

Technologically Enabled Surrender Under the Law of Armed Conflict

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Abstract

The international armed conflict between Russia and Ukraine has given the world a glimpse into warfare of the future, where modern technologies are utilized in combat. Drones, artificial intelligence, cyber capabilities, satellites, and social media platforms, among other technologies, are shaping the conflict in real-time. In some instances, modern technologies change conduct on battlefields, leading to the reconsideration of applications of existing law of armed conflict principles and rules. A case in point is Ukraine's use of modern communications and drone capabilities to facilitate the battlefield surrender of Russian soldiers. The process of and acts associated with technologically enabled surrender, as currently observed on the battlefields of Ukraine, are dissimilar in some respects from traditional notions of battlefield surrender. This Article discusses the development of the modern legal consequences of surrender under the law of armed conflict and explores how technologically enabled surrender is being used in Ukraine. It concludes with an analysis of the impact of these technologies on the surrender process and presents an adaptive interpretation of existing norms, leading to three overarching themes. First, technologically enabled surrender is a harbinger of things to come in future armed conflicts. It appears likely that technologically enabled surrender is safer and more efficient for all parties involved. Second, the

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law of armed conflict is flexible enough to appropriately regulate technologically enabled surrender and, more broadly, other emerging technologies. Third, technology can help implement the law of armed conflict rules on surrender by accounting for both military necessity and humanitarian considerations.

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I. INTRODUCTION

The character of armed conflict¹ is continuously evolving, often dramatically and at a lightning-fast pace. Technological and scientific advancements drive how armed conflicts are and will be fought in all domains—land, sea, air, space, and cyberspace. From chariots, crossbows, and gunpowder to cyber weapons, nanotechnologies, and autonomous systems, armed conflicts are shaped and defined by the development and use of innovative technologies. How people remember and think about armed conflict is often inextricably linked to the technologies and tactics of the era.² An enduring issue underpinning such technological and scientific evolution is whether the elaborate customary and conventional law regime comprising the law of armed conflict (LOAC)³ is well-suited to regulate these emerging battlefield tools and techniques. The armed conflict between Russia and Ukraine is tragically a fertile ground to consider how LOAC principles and rules from the nineteenth and twentieth centuries should be interpreted and applied considering these state-of-the-art advancements in the means and methods of warfare.

A specific instance of potential consequence at the intersection of LOAC norms and technological developments involves Ukraine's use of modern communications and drone capabilities to facilitate the battlefield surrender of

¹ Even though there is no definition of armed conflict in the law of armed conflict (LOAC) treaty law, the body of law distinguishes two types of armed conflict: international armed conflict and non-international armed conflict. International armed conflict involves two or more states. Non-international armed conflicts are between governmental forces and non-governmental armed groups or between such groups only. The 1949 Geneva Conventions established this binary classification paradigm rooted in Common Articles 2 and 3 to the Conventions. Common Articles are contained in all four Geneva Conventions. The substance of the Articles is so essential that the drafters of the Conventions included the same or similar Articles in each of the four Conventions. This new classification framework marked a sea change in the conceptualization of war in several respects. First, the *jus in bello* was developed in the context of wars between states. The drafters of the 1949 Geneva Conventions wanted to ensure states could not avoid the international legal consequences of being at war simply because there needed to be a declaration. Second, the scope and applicability of LOAC not only depends on the existence of an armed conflict but its application also differs depending upon whether it is an international armed conflict versus a non-international armed conflict. See generally EMILY CRAWFORD & ALISON PERT, INTERNATIONAL HUMANITARIAN LAW 54–95 (2d ed. 2020).

² See Michael N. Schmitt, *War, Technology and the Law of Armed Conflict*, 82 U.S. NAVAL WAR COLL. INT'L L. STUD. 137, 137–38 (2006) (discussing the interconnection between war, technology, and norms governing warfare, and how each has influenced the others since the beginning of armed conflict).

³ The terms “law of armed conflict,” “law of war,” and “international humanitarian law” are often used synonymously to describe the body of law that is the subject of this article. The law of armed conflict is part of public international law that applies during wars, armed conflicts—international and non-international—and occupations. Among other aims, it regulates the conduct of hostilities and protects the victims of conflict. GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 16–19 (3d ed. 2022).

Russian soldiers.⁴ Launched in September 2022, a Ukrainian intelligence effort, “Hochu zhit,” translated as “I want to live,” encourages, enables, and empowers Russian soldiers to surrender to the Ukrainian military.⁵ To facilitate the “I want to live” project, Ukraine deploys drones to meet and guide capitulating Russian soldiers from a designated location on the battlefield to waiting Ukrainian soldiers.⁶ The project came at a pivotal point in the armed conflict. Worsening winter weather in Ukraine⁷ coupled with Russian battlefield setbacks and the expanded use of mobilized conscripts led to an ever-increasing number of soldiers and their families contacting “I want to live.”⁸

As new technologies change the character of armed conflict, some dynamics remain constant. One is the inherent danger associated with surrendering to an adversary on a battlefield. Laying down one’s weapon and submitting to the authority of enemy soldiers is arguably the riskiest and most vulnerable act a soldier can take on a battlefield. For much of the 5,000 years of recorded warfare,⁹ it was not uncommon to kill surrendering combatants or force them into slavery.¹⁰ Tragically, atrocities are still committed against surrendering prisoners in the present day. For example, recent videos from the Russian-Ukrainian armed conflict suggest that Ukrainian forces killed Russian soldiers after capture.¹¹

⁴ Although a detailed treatment of individual battlefield status under LOAC is beyond the scope of this Article, customary and conventional laws of armed conflict define and outline protections for prisoners of war under LOAC. Of note, Article 4 of the Third Geneva Convention outlines the categories of individuals who qualify as prisoners of war in an international armed conflict. Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁵ Zoe Strozewski, *I Want to Live’ Project Reveals How Hotline Captures Russian Soldiers*, NEWSWEEK (Nov. 16, 2022), <https://perma.cc/7PJK-XVFN>.

⁶ Marc Santora, *Surrender to a Drone? Ukraine Is Urging Russian Soldiers to Do Just That.*, N.Y. TIMES (Dec. 20, 2022), <https://perma.cc/8VS4-NSYP>.

⁷ Helene Cooper et al., *Winter Will Be a Major Factor in the Ukraine War, Officials Say*, N.Y. TIMES (Nov. 12, 2022), <https://perma.cc/4WRZ-N3LV> (explaining that heavy snow and freezing temperatures present difficulties for poorly equipped Russian troops).

⁸ Strozewski, *supra* note 4.

⁹ Solis, *supra* note 3, at 2.

¹⁰ See Russell Buchan, *The Rule of Surrender in International Humanitarian Law*, 51 ISR. L. REV., 3, 5 (2018). As observed by Jean Pictet, “[i]n the earliest human societies, what we call the law of the jungle generally prevailed; the triumph of the strongest or most treacherous was followed by monstrous massacres and unspeakable atrocities. The code of honour forbade warriors to surrender; they had to win or die, with no mercy.” JEAN PICTET, *THE DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 6 (1985).

¹¹ Malachy Browne et al., *Videos Suggest Captive Russian Soldiers Were Killed at Close Range*, N.Y. TIMES (Nov. 22, 2022), <https://perma.cc/JGH2-98TY> (describing videos that showed “before-and-after scenes of the encounter . . . in which at least 11 Russians . . . appear to have been shot dead at close range”).

Even though the act of surrendering to an adversary on a battlefield is as old as warfare itself, the international customary and conventional laws of LOAC were primarily developed in the nineteenth and twentieth centuries. They are traceable to the Lieber Code, the Brussels Declaration, and the Oxford Manual, and were eventually reflected in treaties and military manuals.¹² At its essence, a soldier who surrenders to an adversary, on the one hand, agrees to stop fighting. On the other, the soldier is accorded legal protections, including safety from targeting and benevolent quarantine.¹³

The process of and acts associated with technologically enabled surrender, as currently observed on the battlefields of Ukraine and likely a mainstay in future armed conflicts, are dissimilar in some respects from traditional notions of battlefield surrender. This Article explores those differences. Part II discusses the development of the modern legal consequences of surrender under LOAC, beginning with the Lieber Code. Part III explains how technologically enabled surrender is being used in Ukraine, as it will likely be used in future armed conflicts to maintain an equilibrium between humanitarian aims and military necessity. Finally, this Article concludes with an analysis of the impact of these technologies on the surrender process and presents an adaptive interpretation of existing norms. Unquestionably, the development and use of cutting-edge technologies in warfare often raise thought-provoking questions about whether existing LOAC norms are adequate to regulate the impacts of technological change. Ultimately, while emerging technology is quickly changing the character of warfare—as it has always done—LOAC is a dynamic and fluid regulatory framework. It can address the myriad challenges presented on contemporary and future battlefields.

