SOF teams. These duties do not include a general duty to evacuate, but include humanitarian obligations to provide medical care to the wounded as feasible.

During commando raids, SOF teams should treat defeated enemy forces as *hors de combat* and not as POWs or capitulated forces. This status provides clear and flexible humanitarian duties that are within the teams' operational capabilities. Special operations forces teams can thereby complete their commando missions without lingering legal uncertainties about the applicable standard of treatment for defeated enemy soldiers.

## Introduction

By doctrine and training, U.S. Special Operations Forces (SOF) conduct direct-action missions, commonly called "commando raids."<sup>1</sup> They are short-duration strikes or small-scale offensive operations in hostile, denied, or politically sensitive territory to seize, destroy, capture, recover, or damage designated targets.<sup>2</sup> Inevitably, these engagements produce defeated enemy personnel who are wounded or neutralized as effective fighting forces. But unlike conventional units, SOF teams have few or no resources to hold prisoners or to evacuate them. So what are the teams' responsibilities to these defeated enemy soldiers?

Special operations forces teams encountered this scenario in 2003 during Operation Iraqi Freedom (OIF). Planners at the United States Central Command (CENTCOM) anticipated that Iraqi forces might launch Scud missiles from western Iraq at civilian population centers in Israel, as they had done in 1991 during Operation Desert Storm.<sup>3</sup> From a humanitarian

---

\* Judge Advocate General's Corps, U.S. Navy. Presently assigned as Chief, Operations Law & Policy, United States Special Operations Command. LL.M., 2006, Georgetown University Law Center (with Distinction and Thomas Bradbury Chetwood, S.J. Prize recipient); J.D., 1991, Boston University School of Law; A.B., 1987, University of Chicago. Recent previous assignments include U.S. Navy Office of the Judge Advocate General (International and Operational Law Division and General Litigation Division), 2003–2007; Staff Judge Advocate, Special Operations Command Central, 2000–2003. The author thanks Colonel James Schoettler, JA, USA for his comments on earlier drafts of this manuscript. He also expresses special gratitude to his wife, Rosalinda Bart, and to his parents, George and Patricia Bart. The views expressed herein are solely those of the author and may not necessarily represent the views of the Department of the Navy, the Department of Defense, or the United States Government.

<sup>1</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 3-05, JOINT DOCTRINE FOR SPECIAL OPERATIONS (17 Dec. 2003) [hereinafter JOINT PUB. 3-05].

<sup>2</sup> *Id.*

<sup>3</sup> WILLIAM ROSENAU, SPECIAL OPERATIONS FORCES AND ELUSIVE ENEMY GROUND TARGETS: LESSONS FROM VIETNAM AND THE PERSIAN GULF WAR (2001).

perspective, there was great concern for injuries to Israeli civilians. From a strategic perspective, planners worried that Scud missile attacks might provoke an Israeli armed response, which could dramatically broaden the conflict's scope.<sup>4</sup>

Hence, in early 2003, CENTCOM deployed SOF teams to Iraq to conduct commando raids and destroy Scud launch sites.<sup>5</sup> The missions required that SOF teams be heavily armed yet highly mobile. The Scud missiles were scattered throughout the western Iraqi desert at guarded, remote sites.<sup>6</sup> The CENTCOM planners anticipated that the SOF teams would be unable to take custody of defeated Iraqis while still accomplishing their missions. The teams would not have the manpower or logistical resources for prisoners. As a practical matter, planners assumed that the teams would simply leave enemy soldiers—wounded or otherwise defeated—and quickly proceed to the next Scud site.

Some scholars opine that the law of war provides only two possible statuses for such defeated enemy soldiers: POW, or capitulated forces who have agreed not to fight.<sup>7</sup> Victorious forces owe prisoners of war absolute duties of care, which carry significant logistical burdens. However, they owe capitulated forces only those duties that are expressed in the agreement not to fight.<sup>8</sup> Accordingly, the status of defeated enemy soldiers can dramatically affect SOF operations planning.

This article considers SOF teams' relationship with a defeated enemy in the above scenario and argues that a third category exists: *hors de combat*.<sup>9</sup> It discusses the teams' responsibilities in the field, not the duties of higher-level strategic military or civilian decision makers. The first section reviews the statuses of POWs and capitulated forces under the law of war. It asserts that POW status begins with the capture and control of defeated soldiers. It also considers the termination of both statuses and the logistical burdens that each status imposes on SOF teams. The second section asserts that neither status accurately reflects the relationship between SOF teams and defeated enemy soldiers during commando raids. This article borrows the concept of effective control from war crimes jurisprudence and suggests that during raids, SOF teams lack the necessary effective control over defeated soldiers to trigger POW status. It further asserts that POWs and capitulated force statuses leave released enemy soldiers in a confusing situation with unclear humanitarian protections. The final section shows how the law of war provides a third status for defeated enemy soldiers: *hors de combat*. This status imposes clear duties of care that field units can meet in light of their mission capabilities.

The article concludes that given the circumstances of commando raids, SOF teams should treat defeated enemy forces as *hors de combat* and not as prisoners of war or capitulated forces. This third status provides for the humane care of defeated forces while recognizing the reality that SOF teams do not have lasting control over them.

## I. Prisoners of War, Capitulated Forces, and Duties of Care

It is important to review the nature of the statuses of POWs and capitulated forces before considering the relationship between SOF teams and defeated enemy soldiers during commando raids.

