Chapter 4

Lawful human targets

The determination of combatant status is a necessity of civilised warfare on land, on sea, or in the air. The distinction between the combatant and the non-combatant elements of a community is the essential condition precedent of the humanising of warfare.¹

Following on from chapter 3, which dealt with the targeting of objects, this chapter deals with the law that applies to targeting people. The basic and uncontroversial rule is that combatants may be targeted and civilians may not be targeted. So, the main issues in this chapter are when is a combatant not subject to attack and when does a civilian lose protection from attack.

The main exception for when a combatant cannot be targeted is when the combatant is hors de combat. I argue that other than when hors de combat, a combatant is subject to lawful attack at all times; this is regardless of whether the combatant at that time is posing a threat to the attacker or other belligerents associated with the attacker. Accordingly, what amounts to hors de combat is a very important issue. For example, it might be argued that an unarmed combatant is de facto hors de combat, or at least there is no military necessity present to justify the use of lethal force against that combatant. I review the negotiating history of API, various commentaries and examples from actual conflicts with a view to determining whether hors de combat includes when a combatant is merely outnumbered, overwhelmed or otherwise defenceless. In other words, is there an obligation to attempt to capture or otherwise use minimum force against an opposing combatant? The related issue of whether there is an obligation to invite or offer an opportunity to surrender before launching an attack is also addressed.

The second part of chapter 4 deals with when it is lawful to attack civilians. According to article 51(3) API, it is lawful to attack a civilian for such time as that civilian is taking a direct part in hostilities. I argue that taking a direct part in hostilities is more limited than contribution to the general war effort;² as a result, civilians who work in munitions factory and senior civilian politicians are not ipso facto targetable. As it is lawful to attack a civilian only “for such time”³ as that civilian is taking a direct part in hostilities, there is an issue known as the “revolving door”.⁴

³ API, above n 2 (chapter 1), art 51(3).
⁴ Schmitt, ““Direct participation in hostilities” and 21st century armed conflict”, above n 58 (chapter 1), 510.
The issue is how to categorise a civilian who regularly starts and stops taking a direct part in hostilities. In resolving this issue, I argue for a distinction between a civilian who is acting independently and one who has become a member of an organised armed group.

4.1 Combatants

As one would expect, it is lawful to target combatants; although this is not obvious from reading the conventions. Indeed, if one was to read article 48 API and the definition of military objectives in article 52 API, you might conclude that the military personnel of the enemy are not lawful targets. This is not the case. Combatant status “implies … being considered a legitimate military objective”, and combatants can be “harm[ed] due to their status as combatants”. The interesting question, therefore, is who is a combatant?

Combatants are defined under IHL as members of:

(a) the armed forces of a Party to the conflict, including members of militias or volunteer corps forming part of such armed forces, other than:
   i. medical personnel and chaplains covered by article 33 GCIII; and
   ii. members of the armed forces assigned to civil defence organizations acting in compliance with article 67 API;

(b) other militias and volunteer corps, who fulfil the following conditions:
   i. being commanded by a person responsible for his subordinates,
   ii. having a fixed distinctive sign recognizable at a distance,
   iii. carrying their arms openly, and

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5 Sandoz, Swinarski and Zimmerman (eds), above n 68 (chapter 1), [2017]; see also Rogers, Law on the Battlefield, above n 84 (chapter 1), 8; Why They Died: Civilian Casualties in Lebanon during the 2006 War, above n 3 (chapter 2), 33.
6 It is suggested that this is because during the diplomatic conferences for the negotiation of API, there was shared by some delegates a “sentiment that affirmatively suggesting violence even against combatants is not appropriate in a humanitarian instrument”—Bothe, Partsch and Solf, above n 87 (chapter 1), 285 (fn 17).
7 Prosecutor v Galic, (Trial Chamber) Case No IT-98-29-T (5 December 2003) fn 88.
8 The Public Committee against Torture in Israel v The Government of Israel, HCJ 769/02 (13 December 2006) [29] (Barak P (emeritus), Rivlin V-P and Beinisch P concurring) (available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf at 09 January 2007). See the consistent State practice on this point at Henckaerts and Doswald-Beck (eds), Customary International Humanitarian Law, vol II, above n 64 (chapter 1), 190–3. Dinstein argues that combatants come within the meaning of ‘military objective’ in the first sentence of API, art 52(2)—Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict, above n 66 (chapter 2), 84–5.
9 API, above n 2 (chapter 1), art 43(1); GCI, above n 5 (chapter 2), art 13(1); and GCIII, above n 7 (chapter 2), art 4(A)(1). The definitions of combatant in HVR, above n 10 (chapter 2), art 1, whilst technically still in force, have been repeated and expanded upon in GCI; accordingly, no further reference to HVR, art 1 is made.
10 API, above n 2 (chapter 1), art 43(2).
11 The non-combatant status of this group is often overlooked; however, see the State practice of Russia quoted in Henckaerts and Doswald-Beck (eds), Customary International Humanitarian Law, vol II, above n 64 (chapter 1), 84.
12 ‘Other’ refers back to other than in sub-paragraph a.