II. THE DEVELOPMENT OF SURRENDER UNDER THE LAW OF ARMED CONFLICT

The 1860s marked an inflection point in the development of LOAC. During this decade, the roots of modern LOAC were marked by three significant advancements, including two international agreements. The first was the adoption of the First Geneva Convention of 1864, protecting wounded and sick soldiers and those taking care of them.¹⁴ The second international accord was the 1868 St.

¹² CRAWFORD & PERT, *supra* note 1, at 7–10.

¹³ MICHAEL WALZER, *JUST AND UNJUST WARS* 46 (3d ed. 2000).

¹⁴ *See generally* Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 129 T.S. 361. In his book, *A Memory of Solferino*, Henry Dunant, a well-to-do Swiss businessman, described the horrors of what he observed at the 1859 Battle of Solferino and its aftermath. SOLIS, *supra* note 3, at 41–42. “The last few pages of [his book] contain the seed of an idea for the formation of neutral relief committees . . . who would treat the wounded in time of war, with an international agreement to recognize and protect those committees.” *Id.* at 42. In 1864, the Swiss government sponsored a diplomatic conference with delegates from sixteen states

Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight.¹⁵ This treaty represented the first international accord prohibiting the use of certain weapons in armed conflict.¹⁶

Even though the above two treaties represented essential milestones in the development of LOAC, the Lieber Code of 1863 made the most enduring contribution. On April 24, 1863, President Abraham Lincoln issued “General Orders No. 100: Instructions for the Government of the Armies of the United States in the Field.”¹⁷ Colloquially referred to as the Lieber Code after its principal author, the 157-article document established rules of conduct for the Union Army reflecting the customary laws of war of that era.¹⁸ Though originally written for battlefield application by Union forces, the creation of the Lieber Code has been credited with directly influencing subsequent international efforts to codify the laws of war, including the development of the Hague Regulations.¹⁹

Article 60 of the Lieber Code addresses surrender.²⁰ It represents a general rule that prohibits a state “to give no quarter.”²¹ “To give no quarter” means that surrender is not accepted, thereby refusing to spare the lives of persons who clearly express their intention to capitulate or otherwise not defend themselves.²² The Article’s exception to this principle, which expressly permits a commander to

gathered in Geneva, Switzerland, to consider such an international accord. *Id.* Given its historical significance, it is interesting to note that the First Geneva Convention contained only ten handwritten articles on two sheets of paper. *Id.* at 43.

¹⁵ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 11, 1868, 138 Consol. T.S. 297 [hereinafter Declaration Renouncing Explosive Projectiles].

¹⁶ *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, INT’L COMM. OF THE RED CROSS, <https://perma.cc/DYH7-5W98>. The agreement renounced using any projectile of a weight below 400 grammes which was either explosive or charged with fulminating or inflammable substances. Declaration Renouncing Explosive Projectiles, *supra* note 15.

¹⁷ War Dep’t, General Orders No. 100, Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863) [hereinafter Lieber Code].

¹⁸ *See generally id.*

¹⁹ *See* R.R. Baxter, *The First Modern Codification of the Law of War*, 3 INT’L REV. OF THE RED CROSS 234, 249 (1963) (“It is thus possible to trace a direct line of personal influence from Dr. Lieber’s Code to the Hague Regulations, which served only to add to the great weight which the Code had acquired with the passage of time.”).

²⁰ Lieber Code, *supra* note 17, art. 60 (“It is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No body of troops has the right to declare that it will not give, and therefore will not expect, quarter; but a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it impossible to cumber himself with prisoners.”).

²¹ *See id.*

²² *Id.*

order no quarter “in great straits, when his own salvation makes it impossible to cumber himself with prisoners,” is no longer valid.²³

Beyond the Lieber Code, the Brussels Declaration of 1874 specifically forbids declaring that no quarter be given to the enemy.²⁴ Unlike the Lieber Code’s prohibition on declaring no quarter, the Brussels Declaration did not provide an exception for exigent circumstances.²⁵ Similarly, the Institute for International Law’s Oxford Manual of 1880, which was drafted to aid the development of international law, addressed the protection of surrendering prisoners.²⁶ Article 9(b) of the Manual states that it is forbidden “[t]o injure or kill an enemy who has surrendered at discretion or is disabled, and to declare in advance that quarter will not be given, even by those who do not ask it for themselves.”²⁷ Even though the Oxford Manual is an unofficial source of LOAC, the prestige of the Institute, with its well-regarded group of international law experts, made the Manual a highly respected source.²⁸ Although neither the Brussels Declaration nor the Oxford Manual were legally binding instruments, both documents formed the basis of the two Hague Conventions on land warfare and the Regulations annexed to them.²⁹

At the turn of the 20th century, advances in weapons technology,³⁰ the burgeoning expense of war,³¹ and an aspirational desire to prevent armed conflicts by peaceful means³² prompted states to seek international agreements to address a wide range of warfare issues. The Hague Conventions of 1899 and 1907 led to

²³ SOLIS, *supra* note 3, at 39.

²⁴ See Project of an International Declaration concerning the Laws and Customs of War art. 13(d), Aug. 27, 1876 [hereinafter Brussels Declaration]. By way of background, Czar Alexander II of Russia convened a meeting of delegates from fifteen European states to consider a draft international accord submitted by the Russian government, addressing the laws and customs of war. *Project of an International Declaration Concerning the Laws and Customs of War*, INT’L COMM. OF THE RED CROSS, <https://perma.cc/U4XM-EV7Q> [hereinafter Brussels Declaration History]. The Brussels Declaration contains fifty-six articles and addresses individual battlefield statuses, means of warfare, sieges, bombardments, surrender, and armistices, among other issues. See Brussels Declaration.

²⁵ See *id.*

²⁶ See INST. OF INT’L L., *MANUAL OF THE LAWS AND CUSTOMS OF WAR* (1980).

²⁷ *Id.* The Institute of International Law, which was founded in 1873 in Belgium by eleven renowned international lawyers, is a learned society working to promote international law. See *About the Institute*, INST. OF INT’L L., <https://perma.cc/QN53-AJNF>.

²⁸ LAURIE R. BLANK & GREGORY P. NOONE, *INTERNATIONAL LAW AND ARMED CONFLICT* 68 (1st ed. 2013).

²⁹ See Brussels Declaration History, *supra* note 24. A number of the articles of the Hague Conventions are easily traced to provisions in the Brussels Declarations and the Oxford Manual. *Id.*

³⁰ SOLIS, *supra* note 3, at 45–46. Advancements in weaponry included using repeating rifles, steel dreadnought steamships, machine guns, and rifled artillery, among others. *Id.*

³¹ *Id.* at 46. One of the driving forces for Czar Nicholas II’s call for the 1899 Hague Peace Conference was his concern with the economically unsustainable increase in the cost of acquiring technologically advanced weapons. *Id.*

³² CRAWFORD & PERT, *supra* note 1, at 11.

the first multilateral treaties and declarations addressing multiple facets of conducting hostilities during war.³³ Before 1899, as noted above, treaties governing the laws of land warfare only addressed specialty areas of law, such as explosive projectiles and protections afforded to wounded soldiers and their caretakers.³⁴

Hague Convention IV of 1907 and its annexed regulations were relevant to the issue of surrender.³⁵ Article 23 of the annexed regulations addressed it in part.³⁶ It explicitly forbids one “[t]o kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion.”³⁷ Similarly, Article 23(d) forbids commanders from declaring that no quarter will be given.³⁸ Significantly, the Hague Regulations remain applicable today in many situations³⁹ and are regarded as declaratory of customary international law.⁴⁰

Several noteworthy contributions have been made to the mosaic of LOAC regulating surrender in recent decades. The first can be found in the Additional Protocols to the 1949 Geneva Conventions, which regulate international and non-international armed conflicts.⁴¹ These two protocols were negotiated and drafted in the 1970s to supplement the four Geneva Conventions of 1949, considering the changes in warfare in the intervening years.⁴² In the context of international

³³ YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 21 (3d ed. 2016). It is important to note that various provisions addressed in 1899 were revised in 1907 when additional instruments were added. *Id.* at 9. By contrast, six conventions and declarations were signed in 1899 and fourteen in 1907. *Id.* at 10.