### A. Prisoners of War

Traditionally, defeated enemy soldiers were at the mercy of victorious forces. They could be killed, held for ransom, enslaved, or simply left in the field. The major documents of the law of war fundamentally altered this tradition by prohibiting victorious forces from refusing quarter—leaving no survivors among the defeated enemy.<sup>10</sup> For captured enemy soldiers, the law of war also created POW status, which imposes on the victor absolute duties of care.

---

<sup>4</sup> Carla Anne Robbins & Karby Leggett, *How the U.S. Plans to Keep Israel on the Iraq War's Sidelines*, WALL ST. J., Mar. 3, 2003, available at [www.globalsecurity.org/news/2003/030303-israel-sideline01.htm](http://www.globalsecurity.org/news/2003/030303-israel-sideline01.htm).

<sup>5</sup> BOB WOODWARD, PLAN OF ATTACK 379–82 (2004).

<sup>6</sup> T. Ripley, *Iraq's Western Desert Special Forces Playground*, JANE'S DEFENCE WKLY., Apr. 3, 2003, available at [http://www.janes.com/defence/news/jdw/jdw030403\\_1\\_n.shtml](http://www.janes.com/defence/news/jdw/jdw030403_1_n.shtml).

<sup>7</sup> M. Scott Holcomb, *Perspective: View from the Legal Frontlines*, 4 CHI. J. INT'L L. 561, 565–66 (2003).

<sup>8</sup> These categories can overlap. A capitulation agreement might provide that defeated soldiers will be taken into custody as POWs.

<sup>9</sup> This status assumes that the commando raids occur during an international armed conflict and that the defeated enemy soldiers are lawful combatants who are entitled, if captured, to POW status under the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. See *infra* notes 11–18 and accompanying text.

<sup>10</sup> L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 196 (2d ed. 2000).

## 1. Definition and Commencement of POW Status

States disagree about the precise moment that POW status begins for defeated soldiers.<sup>11</sup> Nevertheless, the law of war's primary documents consistently define POW in terms of lasting physical custody. One early formulation of the law of war was U.S. Army General Orders Number 100 of 1863, commonly known as the Lieber Code.<sup>12</sup> The Lieber Code governed Union troops' conduct during the American Civil War. Article 49 of the Lieber Code stated: "A prisoner of war is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation."<sup>13</sup> Hence, enemy soldiers did not become prisoners of war simply by reluctance or inability to fight, or by surrender and capitulation. Rather, their status began upon "fall[ing] into the hands of the captor"—conditions of physical custody.<sup>14</sup>

The Hague Convention of 1899 (Hague II) and the Hague Convention of 1907 (Hague IV) adopted a definition of POW in line with the Lieber Code. In both conventions, Article 4 states: "Prisoners of war are in the power of the hostile Government, not of the individuals or corps who capture them."<sup>15</sup> Again, the word "capture"—meaning physical custody—describes the condition that triggers POW status.

The 1929 and 1949 Geneva Conventions Relative to the Treatment of Prisoners of War also required capture for the commencement of POW status. Jean Pictet, the official commentator on the 1949 Convention (GC III), wrote:

The general principle for application of the 1929 Convention to persons referred to in Articles 1, 2 and 3 of the 1907 Hague Regulations is stated in Article 1, paragraphs 1 and 2, of that Convention. The Convention applies to such persons "who are captured by the enemy. . . ."<sup>16</sup>

Of note, the 1949 Convention does not use the term "captured." Instead, it describes prisoners of war as soldiers that have "fallen into the power of the enemy."<sup>17</sup> But Jean Pictet indicates that this condition still requires capture:

Under the present provision, the Convention applies to persons who "fall into the power" of the enemy. This term is also used in the opening sentence of Article 4 above, replacing the expression "captured" which was used in the 1929 Convention (Article 1). It indicates clearly that the treatment laid down by the Convention is applicable not only to military personnel taken prisoner in the course of fighting, but also to those who fall into the hands of the adversary following surrender or mass capitulation.<sup>18</sup>

Geneva Convention III broadened the description of prisoners of war from "captured" to include defeated soldiers who submitted to custody without a fight. Under GC III, victorious forces must still capture defeated soldiers to render them prisoners of war.

The 1977 Protocol I to the 1949 Geneva Conventions is consistent with this concept.<sup>19</sup> Article 44 states that any combatant "who falls into the power of an adverse Party shall be a prisoner of war."<sup>20</sup> The drafters of Protocol I agreed that

<sup>11</sup> JEAN PICTET, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 480–81 (1987).

<sup>12</sup> GREEN, *supra* note 10.

<sup>13</sup> D. SCHINDLER & J. TOMAN, THE LAWS OF ARMED CONFLICTS 3–23 (1988).

<sup>14</sup> To *capture* means "to take captive." *Captive* is an adjective defined in purely physical terms: "taken and held as or as if a prisoner of war"; "kept within bounds: confined"; and "being such involuntarily because of a situation that makes free choice or departure difficult." MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.m-w.com/cgi-bin/dictionary/capture> (second definition) and <http://www.m-w.com/dictionary/captive> (last visited May 10, 2007).

<sup>15</sup> Convention (II) with Respect to the Laws and Customs of War on Land art. 4, July 29, 1899, 32 Stat. 1803, 187 Consol. T.S. 429 [hereinafter 1899 Hague Convention or Hague II]; Convention (IV) Respecting the Laws and Customs of War on Land art. 4, October 18, 1907, 36 Stat. 2277, U.S.T.S. 539 [hereinafter 1907 Hague Convention or Hague IV].

<sup>16</sup> 3 JEAN PICTET, COMMENTARY ON THE GENEVA CONVENTIONS OF AUGUST 12, 1949, at 3, 73 (1952).

