

United States, Surrendering in the Persian Gulf War

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: “United States: Defense Department Report to Congress on the Conduct of the Persian Gulf War – Appendix O on the Role of the Law of War” (April 10, 1992) in *ILM*, vol. 31, 1992, p. 612, pp. 641-44.

Available on http://www.dod.mil/pubs/foi/operation_and_plans/PersianGulfWar/404.pdf

THE CONCEPT OF “SURRENDER” IN THE CONDUCT OF COMBAT OPERATIONS

The law of war obligates a party to a conflict to accept the surrender of enemy personnel and thereafter treat them in accordance with the provisions of the 1949 Geneva Conventions for the Protection of War Victims. Article 23(d) of Hague IV prohibits the denial of quarter, that is the refusal to accept an enemy's surrender, while other provisions in that treaty address the use of flags of truce and capitulation.

However, there is a gap in the law of war in defining precisely when surrender takes effect or how it may be accomplished in practical terms. Surrender involves an offer by the surrendering party (a unit or an individual soldier) and an ability to accept on the part of his opponent. The latter may not refuse an offer of surrender when communicated, but that communication must be made at a time when it can be received and properly acted upon – an attempt at surrender in the midst of a hard-fought battle is neither easily communicated nor received. The issue is one of reasonableness.

A combatant force involved in an armed conflict is not obligated to offer its opponent an opportunity to surrender before carrying out an attack. To minimize Iraqi and Coalition casualties, however, the Coalition engaged in a major psychological operations campaign to encourage Iraqi soldiers to surrender before the Coalition ground offensive. Once that offensive began, the Coalition effort was to defeat Iraqi forces as quickly as possible to minimize the loss of Coalition lives. In the process, Coalition forces continued to accept

legitimate Iraqi offers of surrender in a manner consistent with the law of war. The large number of Iraqi prisoners of war is evidence of Coalition compliance with its law of war obligations with regard to surrendering forces.

Situations arose in the course of Operation Desert Storm that have been questioned by some in the post-conflict environment. Two specific cases involve the Coalition's breach of the Iraqi defensive line and attack of Iraqi military forces leaving Kuwait City. Neither situation involved an offer of surrender by Iraqi forces, but it is necessary to discuss each in the context of the law of war concept of surrender.

[R]apid breach of the Iraqi defense in depth was crucial to the success of the Coalition ground campaign. When the ground campaign began, Iraq had not yet used its air force or extensive helicopter fleet in combat operations, the Iraqi Scud capability had not been eliminated, and most importantly, chemical warfare by Iraq remained a distinct possibility. It was uncertain whether the Coalition deception plan had worked or whether the Coalition effort had lost the element of surprise and there was also no definitive information about the strength and morale of the defending Iraqi soldiers. Because of these uncertainties, and the need to minimize loss of US and other Coalition lives, military necessity required that the assault through the forward Iraqi defensive line be conducted with maximum speed and violence.

The VII Corps main effort was the initial breaching operation through Iraqi defensive fortifications. This crucial mission was assigned to the 1st Infantry Division (Mechanized). The Division's mission was to conduct a deliberate breach of the Iraqi defensive positions as quickly as possible to expand and secure the breach site, and to pass the 1st UK Armored Division through the lines to continue the attack against the Iraqi forces.

To accomplish the deliberate breaching operation, the 1st Infantry Division (Mechanized) moved forward and plowed through the berms and mine fields erected by the Iraqis. Many Iraqis surrendered during this phase of the attack and were taken prisoner. The division then assaulted the trenches containing other Iraqi soldiers. Once astride the trench lines, the division turned the plow blades of its tanks and combat earthmovers along the Iraqi defense line and, covered by fire from its M-2/-3 armored infantry fighting vehicles, began to fill in the trench line and its heavily bunkered, mutually supporting fighting positions.

In the process, many more Iraqi soldiers surrendered to division personnel; others died in the course of the attack and destruction or bulldozing of their defensive positions.

By nightfall, the division had breached the Iraqi defenses, consolidated its position, and prepared to pass the 1st UK Armoured Division through the lines. Hundreds of Iraqi soldiers had been taken prisoner; US casualties were extremely light.

The tactic, used by the 1st Infantry Division (Mechanized) resulted in a number of Iraqi soldiers dying in their defensive positions as those positions were bulldozed. Marine Corps breaching operations along its axis of

attack into Kuwait used different, but also legally acceptable, techniques of assault by fire, bayonet, and the blasting of enemy defensive positions. Both tactics were entirely consistent with the law of war.