³⁴ ADAM ROBERTS & RICHARD GUELF, *DOCUMENTS ON THE LAWS OF WAR* 67 (3d ed. 2000).

³⁵ Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907 [hereinafter Hague Regulation IV].

³⁶ *Id.* art. 23.

³⁷ *Id.* art. 23(c).

³⁸ *Id.* art. 23(d).

³⁹ ROBERT KOLB & RICHARD HYDE, *AN INTRODUCTION TO THE INTERNATIONAL LAWS OF ARMED CONFLICT* 54 (2008).

⁴⁰ See, e.g., *International Military Tribunal (Nuremberg): Judgment*, 41 AM. J. INT’L L. 172, 248–49 (1947) (acknowledging that “the rules of land warfare expressed in [Hague Regulation IV] are declaratory of existing international law and hence are applicable.”).

⁴¹ ROBERTS & GUELF, *supra* note 34, at 419.

⁴² SOLIS, *supra* note 3, at 106. Generally speaking, LOAC is a reactive body of law that evolves in light of recent experiences during armed conflict. The experiences of World War II primarily shaped the 1949 Geneva Conventions. In that conflict, large armies fought each other in battles involving thousands or even hundreds of thousands of soldiers using conventional arms. In the aftermath of World War II, non-international armed conflicts became more commonplace, including wars of national liberation. Moreover, guerrilla fighters or insurgents became the norm on battlefields. Given the change in the type of conflicts, the type of participants, and other changes in the character of warfare, the international community deemed it necessary to supplement the 1949 Geneva Conventions. The U.S. has not ratified Additional Protocols I and II.

armed conflicts, Additional Protocol I⁴³ reiterated that it is prohibited under LOAC to order no quarter.⁴⁴ Additionally, Article 41, which reflects a fundamental tenet of LOAC and customary international law,⁴⁵ addressed the safeguarding of an *hors de combat* enemy.⁴⁶ *Hors de combat* is a LOAC term of art that means “out of the battle.”⁴⁷ Put briefly, the principle is that those who are *hors de combat*—persons who do not or no longer take an active part in the combat—are to be protected from the horrors of war.⁴⁸ It is essential to highlight that civilians are not covered under Article 41’s definition.⁴⁹ Only combatants can become *hors de combat* through surrender or incapacitation.⁵⁰ Similar prohibitions are reflected in Common Article

⁴³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1.4, 8 June 1977 [hereinafter Additional Protocol I]. The provisions of Additional Protocol I apply during a declared war or international armed conflict between two or more States and a partial or total occupation. *See id.* Additionally, they also apply to situations in which “peoples are fighting against colonial domination and alien occupation and racist régimes in the exercise of their right of self-determination . . .” *Id.*

⁴⁴ *Id.* art. 40.

⁴⁵ *See generally Practice Relating to Rule 47. Attacks Against Persons Hors de Combat*, INT’L COMM. OF THE RED CROSS, <https://perma.cc/TT6M-RPDH>. Rule 47 of the ICRC’s Customary International Law Study states:

Attacking persons who are recognized as *hors de combat* is prohibited. A person *hors de combat* is:

- (a) anyone who is in the power of an adverse party;
 - (b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or
 - (c) anyone who clearly expresses an intention to surrender;
- provided he or she abstains from any hostile act and does not attempt to escape.

Rule 47. Attacks Against Persons Hors de Combat, INT’L COMM. OF THE RED CROSS, <https://perma.cc/KNL9-JCGA>.

⁴⁶ Additional Protocol I, *supra* note 43, art. 41(1) (“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 U.S. Dep’t of Def., Law of War Manual, 232, 236 (2016) [hereinafter DOD Manual].

⁴⁸ CRAWFORD & PERT, *supra* note 1, at 135.

⁴⁹ Under Additional Protocol I, *supra* note 43, art. 41(2), a person is *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 any of these cases he abstains from any hostile act and does not attempt to escape.

⁵⁰ DINSTEIN, *supra* note 33, at 190.

3⁵¹ and Additional Protocol II⁵² for non-international armed conflicts. The Rome Statute establishing the International Criminal Court also prohibits attacking persons surrendering in both international and non-international armed conflicts.⁵³

As is common practice, states issue guidance to their armed forces regarding the implementation of LOAC.⁵⁴ The U.S. Department of Defense (DOD) Law of War Manual (DOD Manual) provides such guidance for the U.S.⁵⁵ Though it is written from the perspective of the DOD, and therefore may not always precisely reflect the interpretations of international humanitarian law held by other countries, the DOD Manual nonetheless provides a useful and relevant framework for considering the legal obligations related to the battlefield surrender process.

As outlined in the DOD Manual, the U.S. standard for applying *hors de combat* protections to surrendering individuals is rooted in a good faith assessment of the information available at the time and hinges on the feasibility of accepting surrender.⁵⁶ Specifically, when surrender is the basis for *hors de combat* protections, the DOD Manual states the surrender must be (1) genuine, (2) clear and unconditional, and (3) under circumstances where it is feasible for the opposing party to accept the surrender.⁵⁷ First, the genuineness of surrender speaks to feigning the intent to surrender.⁵⁸ Such behavior may constitute perfidy under

⁵¹ Article 3 is the same in all four of the 1949 Geneva Conventions. See Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3217; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217; 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949 6 U.S.T. 3316; 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516; 75 U.N.T.S. 287.

⁵² See Additional Protocol I, *supra* note 43, art. 4.

⁵³ Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

⁵⁴ See, e.g., *All National Practice: Manuals, Legislation, Case Law and Other National Practice*, INT'L COMM. OF THE RED CROSS, <https://perma.cc/SJU5-JJYE>. Searching for a list of international humanitarian law (IHL) related manuals in this database reveals dozens of States that have issued manuals interpreting IHL. See *id.* This listing is not comprehensive, but it does demonstrate how widespread the practice of articulating IHL guidance for national militaries has become.

⁵⁵ DOD Manual, *supra* note 47. In addition to the DOD, the individual services also guide the application and implementation of LOAC. See, e.g., Michael W. Meier, *Army and Marine Corps Publish New Manual: The Commander's Handbook on the Law of Land Warfare*, JUST SEC. (Aug. 9, 2019), <https://perma.cc/2B5Y-QV9D>.

⁵⁶ *Id.*

⁵⁷ *Id.* at 237.

⁵⁸ *Id.*

LOAC.⁵⁹ Perfidy is a particularly insidious violation of LOAC, contravening fundamental notions of honor and chivalry.⁶⁰ As to the second criterion, whether the surrender is clear and unconditional depends upon the specific acts of the surrendering soldier that manifest their intent. These acts include:

[a]ny arms being carried should be laid down. All hostile acts or resistance, or manifestations of hostile intent, including efforts to escape or to destroy items, documents, or equipment to prevent their capture by the enemy, would need to cease immediately for the offer to be clear and unconditional. Raising one's hands above one's head to show that one is not preparing to fire a weapon or engage in combat is often a sign of surrender. Waving a white flag technically is not a sign of surrender but signals a desire to negotiate.⁶¹

Finally, the feasibility of surrender criteria is worth exploring in greater depth because of its potential relevance to technologically enabled surrender. Practically speaking, for an offer of surrender to render a person *hors de combat*, it must be feasible for the opposing party to accept the offer.⁶² The feasibility of accepting the surrender hinges upon whether it is practical and safe for the opposing force to take custody of the surrendering soldier in the circumstances.⁶³ The DOD Manual provides examples to better explain what is and is not feasible.⁶⁴ One example explores the scenario where an enemy soldier attempts to surrender to an aircraft.⁶⁵ In another example,

a soldier fifty meters from an enemy defensive position during an infantry assault by his unit could not throw down his weapon and raise his arms (as if to indicate his desire to surrender) and reasonably expect that the defending unit will be able to accept and accomplish his surrender while resisting the ongoing assault by his unit.⁶⁶

As the customary and conventional LOAC began to take form, starting in the 1860s with the Lieber Code, norms regulating surrender became well-established in striking an appropriate balance between military necessity and humanitarian aims.⁶⁷ Next, this Article considers how technological advancements have come to impact surrender.