<sup>17</sup> Geneva Convention Relative to the Treatment of Prisoners of War art. 44, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

<sup>18</sup> PICTET, *supra*, note 16, at 76.

<sup>19</sup> The United States is not a party to Protocol I but generally supports the protocol's prohibition against taking no quarter and the principle that POW status should apply to all persons entitled to combatant status. See Martin P. Dupuis, John Q. Heywood, & Michele Y.F. Sarko, *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 415, 425 (1987).

<sup>20</sup> Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 41, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

GC III gives undisputed POW status only to captured enemy soldiers. The drafters worried that GC III provides unclear or no protections for defeated soldiers who are not in the victorious forces' custody. Hence, they included in Protocol I separate protections for such soldiers as *hors de combat*.<sup>21</sup>

The U.S. policy on this issue is expressed in Department of Defense (DOD) regulations, which state that POW status for defeated enemy soldiers begins upon their capture. The DOD POW Program requires enemy personnel captured or detained by U.S. armed forces to be physically handed over to U.S. Army military police for processing as prisoners of war.<sup>22</sup> The armed services secretaries also promulgated a joint regulation for the administrative processing of enemy prisoners of war.<sup>23</sup> Significantly, it applies to persons "captured, detained, interned, or otherwise held in U.S. armed forces custody."<sup>24</sup>

Thus, the law of war and U.S. policy indicate that POW status starts when victorious forces take custody of defeated enemy forces.

## 2. Duties Owed by a Captor's Forces to POWs

Once POW status begins, the law of war mandates that the captor's forces owe the prisoners several duties of care.<sup>25</sup> For SOF teams, these obligations impose significant operational burdens that can inhibit their ability to complete commando raids. However, the captor's forces are prohibited from making special agreements with prisoners to reduce these rights and protections.<sup>26</sup> The rights granted to prisoners of war are absolute.<sup>27</sup> They extend between states and cannot be renounced by either the defeated enemy's individual soldiers or the captor's tactical commanders.

Some scholars opine that the law of war fails to state clearly what a tactical commander must do to satisfy these obligations. They suggest that this ambiguity gives field commanders flexibility in meeting them.<sup>28</sup> However, Article 13 of GC III does not support this conclusion with any language that would indicate that its obligations are required only "as practicable" or "as feasible."<sup>29</sup>

Rather, GC III mandates that captors must treat prisoners of war humanely at all times. This obligation requires absolute physical protection from all violence and even from harsh environmental conditions.<sup>30</sup> Geneva Convention III, Article 13 recognizes that prisoners of war are no longer combatants and includes prohibitions against murder, mutilation, torture, corporal punishment, sensory deprivation, collective punishment, humiliation, and medical experimentation.<sup>31</sup> Captors may not use force or coercion to interrogate prisoners, who are obligated only to reveal their name, rank, service number, and date of birth. Furthermore, captors are required to protect prisoners of war against reprisals from their own forces or those of the adverse power.<sup>32</sup> In short, the captor's forces must keep prisoners of war in *protective* custody, not just to prevent their escape for operational reasons.

---

<sup>21</sup> PICTET, *supra* note 11, at 481–84.

<sup>22</sup> U.S. DEP'T OF DEFENSE, DIR. 2310.1, DOD PROGRAM FOR ENEMY PRISONERS OF WAR (EPOW) AND OTHER DETAINEES paras. 3.3, 3.4 (Aug. 18, 1994).

<sup>23</sup> U.S. DEP'T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (1 Oct. 1997) [hereinafter AR 190-8]. This regulation is promulgated in the Navy, Air Force, and Marine Corps as OPNAVINST 3461.1, AFJI 31-304, and MCO 3461.1, respectively.

<sup>24</sup> *Id.* para. 1-5(a)(1).

<sup>25</sup> Geoffrey S. Corn & Michael L. Smidt, "To Be or Not to Be, That is the Question": *Contemporary Military Operations and the Status of Captured Personnel*, ARMY LAW., June 1999, at 1.

<sup>26</sup> *Id.* at 204.

<sup>27</sup> GREEN, *supra*, note 10, at 203.

<sup>28</sup> Corn & Smidt, *supra* note 25, at 8.

<sup>29</sup> GC III, *supra* note 17, at arts. 12–16; PICTET, *supra* note 16, at 140.

<sup>30</sup> GREEN, *supra* note 10, at 204–06. Geneva Convention III, Article 13, states: "Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention." GC III, *supra* note 17, art. 13.

<sup>31</sup> Corn & Smidt, *supra* note 25, at 9; U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE paras. 84–92 (July 1956) [hereinafter FM 27-10].

<sup>32</sup> FM 27-10, *supra* note 31, para. 89.

Significantly, the law of war also requires the captor's forces to evacuate prisoners of war.<sup>33</sup> Specifically, GC III, Article 19 states that the captor's forces must remove prisoners from the battlefield or harsh environmental conditions to camps that are located far from the zone of combat operations.<sup>34</sup> Unlike Article 13, Article 19 contains the phrase "as soon as possible" and therefore apparently allows the victorious field commander some operational flexibility. But these words are trumped by Article 13's obligations. Until evacuation occurs, Article 13 absolutely requires field commanders to maintain prisoners in safe and humane conditions and to provide wounded prisoners with medical attention.<sup>35</sup> They must also protect prisoners against enemy reprisals. These tasks might require more of the captor's forces than those needed to evacuate the prisoners or to keep them from escaping.

