Chapter 22

International Legal Protections for Persons *Hors de Combat*

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**Introduction**

Throughout history, persons *hors de combat*, literally translated as those who are “out of the fight”, have occupied a special place amongst categories of those requiring legal protection during international and non-international armed conflicts. Ancient and medieval history contain examples of military commanders ordering troops to spare soldiers defeated in battled and of other efforts to moderate the effects of war and even to punish those acting too brutal with the enemy. In 1762, Jean Jacques Rousseau reflected the philosophical underpinnings of these protections in ‘The Social Contract or Principles of Political Right’:

“[War] then is a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers ... . The object of the war being the destruction of the hostile State, the other side has a right to kill its defenders, while they are bearing arms; but as soon as they lay them down and surrender, they cease to be enemies or instruments of the enemy and become once more merely men, whose life no one has any right to take.”

National leaders have issued declarations and international delegations have promulgated enactments identifying and protecting this class of individuals. Most recently, these efforts have culminated in Article 8(2)(b)(vi) of the Statute of the International Criminal Court (ICC), which criminalizes the deliberate attack against those who are *hors de combat* in the midst of an international conflict.

In devising Article 8(2)(b)(vi), the Preparatory Commission for the International Criminal Court (hereinafter “PrepCom”) drew language from Article 23(c) of the Hague Regulations of 1897 and 1907. However, the PrepCom decided that Article 8(2)(b)(vi) should apply not only to scenarios covered in Article 23(c) but to the broader contexts covered by Articles 41 and 42 of Additional Protocol I of the Geneva Conventions of 12 August 1949 (hereinafter “Protocol I”), enacted in 1977. Thus, the

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PrepCom agreed that the terminology of Article 41 of Protocol I would be a correct “translation” of the language deriving from Article 23(c). 3

The contours of the Article 8(2)(b)(vi) and its corresponding elements remain relatively undefined in the context of the ICC. 4 However, the concept of who is hors de combat, what protections such individuals are afforded, and to what extent these protections are limited have evolved considerably and are outlined in detail through the interplay of several international instruments.

Part II of this essay will trace the development of these concepts through legislative measures by highlighting the early attempts at codifying protections for those placed hors de combat. Part III, focusing on Articles 41 and 42 of Protocol I and the General Remarks that follow them, will discuss more recent provisions defining who is hors de combat, the protections afforded those who are hors de combat, and the limitations of such protections. With the drafting history as a backdrop, Part IV will review the conduct, mens rea, and the requisite nexus between the crime and the war that are required for conviction under Article 8(2)(b)(vi) of the ICC Statute.

I. Early Attempts at Codifying Protections for Hors de Combat

Codifying protections for those who were hors de combat began in the nineteenth century with the Lieber Code in 1863. Promulgated by President Abraham Lincoln, the Lieber Code governed the conduct of the United States armed forces during the American civil war.

The Lieber Code expressly forbade Union troops to give no quarter, or, refuse to take prisoners. Efforts at codification at the international level followed, beginning with the first Geneva Convention of 1864, the Brussels Declaration of 1874, and the Oxford Manual of the Laws and Customs of War in 1880. These international efforts culminated in the Hague Peace Conferences of 1899 and 1907, convened on the initiative of the Russian government. The Hague Peace Conferences led to the drafting, among others, of the Hague Conventions respecting the Laws and Customs of War on Land and their annexed regulations (“Hague Convention”).

Drawing heavily from provisions of the 1874 Brussels Declaration and the 1880 Oxford Manual which never came into force, Article 23(c) of the Hague Regulations of 1899 and 1907 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. For several decades, the Hague Conventions remained the principal means of legal protection of persons placed hors de combat and the article’s language remains intact in the new Article 8(2)(b)(vi) of the ICC Statute.

The adoption of the four Geneva Conventions of 1949 enhanced the legal protections of a number of categories of protected persons. 5 The definition of pro-

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4 There is a considerable overlap between this offence as contained in Article 8(2)(b)(vi) of the ICC, Article 23(c) of the Hague Regulations, Article 8(2)(a)(i) of the ICC (Willful killing) and Article 8(2)(b)(xii) of the ICC (Declaring no quarter will be given).
5 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 31 (Geneva Convention I); Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of