⁵⁹ *Id.* Additional Protocol I Article 37 defines perfidy as “acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence.” *See* Additional Protocol I, *supra* note 43, art. 37.

⁶⁰ BLANK & NOONE, *supra* note 28, at 537.

⁶¹ DOD Manual, *supra* note 47, at 237–38.

⁶² *Id.* at 238.

⁶³ *See id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Buchan, *supra* note 10, at 8–10.

III. IMPACT OF TECHNOLOGICAL ADVANCES ON SURRENDER

Leveraging modern and ubiquitous communications technologies, Ukraine launched the “I want to live” project as a military intelligence effort in September 2022.⁶⁸ The project includes a telephone hotline, website, and Telegram channel devoted to communicating with Russian soldiers and their families to facilitate the surrender of Russian personnel to the Ukrainian armed forces.⁶⁹

Of course, encouraging one’s adversary to surrender is not new in warfare. For example, as a form of non-violent psychological operation (known as “PSYOP”), airdropping leaflets that persuade enemy forces to surrender is commonplace in combat.⁷⁰ In the First Gulf War, many surrendering Iraqi soldiers were captured while clutching U.S.-dropped leaflets encouraging their surrender.⁷¹ In the current conflict, Russia and Ukraine have engaged in sustained informational campaigns targeting their adversaries with high- and low-tech communication methods, including leaflets, social media posts, radio appeals, text messages, and television campaigns, all focused on persuading them to surrender.⁷²

So how does the “I want to live” project work? First, a Russian soldier or his family contacts a Ukrainian handler via phone, website, or messenger application at a secure secret facility.⁷³ In describing the unique features of the process, a Ukraine spokesperson stated:

The project has a chatbot called “I want to live bot.” It is easy to find, and a questionnaire can be filled out by a service member of the Russian Federation who has not yet been mobilized or has already been mobilized and does not

⁶⁸ See Daniel Boffey, *I Want to Live: The Ukraine Hotline Encouraging Russians to Surrender*, GUARDIAN (Jan. 26, 2023), <https://perma.cc/HF6U-SL9X>. On March 11, 2022, Ukraine established the Coordination Headquarters for Treatment of Prisoners of War. *Coordination Headquarters for Treatment of Prisoners of War Established in Ukraine*, UKRINFORM (Mar. 12, 2022), <https://perma.cc/6UZE-2QBF>. The Headquarters was created to ensure that Russian war prisoners received the treatment required by international convention and custom. *Id.*

⁶⁹ See Santora, *supra* note 6 (“For the past ten months, both Russia and Ukraine have engaged in robust informational campaigns targeting enemy soldiers with leaflets, social media posts, radio appeals, text messages and television campaigns, all dedicated to convincing them to surrender.”).

⁷⁰ DINSTEIN, *supra* note 33, at 3.

⁷¹ Richard Lei, *When Bombs Are Not Enough*, WASH. POST (Dec. 10, 2001), <https://perma.cc/8NSN-8EX9>. Influencing enemy soldiers to take specific behavioral actions is inherently nuanced and often fraught with potential pitfalls. In 1992, before a U.N. humanitarian effort in Somalia, “a hastily printed psyop leaflet contained a spelling error. Instead of announcing help from the ‘United Nations,’ it came out ‘Slave Nation.’” *Id.*

⁷² See Santora, *supra* note 6. One example of such communication efforts by the Ukrainian armed forces is their utilization of artillery units that “routinely use Vampire multiple-launch rocket systems to fire projectiles filled with 1,500 leaflets each across Russian positions.” *Id.*

⁷³ See James Waterhouse, *Ukraine War: The Surrender Hotline for Russian Soldiers*, BBC NEWS (Nov. 30, 2022), <https://perma.cc/RJ7L-Z2F5>.

want to fight against Ukraine. This is a preliminary surrender. In this way, he declares that he does not want to fight, and it is stored in our unified database. When he is on the territory of Ukraine, this information is pulled up, he calls the hotline again, and then the surrender procedure takes place.⁷⁴

Both soldiers and officers have used the “I want to live” project.⁷⁵ Although difficult to verify, it has been reported that more than a million Russians have called, texted, or visited the “I want to live” project website.⁷⁶ Since the beginning of the project, there have been 200 to 300 calls per day to the hotline.⁷⁷ Most contacts have been made during the evening hours when Russian soldiers have more free time.⁷⁸ “Many of those who call are scared, they want to know whether this project is real and how it is possible for a Russian soldier to escape from the army. There were some prank calls, but most are real . . .” stated one of the employees receiving the calls on the hotline.⁷⁹

More than 4,300 Russians have requested to surrender through the “I want to live” project.⁸⁰ That number will likely grow in the coming weeks and months. Most individuals contacting “I want to live” ask about the surrender process.⁸¹ Some Russian soldiers or their families who contact “I want to live” are not calling to surrender, but to find out how they would surrender if they needed to at some point in the future.⁸²

Because of security concerns, detailed operational and logistical information on the “I want to live” project is sparse. However, Vitaliy Matviyenko, who leads “I want to live,” commented that the project was started to help save the lives of those Russian soldiers who want to stop fighting and surrender to Ukrainian forces.⁸³ Matviyenko reiterated that Ukraine guarantees the security of conversations and correspondence with Russian soldiers and their families.⁸⁴ Matvienko emphasized that the surrendering Russians would be treated in

⁷⁴ Aleksandra Klitina, *Surrender by Phone: Interview with “I Want to Live” Spokesman*, KYIV POST (Nov. 16, 2022), <https://perma.cc/HN8K-YGYG>.

⁷⁵ *Id.*

⁷⁶ Yulia Drozd & Ines de la Cuetara, *Ukraine Offers Russian Soldiers a Hotline to Surrender*, ABC NEWS (Jan. 3, 2023), <https://perma.cc/4VU9-7REJ>.

⁷⁷ *Id.*

⁷⁸ Waterhouse, *supra* note 73.

⁷⁹ Drozd & de la Cuetara, *supra* note 76.

⁸⁰ *More than 4,300 Russian Military Ready to Voluntarily Surrender to Ukrainian Armed Forces – Spokesperson of ‘I Want to Live’ Project*, INTERFAX UKR. (Dec. 15, 2022), <https://perma.cc/S87D-9AV6>.

⁸¹ *See id.*

⁸² *See id.*

⁸³ *See id.*

⁸⁴ *Id.*

accordance with the Geneva Conventions.⁸⁵ He specifically stated that the treatment includes three meals a day, medical care, and the opportunity to contact relatives.⁸⁶

Once a Russian soldier is ready and able to physically surrender, they contact a Ukrainian handler.⁸⁷ At that time, the location of the Russian soldier is determined, and a plan is established for a safe surrender.⁸⁸ A plan involves instructing the soldier on how to reach designated coordinates on the battlefield and specific instructions on what to do when they arrive.⁸⁹ Unsurprisingly, Russia has taken steps to thwart the Ukrainian project. For instance, it has blocked phone numbers from being reached inside Russia and threatened to harshly punish soldiers who contact the Ukrainians to surrender.⁹⁰ It has also been reported that Russia has used national guard units to shoot Russian soldiers who plan on deserting or surrendering to Ukrainian armed forces.⁹¹

In addition to using modern communications channels to execute the “I want to live” project, the Ukrainian armed forces have begun using drones to facilitate the physical surrender of Russian soldiers.⁹² Specifically, the use of drones to aid in surrender was observed when the Ukrainian armed forces released footage in late November 2022 of a surrendering Russian soldier being guided by a drone.⁹³ To further facilitate surrenders under this project, the Ukrainian armed forces also released an instructional video explaining how Russian soldiers can surrender to a Ukrainian drone.⁹⁴

The use of drones by Russia and Ukraine has been widespread in their ongoing conflict, with hundreds of drones flying over Ukraine daily, firing missiles, dropping bombs, and identifying targets for artillery.⁹⁵ Arguably, Russia and Ukraine are fighting the first full-scale drone war,⁹⁶ even though drones have

⁸⁵ See Drozd & de la Cuetara, *supra* note 76 (“The Russians who follow the surrender rules are legally considered prisoners of war . . . [t]hat status guarantees they are treated according to the Geneva conventions.”).

⁸⁶ Danielle Ong, *Ukraine Offers Russians Who Surrender ‘Comfortable Conditions’: Three Meals Daily, Medical, Phone Calls*, INT’L BUS. TIMES (Nov. 16, 2022), <https://perma.cc/JU2T-9VFQ>.