Further, the victorious field commander's forces must accomplish the evacuation under humane conditions that are equivalent to those used to transport the captor's own forces. During the journey, his forces must provide prisoners with food, potable water, medical attention, and even appropriate clothing.<sup>36</sup> At the camp itself, the captor's forces have numerous additional obligations.<sup>37</sup> But at that point, U.S. Army military police are supposed to acquire custody and responsibility for the prisoners of war.<sup>38</sup> (Their obligations are beyond the scope of this article, which focuses on SOF teams' duties.)

Clearly, absent an *hors de combat* category, SOF teams have substantial logistical burdens related to the initial handling in the field of enemy soldiers defeated during a commando raid, if those soldiers qualify for POW status.

### 3. Termination of POW Status

The law of armed conflict requires a captor's forces to treat captured enemy soldiers in the proper manner described above until the termination of their POW status. Geneva Convention III provides that POW status ends with repatriation.<sup>39</sup> This can occur during continued hostilities or upon cessation of active hostilities between countries. When U.S. armed forces are the captors, the Assistant Secretary of Defense for International Security Affairs (ASD (ISA)) must approve all transfers of prisoners of war to any entity outside DOD for any purpose, including repatriation.<sup>40</sup> Moreover, the cessation of hostilities is a policy-level decision. In other words, U.S. field units, such as SOF teams, lack authority to terminate enemy soldiers' POW status.

Of note, GC III allows the captor's forces to release POWs on parole, that is, an agreement not to resume hostilities. But parole does not terminate POW status. It merely releases prisoners due to poor confinement conditions or logistical capabilities to care for them.<sup>41</sup> Moreover, U.S. military field units lack independent authority to approve the parole and release of enemy POWs.<sup>42</sup>

## B. Capitulated Forces

In contrast to POWs, the status of capitulated forces and the duties owed to them depend on agreed terms. A capitulation is an agreement entered into between two field commanders "for the surrender of a body of troops, a fortress, or other defended locality."<sup>43</sup> It might cover the specific force or territory to be surrendered, the disposition of enemy forces, a

---

<sup>33</sup> GREEN, *supra* note 10, at 206.

<sup>34</sup> *Id.*; GC III, *supra* note 17, arts. 19-20; FM 27-10, *supra* note 31, paras. 95-96.

<sup>35</sup> GREEN, *supra* note 10, at 206; GC III, *supra* note 17, arts. 13, 15.

<sup>36</sup> GC III, *supra* note 17, art. 20.

<sup>37</sup> FM 27-10, *supra* note 31, paras. 97-100; AR 190-8, *supra* note 23.

<sup>38</sup> *See* Corn & Smidt, *supra* note 25, at 7-8.

<sup>39</sup> GREEN, *supra* note 10, at 212-13. *Repatriation* means the return of a prisoner to his home country. GC III, *supra* note 17, arts. 109-17.

<sup>40</sup> Corn & Smidt, *supra* note 25, at 7-8.

<sup>41</sup> GC III, *supra* note 17, art. 21; GREEN, *supra* note 10, at 207.

<sup>42</sup> DOD DIR. 2310.1, *supra* note 22; AR 190-8, *supra* note 23, para. 2-2d.

<sup>43</sup> FM 27-10, *supra* note 31, para. 470.

ceasefire for withdrawal or provisioning, disarmament, the treatment of surrendered installations, or even orders to be completed. Parties must scrupulously adhere to the terms of a capitulation agreement.<sup>44</sup>

Its provisions determine the status of capitulated forces and the duties owed to them.<sup>45</sup> If troops are surrendered under the agreement, then they become prisoners of war and are entitled to receive all due protections and duties of care. On the other hand, if the capitulation covers only the surrender of a locality or a fortress, then it might provide only for a ceasefire while certain conditions continue to exist. Such conditions might include time limits, the withdrawal of troops, or keeping troops within specified geographic limits.<sup>46</sup>

In a mere ceasefire, defeated enemy forces remain active combatants, not prisoners of war, and the victorious forces owe them only the duties that are defined in the ceasefire agreement. The victorious forces are not prohibited from targeting the enemy, except according to the agreement, which might cover only a limited time and location. Also, the victorious forces might not have any obligation to evacuate enemy soldiers nor to provide medical care, food and clothing, or even shelter from the environment.

Capitulated forces therefore receive care according to the capitulation agreement, which might confer upon them the rights of statuses ranging from POW to active enemy combatant.<sup>47</sup>

## II. Defeated Enemy Soldiers: Neither Prisoners of War nor Capitulated Forces

Unfortunately, the statuses of POWs and capitulated forces do not realistically reflect the relationship between a SOF team and defeated enemy soldiers during a commando raid. The SOF team's mission might be exclusively to destroy an enemy facility, rather than to take custody of enemy soldiers. Neither category—POWs nor capitulated forces—accounts for the team's lack of effective custody or control over the defeated enemy. Further, SOF teams often release any temporarily detained enemy soldiers. Neither category clearly explains the status of the released enemies nor the duties owed to them.

### A. SOF Teams Lack Effective Control over Defeated Enemy Soldiers

It is helpful to borrow the standard of *effective control* from war crimes jurisprudence to understand whether a SOF team has custody over defeated enemy soldiers during a commando raid for purposes of POW status. Effective control is an element of command responsibility theory. An analogy can be drawn between assessing the effective control of a SOF team over defeated enemy soldiers and assessing the effective control of a military superior over a subordinate who commits war crimes.