Tactics involving the use of armored vehicles against dug-in infantry forces have been common since the first use of armored vehicles in combat. The tactic of using armored vehicles to crush or bury enemy soldiers was briefly discussed in the course of the UN Conference on Certain Conventional Weapons, conducted in Geneva from 1978 to 1980 and attended by the United States and more than 100 other nations. It was left unregulated, however, as it was recognized by the participants to be a common long-standing tactic entirely consistent with the law of war.

In the case in point, military necessity required violent, rapid attack. Had the breaching operation stalled, the VII Corps main effort would have been delayed or, at worst, blunted. This would have had an adverse effect on the entire ground campaign, lengthening the time required to liberate Kuwait, and increasing overall Coalition casualties.

As first stated in US Army General Orders No. 100 (1863), otherwise known as the Lieber Code, military necessity "consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war...[It] admits of all direct destruction of life or limb of armed enemies." As developed by the practice of nations since that time, the law of war has placed restrictions on the application of force against enemy combatants in very few circumstances (e.g., the first use of chemical or biological weapons). None of these restrictions were at issue during the breaching operations during Operation Desert Storm.

The law of war principle complementary to military necessity is that of unnecessary suffering (or superfluous injury). That principle does not preclude combat actions that otherwise are lawful, such as that used by the 1st Infantry Division (Mechanized).

In the course of the breaching operations, the Iraqi defenders were given the opportunity to surrender, as indicated by the large number of EPWs taken by the division. However, soldiers must make their intent to surrender clear and unequivocal, and do so rapidly. Fighting from fortified emplacements is not a manifestation of an intent to surrender, and a soldier who fights until the very last possible moment assumes certain risks. His opponent either may not see his surrender, may not recognize his actions as an attempt to surrender in the heat and confusion of battle, or may find it difficult (if not impossible) to halt an onrushing assault to accept a soldier's last-minute effort at surrender.

It was in this context that the breach of the Iraqi defense line occurred. The scenario Coalition forces faced and described herein illustrates the difficulty of defining or effecting "surrender." Nonetheless, the breaching tactics used by US Army and Marine Corps forces assigned this assault mission were entirely consistent with US law of war obligations.

In the early hours of 27 February, CENTCOM received a report that a concentration of vehicles was forming in Kuwait City. It was surmised that Iraqi forces were preparing to depart under the cover of darkness. CINCCENT was concerned about the redeployment of Iraqi forces in Kuwait City, fearing they could join with and provide reinforcements for Republican Guard units west of Kuwait City in an effort to stop the Coalition advance or otherwise endanger Coalition forces.

The concentration of Iraqi military personnel and vehicles, including tanks, invited attack. CINCCENT decided against attack of the Iraqi forces in Kuwait City, since it could lead to substantial collateral damage to Kuwaiti civilian property and could cause surviving Iraqi units to decide to mount a defense from Kuwait City rather than depart. Iraqi units remaining in Kuwait City would cause the Coalition to engage in military operations in urban terrain, a form of fighting that is costly to attacker, defender, innocent civilians, and civilian objects.

The decision was made to permit Iraqi forces to leave Kuwait City and engage them in the unpopulated area to the north. Once departed, the Iraqi force was stopped by barricades of mines deployed across the highway in front of and behind the column. Air attacks on the trapped vehicles began about 0200. The following morning, CENTCOM leadership viewed the resulting damage. More than two hundred Iraqi tanks had been trapped and destroyed in the ambush, along with hundreds of other military vehicles and various forms of civilian transportation confiscated or seized by Iraqi forces for the redeployment. The vehicles in turn were full of property pillaged from Kuwaiti civilians: appliances, clothing, jewelry, compact disc players, tape recorders, and money, the last step in the Iraqi looting of Kuwait.

Throughout the ground campaign Coalition leaflets had warned Iraqi soldiers that their tanks and other vehicles were subject to attack, but that Iraqi soldiers would not be attacked if they abandoned their vehicles – yet another way in which the Coalition endeavored to minimize Iraqi casualties while encouraging their defection and/or surrender. When the convoy was stopped by the mining operations that blocked the Iraqi axis of advance, most Iraqi soldiers in the vehicles immediately abandoned their vehicles and fled into the desert to avoid attack.

In the aftermath of Operation Desert Storm, some questions were raised regarding this attack, apparently on the supposition that the Iraqi force was retreating. The attack was entirely consistent with military doctrine and the law of war. The law of war permits the attack of enemy combatants and enemy equipment at any time, wherever located, whether advancing, retreating, or standing still. Retreat does not prevent further attack. At the small-unit level, for example, once an objective has been seized and the position consolidated, an attacking force is trained to fire upon the retreating enemy to discourage or prevent a counterattack.