⁸⁷ See Drozd & de la Cuetara, *supra* note 76.

⁸⁸ *See id.*

⁸⁹ See Klitina, *supra* note 74.

⁹⁰ Waterhouse, *supra* note 73. See Scott McDonald, *Russia Shoots Own Troops Planning to Surrender, Ukraine Warns*, NEWSWEEK (Jan. 8, 2023), <https://perma.cc/Y69H-3S72>.

⁹¹ *Id.*

⁹² Santora, *supra* note 6.

⁹³ *Id.*

⁹⁴ *See id.*

⁹⁵ See Isabelle Khurshudyan et al., *Russia and Ukraine Are Fighting the First Full-Scale Drone War*, WASH. POST (Dec. 2, 2022), <https://perma.cc/HQV4-A2W5>.

⁹⁶ *Id.*

been used to varying degrees and sophistication for over a century.⁹⁷ Of note, the first radio-controlled drone flew back in 1917.⁹⁸ By the 1960s, drones were in widespread military use.⁹⁹ For example, the U.S. Air Force Lightning Bug drone flew thousands of hours of reconnaissance missions in Vietnam.¹⁰⁰ By the late 1980s, innovations in satellite communications, streaming videos, and GPS systems made drones very useful.¹⁰¹ The U.S. military flew drones in the first Gulf War in 1991 as part of the overall air campaign against Iraq and Kuwait. It was during these operations that an Iraqi soldier surrendered to a drone.¹⁰² This was the first recorded instance of a soldier surrendering to a drone.¹⁰³ That capture of Iraqi prisoners of war involved a Navy Pioneer remotely-piloted vehicle (RPV).¹⁰⁴ The missions of the Pioneer RPV were to fly behind Iraqi lines, transmit live video of troop or tank movements, and serve as a spotter for shelling, some of which came from battleships in the Persian Gulf.¹⁰⁵

In the aftermath of September 11, 2001, the use of drones across a broad spectrum of operations by the U.S. became closely associated with the so-called War on Terror.¹⁰⁶ In some ways, drones are the iconic military technology of the War on Terror. Several noteworthy features relate to U.S. use of drones post-9/11. First, drones continue to provide a robust capability for identifying targets and personalizing attacks.¹⁰⁷ Some drone strikes have been highly publicized, such as the attacks on Anwar Al-Awlaki in Yemen,¹⁰⁸ Qassim Suleimani in Iraq,¹⁰⁹ and Ayman Al-Zawahiri in Afghanistan.¹¹⁰ Second, drone technology allows senior

⁹⁷ David Axe, *Russian Soldiers Are Surrendering to Ukrainian Drones. This Has Happened Before*, FORBES (Nov. 18, 2022), <https://perma.cc/5ZL5-PUVC>.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *See id.*

¹⁰⁴ *See* Ted Shelsby, *Iraqi Soldiers Surrender to AAI's Drones*, BALTIMORE SUN (Mar. 2, 1991), <https://perma.cc/5K2Z-5WMT> (“The Pioneer has a wingspan of about 17 feet and is 14 feet long. It is powered by a 26-horsepower snowmobile engine.”).

¹⁰⁵ *Id.* The Pioneer RPVs were also used to conduct battlefield damage assessments. *Id.*

¹⁰⁶ KENNETH WATKIN, *FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT* 277 (2016).

¹⁰⁷ *Id.* at 278.

¹⁰⁸ *See* Christopher Faulkner & Jeff Rogg, *Ten Years After the Al-Awlaki Killing: A Reckoning for the United States' Drones Wars Awaits*, MOD. WAR INST. (Sept. 27, 2021), <https://perma.cc/9WK7-XPZG>.

¹⁰⁹ *See* Michael Crowley et al., *U.S. Strike in Iraq Kills Qassim Suleimani, Commander of Iranian Forces*, N.Y. TIMES (Jan. 2, 2020), <https://perma.cc/5J3U-95B5>.

¹¹⁰ Peter Baker et al., *U.S. Drone Strike Kills Ayman al-Zawahiri, Top Qaeda leader*, N.Y. TIMES (Aug. 1, 2022), <https://perma.cc/8WWY-FP8A>.

political and military leaders to be personally involved in real-time operational decision-making.¹¹¹ Third, drone operations have occurred both inside and outside active combat theaters.¹¹² Fourth, drones have typically been used by the U.S. in largely uncontested airspace.¹¹³ The use of drones in the War on Terror has sparked significant debate on many issues, including a lack of transparency relating to attacks, the loss of innocent civilian life, and their battlefield effectiveness.¹¹⁴

In Ukraine, drones are used for traditional, well-established combat functions like reconnaissance and attack missions.¹¹⁵ The conflict in Ukraine has also served as a laboratory of experimentation on the use of drones.¹¹⁶ Commenting on the asymmetrical advantages offered by drones in combat, a military analyst noted:

[t]he Ukrainian military absolutely has proved its mettle against Russian forces; however, Ukraine is hardly considered a great power. Ukraine ranks fortieth in the world for defense spending, outspent by Vietnam and Kuwait. Ukraine's drone success adds evidence to broader claims that drones offer significant military capability at a relatively low cost . . . Moreover, drones offer relatively cheap access to airpower, and training requirements are likely far smaller than human-crewed aircraft, mainly because various operations can be easily automated: the TB-2 can taxi, take off, land, and cruise autonomously.¹¹⁷

The Ukrainian use of drones to facilitate the surrender of Russian soldiers has captured public imagination. But the use of drones for this purpose is a logical extension of their capabilities. This is especially true considering that surrender on a battlefield like Ukraine often occurs under hazardous circumstances including navigating a sprawling, trench-filled frontline littered with landmines while exposed to snipers and continuous bombardment.¹¹⁸ The surrendering Russian soldiers travel according to instructions received through the “I want to live” project to designated coordinates on the battlefield and wait for the appearance of a Ukrainian quadcopter-style drone.¹¹⁹ In addition, as previously mentioned, the Ukrainian Army issued an instructional video that details the step-by-step process

¹¹¹ WATKIN, *supra* note 106, at 279.

¹¹² MITT REGAN, DRONE STRIKE: ANALYZING THE IMPACTS OF TARGETING KILLING 3 (2022).

¹¹³ Khurshudyan et al., *supra* note 95.

¹¹⁴ *See id.*

¹¹⁵ *See id.*

¹¹⁶ *See* Zachary Kallenborn, *Seven (Initial) Drone Warfare Lessons from Ukraine*, MOD. WAR INST. (May 5, 2022), <https://perma.cc/FMM2-N5JV>.

¹¹⁷ *Id.*

¹¹⁸ *See* Santora, *supra* note 6.

¹¹⁹ *See id.*

for Russian soldiers on how to surrender.¹²⁰ The video stresses the importance of the surrendering soldier arriving at the precise location at an exact time.¹²¹ This is critical because of the short flight time of the quadcopter drone.¹²² When the drone arrives, the surrendering soldier is instructed to make eye contact with it.¹²³ At that point, the Russian soldier drops their weapons, raises their hands, and follows the drone at walking speed to the waiting Ukrainian forces.¹²⁴ If the battery fails on the quadcopter, the Russian soldier has been instructed to wait for a new one before continuing the movement.¹²⁵ When the surrendering soldier finally meets Ukrainian forces, they will be instructed to lie on the ground to be searched.¹²⁶

In the fullness of time, more information and insights will emerge regarding technologically enabled surrender. Therefore, the next step is to analyze existing LOAC norms related to surrender, considering the technological advancements discussed above.

IV. ANALYSIS: APPLYING 20TH-CENTURY SURRENDER NORMS TO 21ST-CENTURY TECHNOLOGIES

The international armed conflict between Russia and Ukraine has raised a wide range of LOAC-related issues, including targeting civilians and critical infrastructure, allegations of war crimes, violating fundamental occupation law norms, using foreign fighters, forced civilian labor, and conscription, among many others. The scale of reported LOAC violations is staggering, with Ukrainian prosecutors documenting 66,000 reported war crimes committed by Russian forces as of January 2023.¹²⁷ Like the other LOAC issues, Ukraine's "I want to live" project poses challenging and thought-provoking questions regarding the application of well-established LOAC norms to technologically enabled surrender.