#### 1. *Effective Control in War Crimes Jurisprudence*

For over fifty years, U.S. courts and international tribunals have applied command responsibility theory to hold commanders responsible for crimes by subordinate soldiers.<sup>48</sup> Regardless of the forum, the essential questions for command responsibility are the same: “When a crime is committed by a subordinate, under what circumstances is the superior liable?” and “Who is a superior?”<sup>49</sup> A superior-subordinate relationship exists when there is “effective command and control,” either *de jure* or *de facto*.<sup>50</sup>

---

<sup>44</sup> *Id.*; Hague IV, *supra* note 15, art. 35 (regulations).

<sup>45</sup> FM 27-10, *supra* note 31, para. 475.

<sup>46</sup> *Id.* para. 474.

<sup>47</sup> United States field commanders generally have authority to enter into capitulation agreements (but not to repatriate POWs or grant them parole). United States field commanders entered into such agreements with numerous Iraqi field commanders during Operation Iraqi Freedom. Iraqi units remained at designated sites under ceasefire terms while the main U.S. offensive forces bypassed them en route to Baghdad. In this manner, the spearhead of the U.S. forces attempted to avoid many of the logistical burdens associated with handling POWs during the advance to Baghdad. Days later, other U.S. forces took custody of the capitulated Iraqi forces and provided them with POW protections and duties of care. *Id.* para. 472; Holcomb, *supra* note 7, at 567.

<sup>48</sup> Michal Stryszak, *Command Responsibility: How Much Should a Commander be Expected to Know?*, 11 U.S.A.F. ACAD. J. LEG. STUD. 27 (2000/2001); Andrew D. Mitchell, *Failure to Halt, Prevent, or Punish: The Doctrine of Command Responsibility for War Crimes*, 22 SYDNEY L. REV. 381 (Sept. 2000).

<sup>49</sup> The theory has a common formulation in both domestic and international tribunals. It requires three elements: (1) a superior-subordinate relationship, (2) knowledge, actual or constructive, by the superior of the crimes committed by the subordinate, and (3) failure by the superior to halt, prevent, or punish the

The most recent and comprehensive consideration of the theory occurred in the *Celebici Judgment* by the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>51</sup> In the *Celebici Judgment*, the ICTY considered whether three officers (Zejnil Delalic, Zcravko Mucic, and Hazim Delic) had effective control over Bosnian Muslim and Croat guards who committed numerous atrocities against Bosnian Serb prisoners in 1992 at the Celebici camp.<sup>52</sup> Delalic was the commander of military forces in Konjic, Bosnia, where the camp was located. Mucic was the alleged commander of the camp, and Delic was his deputy. The Trial Chamber first considered whether each had de jure authority over the guards. It examined legislation, laws, written policies, and written orders for definitions of their authority and of any hierarchy that included the defendants and the guards. Then it analyzed whether a de facto relationship existed between the defendants and the perpetrators. The Trial Chamber considered a variety of factors: the distribution of tasks; the capacity to issue orders; any exercise of disciplinary measures by the defendants; and lastly the defendants' powers of influence. Significantly, it distinguished between influence and effective control, indicating that influence alone does not establish a superior-subordinate relationship. An individual is criminally liable under command responsibility theory only to the extent that he fails to exert proper influence on others over whom effective control already exists.<sup>53</sup>

The Trial Chamber ruled that Mucic had de jure effective control over the guards. Numerous documents established that he had such authority as a camp commander within the Bosnian Army. Accordingly, the Chamber found him guilty of atrocities committed by the guards at the camp. In contrast, it ruled that Delalic did not have effective control over the guards. It distinguished between influence and effective control and focused on Delalic's functions and activities as the regional coordinator for forces in the Konjic area and as the appointed commander of Tactical Group I. The Chamber held that as a coordinator, Delalic's duties consisted of "mediation and conciliation" and that he had "his functions prescribed."<sup>54</sup> The Chamber noted that the position of coordinator was not recognized in the Bosnian Army and that it did not place Delalic in a military chain of command.<sup>55</sup> Rather, he acted as a mediator between military and civilian groups in the Bosnian government and facilitated the distribution of supplies, but he exercised no independent judgment.<sup>56</sup> Accordingly, the Trial Chamber held that Delalic's job as a coordinator did not make him a superior of the prison guards. Concerning his post as the commander of Tactical Group I, the Chamber opined that the unit was a temporary combat unit that did not include non-combat institutions such as prisons.<sup>57</sup> Further, it rejected any inference of a superior-subordinate relationship from an order that Delalic transmitted from higher authority to the Celebici camp commander to appoint a commission to interrogate prisoners. The Chamber emphasized that the tactical group existed only to carry out specific combat missions and was merely a conduit in transmitting the order.<sup>58</sup> The Chamber concluded that Delalic was not a regional commander, and he directed other units in the area only on an ad hoc, occasional, tactical basis. Accordingly, it held that Delalic did not have effective control over the camp and was not criminally liable for atrocities committed there.

The Trial Chamber also found that Delic lacked both de jure and de facto effective control over the guards even though he was the camp's deputy commander. The Chamber again distinguished influence from effective control. Several witnesses testified that Delic appeared to be the guards' "boss" because he sometimes gave orders and apparently had a strong, intimidating, and coercive influence on them.<sup>59</sup> Nevertheless, the Trial Chamber held that Delic's influence was merely the result of his forceful personality, which intimidated the guards. The Chamber emphasized that he received daily direction from Camp Commander Mucic, he could not exercise discipline, and he could not act alone without the commander's

---

subordinate. Further, command responsibility theory creates liability for two types of conduct—positive acts and omissions—when there exists a legal obligation to act. See Mitchell, *supra* note 48, at 383.