Attacks on retreating enemy forces have been common throughout history. Napoleon suffered some of his worst losses in his retreat from Russia, as did the German Wehrmacht more than a century later. It is recognized by military professionals that a retreating force remains dangerous. The 1st Marine Division and

its 4,000 attached US Army forces and British Royal Marines, in the famous 1950 march out of the Chosin Reservoir in North Korea, fighting outnumbered by a 4:1 margin, turned its “retreat” into a battle in which it defeated the 20th and 26th Chinese Armies trying to annihilate it, much as Xenophon and his “immortal 10,000” did as they fought their way through hostile Persian forces to the Black Sea in 401 BC.

In the case at hand, neither the composition, degree of unit cohesiveness, nor intent of the Iraqi military forces engaged was known at the time of the attack. At no time did any element within the formation offer to surrender. CENTCOM was under no law of war obligation to offer the Iraqi forces an opportunity to surrender before the attack.

Discussion

1. Which provisions of IHL concern the surrender of enemy personnel? Who is considered hors de combat ? Under which circumstances? (HR, Art. 23(c) and (d); GC III, Arts 4 and 13; P I, Art. 41(2))
2.
 - a. Why does the US Defense Department Report mention the Geneva Conventions and Hague Regulations, but not Protocol I?
 - b. Even without application of Protocol I, are not the same rules applicable to the US actions in these two cases? (GC III, Arts 4 and 13; P I, Art. 41(2), 43 and 44) Is Art. 41(2) of Protocol I even necessary?
3.
 - a. Do you agree with the two-part definition given by the US Department of Defense that “[s]urrender involves an offer by the surrendering party (...) and an ability to accept on the part of his opponent”? What kind of offer must be made? What kind of communication? Who decides when there exists the ability to accept? Which factors are used in reaching such a decision? Are there clear, objective criteria for such a determination?
 - b. Is the issue of surrender really a matter of reasonableness? How is reasonableness to be defined? From whose perspective? And under which circumstances? Does it require the balancing of unnecessary suffering – and superfluous injury – against military necessity? Are the criteria used to assess these factors clear? Could military necessity ever outweigh an unconditional surrender? (P I, Art. 41(2)(b))
4. Is the tactic of crushing and burying enemy combatants considered as causing unnecessary suffering? [See United States, Memorandum of Law: The Use of Lasers as Anti-Personnel Weapons] In comparison to the suffering caused by lawful artillery fire on the same position? In relation to which factors can the necessity and the extent of the suffering be evaluated? (P I, Art. 35(2))
5.
 - a. If a military method logistically makes it almost impossible to surrender, is that in effect not equivalent to denying quarter, in violation of IHL? Could that describe the situation in the first case discussed in the above report?
 - b. Must an attacker constantly give enemy soldiers an opportunity to surrender?
 - c. Must any surrender that is clearly indicated and of which the enemy has become aware be accepted?
 - d. Must an attack on a military objective, for instance military barracks, made with collective weapons, e.g., by aerial or artillery bombardment, stop as soon as some enemy soldiers surrender? [See British Military Court at Hamburg, The Peleus Trial [Section 6]] As soon as some enemy soldiers are wounded? As soon as all enemy soldiers concerned surrender? Is there a difference relevant

for IHL between artillery fire and bulldozing enemy positions?

- e. If some wounded and sick Iraqi soldiers were in the bulldozed trench, was the bulldozing not an unlawful attack on wounded and sick? (GC I, Arts 12 and 50)
 - f. Should US forces have searched the bulldozed Iraqi positions for casualties as soon as fighting ended at the site? (GC I, Art. 15)
6. Must combatants make a formal gesture to indicate surrender, e.g., raising their hands or dropping their weapons, before being considered hors de combat? Must combatants always do so? Even the sick and wounded and the shipwrecked? What if they are already defenceless? Is a formal surrender always realistically possible? (P I, Art. 41(2))
7. a. Do you agree with the US assessment of the historical facts regarding attacks on retreating enemy forces? Does it establish that such attacks are still permissible today? If so, does that make it permissible to attack the Iraqi forces leaving Kuwait?
- b. In the second incident discussed in the report, did the situation change once the soldiers concerned became trapped? Were the Iraqis then hors de combat? If so, did the air attacks constitute a grave breach of IHL? A war crime? (GC III, Art. 130; PI, Art. 85)
8. Does the large number of POWs demonstrate that the US complied with IHL provisions concerning persons hors de combat? But could there not perhaps have been even more POWs?