The starting point for this analysis is to consider technologically enabled surrender through the lens of the equilibrium between military necessity and humanity that permeates LOAC. At its most fundamental level, LOAC strikes a grand and, at times, delicate balance between two opposing impulses: military

¹²⁰ Mia Jankowicz, *Ukrainian Army Issues Instructional Video Telling Russians How to Surrender to a Drone*, BUS. INSIDER (Dec. 13, 2022), <https://perma.cc/W7RQ-64T3>.

¹²¹ *See id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Santora, *supra* note 6.

¹²⁵ *Id.*

¹²⁶ Jankowicz, *supra* note 120.

¹²⁷ Liz Sly, *66,000 War Crimes Have Been Reported in Ukraine. It Vows to Prosecute Them All*, WASH. POST (Jan. 29, 2023), <https://perma.cc/Q6AU-DXWS>.

necessity and humanitarian aims.¹²⁸ The Lieber Code's most significant and enduring contribution to modern LOAC is Article 14, wherein Francis Lieber defined military necessity.¹²⁹ It provides that “[m]ilitary necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”¹³⁰ Military necessity is a principle of authority—limited in scope—to use force to accomplish strategic and national security goals in armed conflict.¹³¹ Even though military necessity is mentioned in all four of the 1949 Geneva Conventions and the 1977 Additional Protocols, it was not explicitly defined.¹³² The DOD Manual defines military necessity as “the principle that justifies the use of all measures to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war.”¹³³ Military necessity permeates LOAC, is expressly incorporated into numerous provisions, and exists as a logical inverse of the principle of humanity.¹³⁴

The principle of humanity, or humanitarian aims or considerations in armed conflict, is best understood as an attempt to minimize human suffering and physical destruction in armed conflict.¹³⁵ Put differently, “the infliction of suffering or destruction not necessary for legitimate military purposes is forbidden. Once a military purpose has been achieved, the infliction of further suffering is unnecessary.”¹³⁶ The principle of humanity animates specific LOAC rules, including fundamental safeguards for persons who surrender to the enemy and prohibitions on weapons that are calculated to cause superfluous injury.¹³⁷

The LOAC principles and rules of surrender accommodate and support both military necessity and humanitarian considerations. When a soldier indicates that they no longer intend to participate in hostilities, that individual is no longer

¹²⁸ See Kjetil Mujezinovic Larsen et al., *Introduction by the Editors: Is There a “Principle of Humanity” in International Humanitarian Law?*, in SEARCHING FOR A “PRINCIPLE OF HUMANITY” IN INTERNATIONAL HUMANITARIAN LAW 9 (Kjetil Mujezinovic Larsen et al. eds., 2012).

¹²⁹ SOLIS, *supra* note 3, at 217.

¹³⁰ Lieber Code, *supra* note 17, art. 14.

¹³¹ BLANK & NOONE, *supra* note 28, at 36; see also Brian J. Bill, *The Rendulic “Rule”: Military Necessity, Commander’s Knowledge, and Methods of Warfare*, 12 Y.B. INT’L HUMANITARIAN L. 119 (2009) (“The concept of military necessity is a recognition that, at its most core level, war is different than peace. In war, actions are permitted which would not be permitted in peace.”).

¹³² Dave Wallace & Shane R. Reeves, *Modern Weapons and the Law of Armed Conflict*, in U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE (Geoffrey S. Corn et al. eds., 2016).

¹³³ DOD Manual, *supra* note 47, at 52.

¹³⁴ BLANK & NOONE, *supra* note 28, at 36.

¹³⁵ Wallace & Reeves, *supra* note 132, at 48.

¹³⁶ BLANK & NOONE, *supra* note 28, at 41.

¹³⁷ DOD Manual, *supra* note 47, at 60.

a threat.¹³⁸ Accordingly, it is not militarily necessary to target them.¹³⁹ The surrendering soldier's life is spared, as it would be "an unacceptable and indefensible affront to human dignity" and "incongruous with the principle of humanity" if "persons who have placed themselves outside the theatre of war" were targeted.¹⁴⁰ Accepting surrender during armed conflict with the protections afforded by LOAC also incentivizes individuals to capitulate versus fighting to the death. By contrast, if one knows that his adversary will refuse quarter, it makes sense to continue to fight, resulting in significant loss of life.¹⁴¹ In humanitarian terms, following the LOAC principles and rules related to surrender leads to more lives being spared.

So how, if at all, is the balance between military necessity and humanitarian considerations impacted by technologically enabled surrender? Arguably, technologically enabled surrender accommodates and supports military necessity and humanitarian considerations better than traditional battlefield surrender practices. This claim can be stress-tested by considering the surrender criteria in the DOD Manual, which appropriately deconstructs what it means to be *hors de combat* through surrender in combat.¹⁴² As mentioned above, the surrender must be (1) genuine, (2) clear and unconditional, and (3) under circumstances where it is feasible for the opposing party to accept the surrender.¹⁴³

A. Genuine

The element of genuineness speaks to the trust inherent in the battlefield's surrender process, which flows both to and from the surrendering and capturing of soldiers involved. In LOAC terms, the genuineness of a surrender raises the specter of perfidy.¹⁴⁴ Additional Protocol I defines perfidy as follows:

It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international

¹³⁸ See Buchan, *supra* note 10, at 9.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ SOLIS, *supra* note 3, at 6. World War II in the Pacific Theater of Operations illustrates the savagery and devastating humanitarian consequences associated with false surrenders and atrocities committed upon captured combatants on both sides of the conflict. *See id.* at 170. This resulted in the practice of combatants fighting to the death. *See id.* at 6. According to Professor Solis,

[o]n Iwo Jima, of 21,000-23,000 Japanese combatants, 20,703 were killed. When the island was declared secure, 212 Japanese surrendered—less than 2 percent—because marines and soldiers fearing that they would be murdered or mistreated if they surrendered, put surrender out of mind and fought on, increasing casualties on both sides. *Id.*

¹⁴² DOD Manual, *supra* note 47, at 237.

¹⁴³ *Id.*

¹⁴⁴ The terms "treachery" and "perfidy" are sometimes used interchangeably.

law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:

- (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
- (b) the feigning of an incapacitation by wounds or sickness;
- (c) the feigning of civilian, non-combatant status; and
- (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict . . .¹⁴⁵

Although the line between those deceptions that good faith permits and those that it prohibits is—at times—indistinct and varied in combat,¹⁴⁶ feigning surrender is a somewhat obvious example of perfidy. The essence of perfidy is the false claim to protection under LOAC to secure a military advantage over an adversary. From the perspective of a surrendering soldier, a soldier who feigns surrender and acts disingenuously undermines the LOAC protections afforded to all of those seeking to be *hors de combat* by surrender.¹⁴⁷ In doing so, they rip at the very fabric of LOAC.

Reflecting on the genuineness of surrender under the “I want to live” project, it is important to highlight that the Ukrainians, or parties accepting surrender using technologically enabled methods, are well-positioned to assess the potential disingenuousness of battlefield surrender. Specifically, the actual surrender is pre-planned and initially at arm’s length, that is, the Russian soldier is met by a quadcopter and then escorted to the exact point of physical surrender.¹⁴⁸ The technologically enabled process mitigates against a Russian feigning surrender because the Ukrainians can orchestrate the precise time, location, and circumstances of the physical surrender.¹⁴⁹ Accordingly, technologically enabled surrender arguably better accommodates and supports military necessity and humanitarian considerations compared to traditional battlefield surrender practices.

Obligations of good faith and the prohibition on perfidy also apply to the Ukrainian forces running the “I want to live” program.¹⁵⁰ The relative novelty of the technologically enabled surrender process utilized by the “I want to live” program raises interesting questions about the obligations of the Ukrainians running the program. The separation in time and space between the surrendering

¹⁴⁵ Additional Protocol I, *supra* note 43, art. 37. The U.S. defines perfidy in a slightly different manner. The DOD Manual states that “[a]cts of perfidy are acts that invite the confidence of enemy persons to lead them to believe that they are entitled to, or are obliged to accord, protection under the law of war, with intent to betray that confidence.” DOD Manual, *supra* note 47, at 296.

¹⁴⁶ DOD Manual, *supra* note 47, at 294.

¹⁴⁷ Hague Regulation IV, *supra* note 35, art. 23(c).

¹⁴⁸ See Santora, *supra* note 6.

¹⁴⁹ See generally *id.*

¹⁵⁰ See *id.*; see also Additional Protocol I, *supra* note 43, art. 37.