<sup>50</sup> Prosecutor v. Delalic et al., Case No. IT-96-21-T, Judgment (Nov. 16, 1998) (*aff'd*, Case No. IT-96-21-A, Judgment (Feb. 20, 2001)); Rome Statute of the International Criminal Court art. 28, July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002.

<sup>51</sup> See Statute of the International Tribunal (Former Yugoslavia), May 25, 1993, 32 I.L.M. 1192.

<sup>52</sup> Mitchell, *supra* note 48, at 390; Ann B. Ching, Comment, *Evolution of the Command Responsibility Doctrine in Light of the Celebici Decision of the International Criminal Tribunal for the Former Yugoslavia*, 25 N.C. J. INT'L L. & COM. REG. 167, 192–202 (Fall 1999).

<sup>53</sup> Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 A.J.I.L. 573, 576 (July 1999).

<sup>54</sup> *Id.* at 238.

<sup>55</sup> Ching, *supra* note 52, at 196.

<sup>56</sup> *Id.*

<sup>57</sup> Prosecutor v. Delalic et al., Case No. IT-96-21-T, Judgment, ¶ 245 (Nov. 16, 1998).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* ¶¶ 285–89.

authority. Accordingly, the Chamber ruled that influence alone did not establish that Delic had de facto effective control over the Celebici camp and found him not guilty under command responsibility theory.<sup>60</sup>

## 2. SOF Teams Lack Effective Control over Defeated Enemy Soldiers

The *Celebici* cases provide a framework to analyze whether SOF teams have de jure or de facto effective control over defeated enemy soldiers during commando raids. By drawing an analogy to these cases, one can demonstrate that the defeated soldiers have not “fallen under the power” of the teams in a manner that triggers POW status.

Special operations forces teams lack de jure effective control over defeated enemy soldiers because the law of war does not generally require victorious forces to capture defeated enemy forces.<sup>61</sup> Certainly, it prohibits victorious forces from refusing quarter—killing all defeated enemy soldiers, even the wounded.<sup>62</sup> The 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field (GC I) requires that forces collect the wounded and treat the wounded and sick soldiers who fall into their hands as POWs.<sup>63</sup> Accordingly, SOF teams must cease attacks against defeated and defenseless enemy soldiers. But that obligation is prohibitive, not affirmative. It does not logically follow that SOF teams must treat all defeated enemy soldiers as prisoners of war.<sup>64</sup>

Moreover, it is important to distinguish a common understanding of the prohibition against refusing quarter that states that armed forces cannot decide to “take no prisoners.”<sup>65</sup> The prohibition focuses on ensuring that there are survivors from the defeated enemy and not on requiring that victorious forces actually take prisoners. Jean Pictet explains: “The term ‘quarter’ . . . here means that the conquered enemy’s life is spared.”<sup>66</sup> For this reason, references to “no prisoners” were deleted from the final draft of Protocol I’s quarter provisions.<sup>67</sup> Clearly, SOF teams are not obligated to take custody of defeated enemy soldiers during commando raids; thus, the teams lack de jure effective control over them.

Prisoner of war status therefore depends on whether SOF teams have de facto effective control. Under the *Celebici* cases, one may consider the following factors to determine whether SOF teams’ functions include the material ability to prevent defeated enemy forces from committing hostile acts: the distribution of tasks, the capacity to issue orders, any previous exercise of disciplinary measures by the teams, and powers of influence.

The distribution of tasks for SOF teams does not indicate the existence of de facto effective control. During commando raids, SOF teams typically do not take physical custody of defeated enemy soldiers, or do so only for short periods until the teams depart the site.<sup>68</sup> This follows from the unusual circumstances of such missions. Teams typically are small in number, usually twelve or fewer soldiers. To facilitate their mobility, they carry few supplies; by weight, most of their supplies consist of ammunition. Typically, their mission deep in enemy territory is to destroy enemy facilities such as Scud launchers. The conditions might require them to attack at night and to hide during the day.<sup>69</sup> Upon completing their mission, teams are usually exfiltrated from enemy territory by helicopters, which have limited room for passengers. Moreover, SOF teams’ missions might include immediate follow-on raids against other sites. Accordingly, unless tasked to retrieve specific high-profile enemy combatants, SOF teams often release any defeated enemy combatants that are held during a raid.<sup>70</sup> Hence, the

---

<sup>60</sup> *Id.*

<sup>61</sup> SCHINDLER & TOMAN, *supra* note 13, at 3–23; Hague IV, *supra* note 15, art. 23.

<sup>62</sup> GREEN, *supra* note 10, at 196; Hague IV, *supra* note 15, art. 23.

<sup>63</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field arts. 14–15, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I].

<sup>64</sup> See PICTET, *supra* note 16, at 151–55. A duty to provide supplies or to evacuate might arise if defeated enemy soldiers are left in a situation where they would have virtually no chance of survival because of the environment. A decision not to help them would be equivalent to a refusal to give quarter. But, as discussed in Part III, that duty is owed to all *hors de combat*. See PICTET, *supra* note 11, at 490.

<sup>65</sup> PICTET, *supra* note 11, at 475.

<sup>66</sup> *Id.*

<sup>67</sup> Protocol I, Article 40, states: “It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.” Protocol I, *supra* note 20, art. 40.

<sup>68</sup> Gary L. Walsh, *Role of the Judge Advocate in Special Operations*, ARMY LAW., Aug. 1989, at 4.

<sup>69</sup> ROSENAU, *supra* note 3, at 34–40.

<sup>70</sup> *Id.*

teams exercise only ad hoc, limited tactical control over defeated enemy soldiers. This task is more analogous to the limited, occasional, non-effective control exercised by Delalic and Delic in the *Celebici* cases rather than the extensive, prolonged effective control that Mucic exercised.

Special operations forces teams also lack lasting authority to issue orders, to exercise discipline, or to exert lasting influence on the defeated enemy. Commando teams have contact with enemy forces only for short periods. They do not function as occupiers of the targeted enemy facilities. In Iraq, they quickly move from one site to the next. They might have custody over some defeated enemies for short periods, but only to complete the destruction of the facility. They do not remain as guards of enemy territory or defeated soldiers. After the SOF teams leave, the enemy soldiers are no longer in custody or directly prevented from resuming hostile activities. Hence, the team's ability to issue orders and impose discipline on the defeated enemy is one of influence alone through force of personality and threats (as with Delalic) and not one of effective control (as with Mucic).

After leaving, SOF teams' primary lasting influence on defeated enemies is through threats of renewed hostilities, such as air strikes. One might argue that such influence amounts to the defeated enemy being "in the power" of the team so as to trigger POW status. But Jean Pictet indicates that such influence does not necessarily invoke POW status, which requires the defeated enemy to have "fallen into the power" of the team through capture.<sup>71</sup> Accordingly, SOF teams do not have effective control over defeated enemy soldiers during commando raids, and POW status does not accurately or realistically define the relationship between the teams and the defeated enemy.

## B. Confusion over POW Status and Released Enemy Soldiers

Moreover, applying POW status leads to confusion over the defeated enemies' status and the standard for their treatment. Assuming that the defeated soldiers qualify as POWs, what is their status if SOF teams release them? Special operations forces teams lack the authority to terminate POW status or to grant parole. Those decisions rest with the ASD (ISA). The released enemy soldiers therefore would fall into the confusing situation of being POWs at-large, without authorized release. In effect, they would be the equivalent of escaped prisoners—who may also be defined as at-large without authority. The law of armed conflict sanctions the use of force to stop escaped prisoners.<sup>72</sup> The released soldiers therefore would run the risk of being targeted as suspected escapees. Moreover, they would likely not clearly understand what actions constitute "escape" versus "parole" and what they must do to maintain their POW status. After all, the released prisoners have no duty to honor ambiguous de facto paroles that do not exist under law or regulation. Applying POW status to released enemy soldiers during commando raids leaves them in an untenable situation.

Of note, Protocol I's drafters attempted to address this problem. Article 41 states: "When persons entitled to protection as prisoners of war have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation . . . they shall be released and all feasible precautions shall be taken to ensure their safety."<sup>73</sup> But this provision also leads to confusion. As Jean Pictet notes, it is unclear what level of authority can approve release and what the ramifications of an unauthorized release are.<sup>74</sup>

Also, it is unclear whether victorious forces can properly invoke Article 41 to release prisoners for purely operational or logistical purposes. In his report on Protocol I, the *Rapporteur* indicated that practical concerns would dictate the article's use:

The requirement that all "feasible precautions" be taken to ensure the safety of released prisoners was intended to emphasize that the detaining Power, even in those extraordinary circumstances, was expected to take all measures that were practicable in light of the combat situation. In the case of a long distance patrol, it need not render itself ineffective by handing the bulk of its supplies over to the released prisoners, but it should do all that it reasonably can do in view of all the circumstances to ensure their safety.<sup>75</sup>

---

<sup>71</sup> PICTET, *supra* note 11, at 484.

<sup>72</sup> *Id.* at 488.

<sup>73</sup> Protocol I, *supra* note 20, art. 41.

<sup>74</sup> PICTET, *supra* note 11, at 490.

<sup>75</sup> *Id.* at 489 (quoting 15 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 384 (Geneva 1974-77)).

In contrast, Jean Pictet states in his commentary to Article 41 that a captor's forces should not release prisoners for purely operational or logistical reasons. He cautions:

The release should be a humanitarian gesture, not an easy means of getting rid of prisoners considered to be an encumbrance. In fact, in some situations where the prisoner would have virtually no chance of survival, this would be equivalent to a refusal to quarter.<sup>76</sup>

Further, Article 41's release provisions would not necessarily apply to U.S. SOF teams. The United States has not publicly indicated support for Article 41 as a statement of customary international law.<sup>77</sup> Accordingly, the application of POW status to defeated soldiers during commando raids leads to confusing results that ignore the realities of field operations.

### C. The Humanitarian Obligations Owed to Capitulated Forces

Capitulated-force status also does not clarify what humanitarian obligations SOF teams owe to defeated enemies during commando raids. If the terms of a capitulation agreement include the capture of enemy soldiers, then POW status applies. But, as stated, that status leaves the defeated forces in an untenable situation if SOF teams release them, as the teams are likely to do. If the capitulation agreement does not include the capture of enemy soldiers, then the defeated enemies are still active combatants to whom no duties are owed except for those provided in the agreement's terms. Clearly, a third category or status must apply to the defeated enemy soldiers in this scenario in order to provide them with clear humanitarian protections.

## III. Defeated Enemy Soldiers During Commando Raids Are *Hors de Combat*

The law of war recognizes for defeated enemy soldiers a third category that is distinct from POW or capitulated forces. These enemies are *hors de combat*—soldiers who, having laid down their arms or having no further means of defense, have surrendered at the discretion of the victorious forces.<sup>78</sup> This status includes defenseless wounded soldiers. Special operations forces teams owe *hors de combat* duties of care that are independent of and overlap those owed to prisoners of war and capitulated forces.