Russian soldier's preliminary expression of intent to surrender and the actual rendezvous with the quadcopter contrasts sharply with the traditional process of surrender by individual combatants.¹⁵¹ Historically, the surrender of individuals has primarily been conducted in the face of the adversary at the time and location of the intended surrender, without any prior coordination or agreement.¹⁵² By contrast, consider a hypothetical case of a Russian soldier who follows the directions received from the "I want to live" program and abandons their unit, leaving Russian lines en route to the quadcopter rendezvous point. For a meaningful period of time, that Russian soldier is in a vulnerable position of following the directions provided by the Ukrainians without having been detected and identified by Ukrainian forces, meaning the soldier cannot yet be classified by the Ukrainians as *hors de combat*. While the surrendering soldier clearly cannot be the target of military attacks once they become *hors de combat*, the obligations of the Ukrainians prior to the Russian soldier becoming *hors de combat* are less immediately clear. Broader principles of international law must be applied to discern Ukraine's obligations.

One relevant principle that permeates LOAC and helps to clarify Ukrainian obligations toward the Russian soldier is the same obligation to act in good faith that lies at the core of the prohibition on perfidy, although the obligation of good faith applies on a broader scale than just perfidy.¹⁵³ The obligation to act in good faith is an essential pillar of the LOAC framework.¹⁵⁴ Breaching good faith makes future LOAC compliance by an adversary less likely, placing the traditional beneficiaries of LOAC protections at heightened risk.¹⁵⁵ By reducing the ability of adversaries to trust that LOAC provisions will be honored, breaches of good faith risk prolonging the duration of the conflict by inhibiting negotiations, entrenching enmity, and increasing the suffering and damage to the vulnerable persons and places LOAC is intended to protect.¹⁵⁶

¹⁵¹ See Santora, *supra* note 6.

¹⁵² See Hague Regulation IV, *supra* note 35, art. 35. A form of pre-arranged surrender for a body of troops called "capitulation" is acknowledged under LOAC. See *id.* Capitulation consists of the commander of a unit negotiating the time, location, and possible conditions of a surrender, not unlike what the Russian soldier negotiates with Ukrainian handlers of the "I want to live" program. See DOD Manual, *supra* note 47, at 856–63. Capitulation, however, has not historically been used for individual surrenders by deserting soldiers. See *id.* Rather, capitulation is a way for the commander of a military unit to negotiate the surrender of their entire unit. See *id.*

¹⁵³ See Additional Protocol I, *supra* note 43, art. 37.

¹⁵⁴ DOD Manual, *supra* note 47, at 318 ("Absolute good faith with the enemy must be observed as a rule of conduct.").

¹⁵⁵ See *id.*

¹⁵⁶ DOD Manual, *supra* note 47, at 318–19 ("Breaches of good faith may: (1) undermine the protections afforded by the law of war to classes of persons and objects; (2) impair nonhostile relations between opposing belligerents; and (3) damage the basis for the restoration of peace short of complete annihilation of one belligerent by another.").

The most extreme breach of good faith Ukrainians could potentially commit in administering the “I want to live” program would be to commit perfidy. Article 37 of Additional Protocol I prohibits killing, injuring, or capturing an enemy through acts of perfidy, which include “[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to . . . protection under the rules of international law applicable in armed conflict, with intent to betray that confidence.”¹⁵⁷ Just as the Russian soldier feigning surrender in order to kill, injure, or capture Ukrainians is guilty of perfidy, the Ukrainians can also be charged with perfidy if they administer the “I want to live” program in a manner that invites the confidence of Russian soldiers with the intention of betraying that confidence to kill, injure, or capture that individual.¹⁵⁸ However, Article 37 does not prohibit merely reckless action that unreasonably raises the probability of an individual Russian soldier’s death.¹⁵⁹ To be guilty of perfidy, the Ukrainian forces would have to intentionally betray that soldier’s confidence in LOAC protections in order to kill, injure, or capture the soldier.¹⁶⁰ For example, it would be clearly prohibited to use the “I want to live” program to lure Russian soldiers attempting to surrender into the open so that they could be killed by waiting Ukrainian snipers. There is, of course, no indication that the Ukrainians are using the program in this manner or have any intention to do so. Nonetheless, the prohibition on perfidy clearly constrains the Ukrainian forces in addition to the surrendering Russian soldier.

By itself, avoiding perfidy is not sufficient to fulfill Ukrainian obligations to act in good faith.¹⁶¹ Consider a hypothetical scenario where a Russian soldier is instructed by their Ukrainian “I want to live” handlers to transit to a quadcopter rendezvous location and follow instructions that Ukrainian forces know will cause an unreasonably high probability of death or injury of the Russian soldier seeking surrender. Imagine further that the Ukrainian forces selected this elevated-risk rendezvous point despite knowing of alternative, less risky locations that were equally safe for the Ukrainian forces accepting the surrender. An example of such an elevated-risk rendezvous location might involve directing the soldier to cross a known minefield, for example, or choosing a location expected to draw fire from Russian snipers as a means of revealing the snipers’ positions. While recklessly or even intentionally placing Russian soldiers at unnecessarily heightened risk of

¹⁵⁷ Additional Protocol I, *supra* note 43, art. 37.

¹⁵⁸ *See id.*

¹⁵⁹ *See id.*

¹⁶⁰ *Id.*

¹⁶¹ *See* DOD Manual, *supra* note 47, at 318 (“Absolute good faith with the enemy must be observed as a rule of conduct.”).

death or injury would not trigger the high bar of perfidy, it would certainly be a breach of the good faith that LOAC requires.¹⁶²

Thus, even though the Russian soldiers do not become *hors de combat* the moment they abandon their unit, they do retain some LOAC protection as they make the perilous trip from Russian lines to the selected rendezvous point.¹⁶³ Specifically, the transiting Russian soldier is protected by the prohibition upon the Ukrainians from using the program to kill or injure the Russian soldier, which would constitute perfidy, as well as the obligation placed on the Ukrainians to administer the “I want to live” program in good faith.¹⁶⁴ This is not to say that the Ukrainians are obligated to guarantee the safety of the Russian soldier from all harms as they depart Russian lines. There are many hazards to be expected for the deserting Russian soldier prior to the rendezvous point that Ukrainian forces cannot reasonably be expected to control. Nonetheless, to the extent feasible, Ukrainian forces must make a good faith effort not to administer the “I want to live” program in a manner that needlessly exposes surrendering Russian soldiers to elevated risks prior to gaining *hors de combat* status.

B. Clear and Unconditional

The second element for surrender to be the basis of *hors de combat* status is that the surrender must be clear and unconditional.¹⁶⁵ Regarding unconditionality, the “I want to live” project better accommodates military necessity and supports humanitarian aims because the surrendering Russian soldier can learn the terms and conditions of the surrender before initiating the process.¹⁶⁶ Regarding the “clear” requirement, a soldier communicates the intent to surrender by laying down arms.¹⁶⁷ In the context of the “I want to live” project, an initial expression of an intent to surrender is made to the Ukrainian handler over the phone or through a website or a messenger app.¹⁶⁸ Unlike the typical circumstances of surrender during land warfare, where the expression of intent and the actual physical surrender are close in time and space, surrendering prisoners using “I want to live” will coordinate a later time and place for the physical surrender.¹⁶⁹

¹⁶² See Additional Protocol I, *supra* note 43, art. 37 (prohibition against perfidy); see also DOD Manual, *supra* note 47, at 318 (good faith LOAC requirement).

¹⁶³ See *id.*

¹⁶⁴ See *id.*

¹⁶⁵ Hague Regulation IV, *supra* note 35, art 23(c).

¹⁶⁶ See Santora, *supra* note 6.

¹⁶⁷ Hague Regulation IV, *supra* note 35, art 23(c).

¹⁶⁸ See Santora, *supra* note 6.