### A. Existence of *Hors de Combat* Status

The law of armed conflict reveals the existence of *hors de combat* as a distinct category in the structure of major treaties. All contain articles for *hors de combat* separate from those for prisoners of war. In Hague IV's regulations, Section II, Chapter I, Article 23 outlaws killing or wounding "an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion."<sup>79</sup> In contrast, Hague IV's regulations concerning prisoners of war are located in Section I, Chapter II, Articles 4 through 20.<sup>80</sup> In the 1949 Geneva Conventions, GC I provides protections on the battlefield for all wounded and sick who are *hors de combat*.<sup>81</sup> But an entirely separate treaty, GC III, provides protections for prisoners of war, including the wounded and sick.<sup>82</sup>

Moreover, the 1977 Protocol I's drafters were keenly aware of the distinction between *hors de combat* and prisoners of war. They perceived a gap in the protections between these statuses. Jean Pictet explains:

---

<sup>76</sup> PICTET, *supra* note 11, at 490.

<sup>77</sup> Dupuis et al., *supra* note 19.

<sup>78</sup> PICTET, *supra* note 11, at 480.

<sup>79</sup> Hague IV, *supra* note 15, art. 23(d).

<sup>80</sup> *Id.* arts. 4-20.

<sup>81</sup> GC I, *supra* note 63 *passim*.

<sup>82</sup> *Id.* art. 14; GC III, *supra* note 17.

The essential problem concerned how to create a concrete link between the moment when an enemy soldier is no longer a combatant because he is *hors de combat*, and the moment when he becomes a prisoner of war because he has “fallen into the power” of his adversary.<sup>83</sup>

The drafters therefore included in Protocol I an article that prohibits attacks against defeated soldiers who are *hors de combat*, regardless of their status as wounded, captives, or prisoners of war.<sup>84</sup> It broadly applies to all combatants who express an intent to surrender, who remain under the power of an adverse party, or who cannot defend themselves.

#### B. Applying *Hors de Combat* Status to Defeated Soldiers During Commando Raids

*Hors de combat* status accurately describes defeated enemy soldiers during commando raids. The soldiers are no longer willing or able to defend themselves, regardless of whether they are wounded or captives. Further, the status is unaffected by the unusual battlefield circumstances of commando raids. As already described, the defeated soldiers are not in the effective control or custody of SOF teams, and are often released from any temporary custody. But *hors de combat* status does not depend on custody or control, or approval by higher military or civilian authorities. The defeated soldiers are *hors de combat* as long as they choose not to fight.

Accordingly, *hors de combat* status provides clear guidance on the duties that SOF teams owe to defeated enemy forces, regardless of custody or release. Notably, these obligations blend the duties owed to prisoners of war and those owed to capitulated forces. The prohibition against refusing quarter applies to all *hors de combat*. Special operations forces teams must therefore cease all attacks against defeated soldiers as if they were prisoners of war. This is a broader protection than a mere ceasefire resulting from a limited capitulation agreement. But if the defeated soldiers resume hostilities, then they are no longer *hors de combat* and they become lawful targets again. Also, GC I, Article 15 requires that SOF teams treat wounded *hors de combat* humanely. This includes general obligations for SOF teams to search for and collect the wounded and to provide them medical care and protection.<sup>85</sup> The release of defeated soldiers does not affect these duties.

Nonetheless, these duties are more flexible than GC III’s absolute obligations for the treatment of prisoners of war.<sup>86</sup> Geneva Convention I, Article 15 requires both sides in a battle to take “all possible measures,” while GC III lacks such flexible language. For *hors de combat*, SOF teams can therefore choose the form and scope of relief for injured enemies based on operational considerations. For example, teams can meet GC I’s obligation by leaving the injured *hors de combat* with medical supplies or by coordinating air drops of supplies to them. In short, *hors de combat* status acknowledges the practical limitations of operations such as commando raids.

Most importantly, SOF teams do not necessarily have to abandon commando missions to take *hors de combat* into protective custody or to evacuate them. For uninjured defeated enemies, there is no general duty under the law of armed conflict for the teams to take custody of them. For wounded defeated enemies, GC I requires evacuation only if possible within the limits of battlefield operations.<sup>87</sup> But again, SOF teams cannot leave *hors de combat* in environmental conditions with virtually no chance for survival.<sup>88</sup>

*Hors de combat* status therefore provides understandable and realistic standards of treatment for defeated enemy soldiers during commando raids. It strikes a balance between the rigid humanitarian goals of POW status and the practical considerations that promote use of capitulated forces status.

#### IV. Conclusion

During commando raids, SOF teams should treat defeated enemy forces as *hors de combat* and not as prisoners of war or capitulated forces. This status recognizes the reality of the battlefield circumstances during such raids. It removes confusion

---

<sup>83</sup> PICTET, *supra* note 11, at 481.

<sup>84</sup> Protocol I, *supra* note 20, art. 40; PICTET, *supra* note 11, at 481–84.

<sup>85</sup> GC I, *supra* note 63, art. 15.

<sup>86</sup> See PICTET, *supra* note 16, at 151.

<sup>87</sup> See *id.*

<sup>88</sup> PICTET, *supra* note 11, at 490.

about the status of defeated soldiers who are released and the appropriate standard for their treatment. Furthermore, the teams can still meet the operational burdens that this status imposes, without sacrificing mission accomplishment.

By applying *hors de combat* status to defeated enemy soldiers, SOF teams can thereby accomplish commando raids without lingering questions as to whether they acted consistently with the law of war. Clearly, there are many inherent operational uncertainties in daring commando raids. Legal ambiguities over the status of defeated enemy soldiers should not be among them.