¹⁶⁹ See *id.*

Practically speaking, just because a Russian soldier expressed an intent to surrender to a Ukrainian handler does not make that soldier *hors de combat*. For example, suppose that soldier remained with their unit while waiting for that opportune time to leave the unit to travel to a location where they will physically surrender. Despite the expression of an intent to surrender at a set time in the future, that individual is not *hors de combat* and is still a targetable combatant because the expression is neither clear nor unconditional.¹⁷⁰ In fact, at this stage, the expression of surrender is explicitly conditional in terms of both time and space due to the understanding that to officially surrender, the Russian soldier will meet Ukrainian forces at a specific rendezvous point at some future time. The “I want to live” program is perhaps best understood as an offer to negotiate the details of a surrender; a Russian soldier’s use of the program to express an intention to surrender in the future is an act of negotiation that alone is insufficient to classify the Russian soldier as *hors de combat*. Even if those negotiations end with an agreement on a surrender plan, it will by no means be clear to the Ukrainians what the actual intent of the Russian soldier is, especially so long as the soldier remains behind Russian lines. There are abundant opportunities and powerful incentives for the Russian soldier to change their mind before executing the surrender plan. It is thus apparent that, as long as the Russian soldier remains with their unit, they cannot be considered *hors de combat* no matter how adamantly they may covertly express an intention to surrender in the future in their negotiations with the Ukrainians via the “I want to live” program.

At the other end of the timeline, when a Russian soldier crosses Russian lines and arrives at the pre-arranged designated location for the capture, the surrender will likely follow the ordinary affirmative acts constituting a surrender, such as laying down arms and complying with all orders.¹⁷¹ A thought-provoking circumstance occurs after the Russian soldier departs their unit with instructions and coordinates from the “I want to live” project. Reportedly, the Russians are instructed to arrive at the designated coordinates at a specific time and then wait for the arrival of a quadcopter.¹⁷² While the departure from Russian lines marks a substantial step in the procedure for surrender, the Ukrainian forces cannot reasonably be expected to detect the Russian soldier’s desertion until the rendezvous with the quadcopter. The act of surrender cannot be clear unless it can be reasonably discerned¹⁷³—a milestone not reached until Ukrainian forces positively identify the Russian soldier with the quadcopter. At that point, they will

¹⁷⁰ See Hague Regulation IV, *supra* note 35, art 23(c).

¹⁷¹ See Santora, *supra* note 6.

¹⁷² *Id.*

¹⁷³ Buchan, *supra* note 10, at 24 (“Thus, the test imposed by international humanitarian law is whether a reasonable combatant operating in those circumstances would have been expected to discern the offer of surrender.”).

raise their hands with the drone—flying at walking speed—showing the surrendering Russians the direction of movement to waiting Ukrainian forces.¹⁷⁴ It is reasonable to conclude they are *hors de combat* from that time until the actual physical capitulation to Ukrainian forces.¹⁷⁵ Again, this approach strikes an appropriate balance between military necessity and humanitarian considerations. At the point where the Russian soldier meets the drone, puts down their arms, and begins to follow the drone, they are defenseless and there is no necessity to make them the object of an attack. Also, the coordination and planning associated with “I want to live,” coupled with the use of drones, makes the surrender safer for both surrendering and capturing soldiers.

C. Feasibility of Accepting Surrender

The third element of a surrender that qualifies a soldier for *hors de combat* status is that the surrender must be under circumstances where it is feasible for the opposing party to accept the surrender.¹⁷⁶ Again, the DOD Manual offers guidance on the feasibility of accepting surrender. It specifies that this component “refers to whether it is practical and safe for the opposing force to take custody of the surrendering persons in the circumstances.”¹⁷⁷ It further explains this definition through two example scenarios:

For example, consider the situation of enemy soldiers who operate an anti-aircraft gun and shoot at an enemy aircraft and then who raise their hands as if to surrender seconds before a second aircraft attacks their position. In the circumstances, it would not be feasible for the crew of the attacking aircraft to land and accept their surrender. Similarly, a soldier fifty meters from an enemy defensive position in the midst of an infantry assault by his unit could not throw down his weapon and raise his arms (as if to indicate his desire to surrender) and reasonably expect that the defending unit would be able to accept and accomplish his surrender while resisting the ongoing assault by his unit.¹⁷⁸

Several observations flow from this element. First, the feasibility of surrender relates to whether it is feasible to take custody of a surrendering soldier; it does not include considerations of whether it is feasible to care for the individual after taking custody.¹⁷⁹ Second, and relatedly, it is unlawful to refuse the acceptance of surrender because it is militarily inconvenient to do so.¹⁸⁰ Third, the

¹⁷⁴ Santora, *supra* note 6.

¹⁷⁵ David Wallace & Shane Reeves, *Ukraine Symposium: The “I Want to Live” Project and Technologically Enabled Surrender*, ARTICLES OF WAR (Jan. 13, 2023), <https://perma.cc/TKT4-RQ4F>.

¹⁷⁶ DOD Manual, *supra* note 47, at 234.

¹⁷⁷ *Id.* at 238.

¹⁷⁸ *Id.*

¹⁷⁹ *See id.*

¹⁸⁰ *See id.*

standard to judge whether the acceptance of surrender is feasible is one of reasonableness under the circumstances at the time.¹⁸¹

The application of the feasibility element to Russian soldiers utilizing “I want to live” supports conferring *hors de combat* status on the Russian soldier at the point of rendezvous with the quadcopter. In most, if not all, circumstances it will not be feasible for Ukrainian forces to accept surrender prior to the Russian’s rendezvous with the quadcopter, despite the Russian soldier being exposed to substantial peril between departing Russian lines and arriving at the rendezvous point. The Russian soldier is likely to be exposed to attack by both Russian forces seeking to deter desertion and Ukrainian forces manning front-line positions. This latter risk can and should be minimized to the extent practicable by Ukrainian handlers for the “I want to live” project. The Ukrainians can select rendezvous points and times that minimize the risk that the Russian soldier is needlessly exposed to Ukrainian fire as they navigate the front lines. Still, the chaotic and shifting nature of the frontlines make the complete elimination of that risk impossible in many instances. Once at the quadcopter rendezvous point, however, it becomes feasible to accept the surrender and the Russian soldier becomes legally protected from being the target of attack.

The use of technology to enable the surrender enhances its feasibility because the actual surrender can be planned and executed in a deliberate and controlled fashion.

V. CONCLUSION

Beyond supporting military necessity, technologically enabled surrender promotes humanitarian aims in two crucial respects. First, using modern, ubiquitous communication channels, Russian soldiers are made aware of the process of becoming *hors de combat* and prisoners of war with all the protections afforded under LOAC. Second, the actual physical surrender can arguably be done in a manner that is safer for both the surrendering Russians and the capturing Ukrainians.

The full-scale international armed conflict between Russia and Ukraine has given the world a glimpse into warfare of the future, where modern technologies are utilized in combat. Drones, artificial intelligence, cyber capabilities, satellites, and social media platforms, among other technologies, are shaping the conflict in real-time. In some instances, modern technologies change conduct on battlefields, leading to the reconsideration of applications of existing LOAC principles and rules. A case in point is Ukraine’s use of modern communications and drone capabilities to facilitate the battlefield surrender of Russian soldiers.

¹⁸¹ *See id.*

One can make three overarching conclusions about technologically enabled surrender under LOAC. First, this method of surrender is a harbinger of things to come in future armed conflicts. This is seemingly good news as, based upon the information available, it appears likely that technologically enabled surrender is safer and more efficient for all parties involved. Second, as the above analysis has illustrated, LOAC is flexible enough to appropriately regulate technologically enabled surrender and, more broadly, other emerging technologies.¹⁸² Third, technology can help implement LOAC rules on surrender. Because these rules account for both military necessity and humanitarian considerations, the equilibrium between the two often-competing principles is maintained.¹⁸³ This is of critical importance as the primacy of LOAC is dependent upon maintaining this delicate balance and, accordingly, may help more effectively regulate the war raging in Ukraine.¹⁸⁴

¹⁸² Wallace & Reeves, *supra* note 132, at 66 (noting that international law “provides a dynamic and fluid regulatory framework capable of addressing the myriad of challenges”).

¹⁸³ See Shane R. Reeves & Jeff S. Thurnher, *Are We Reaching a Tipping Point? How Contemporary Challenges Are Affecting the Military Necessity-Humanity Balance*, HARV. NAT. SEC. J. FEATURES ONLINE (June 24, 2013), <https://perma.cc/XM8T-2G5P> (“It is undeniable that armed conflicts will continue, what is questionable is whether [LOAC] can ensure that warfare does not devolve into the brutality and savagery that historically has defined it.”).

¹⁸⁴ See Bill, *supra* note 131, at 134 (stating that “[h]uman life is no less valuable in war than in peace, but the need to resolve the contention between states through recourse to armed conflict has been permitted to outweigh that value in certain circumstances. In other circumstances . . . the balance remains tipped towards humanitarian concerns.”).