

BIRGIT HASLINGER

Nobody is born a legitimate target

**A four-step test to the targeting of individuals
and groups in armed conflict**

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Introduction

Nobody is born a legitimate target.¹ The title of the present work² is a slightly modified version of *Dinstein's* statement that “[n]obody is born a combatant”.³

The correctness of the above statement cannot be doubted. Newborn babies are the epitome of “innocent” and “worthy of protection”. Common morality as understood in the present work implies that when born, human beings are not able or interested in harming others and consequently nobody should do them harm. Interestingly, although newborn, they already have a legal status under the laws of armed conflict. They are civilians. In fact, their status is even more than that as newborn babies and children enjoy special protection. Obviously, the status of individuals can change and they may become lawful targets, but the major question is how exactly this change is brought about. Is it really their status that determines whether they are military objectives and hence lawful targets? Is it their conduct? Is it really as simple as the principle that tells us combatants may be targeted whereas civilians have to be spared? Are there – as is widely held – only two statuses in the international law of armed conflicts, namely civilian or combatant, or is there something that could be referred to as an intermediate status? If so, what implications would such a status have in relation to targeting decisions?

Today, there is a full body of law applicable to situations in which states and other actors have decided to use armed force. In fact, legal regulations have come as far as to prohibit violence between states in principle with only a few exceptions.⁴ Although the prohibition on the use of force is accepted as *jus cogens*, we cannot close our eyes and ignore the fact that armed conflicts nevertheless happen.

Thus, the best way to deal with this inevitability is to find rules that are capable of reducing human suffering by subordinating armed conflicts to law.⁵ However, as shown above, the idea of a “law of war” seems somewhat oxymoronic. For some today, this view holds true,⁶ nevertheless, the necessity of such rules and principles is beyond

¹ Although the term “legitimacy” is often used to refer to moral questions, and thus contrasts to the term “legality” (see also Know the framework – Moral framework). Hence in addressing questions of targets, this work uses the terms “legitimate target” and “lawful target” interchangeably.

² All data and references contained herein are current as at December 2017.

³ Dinstein, ‘Unlawful Combatancy – Combatants and Civilians’, in Borch/Wilson (eds), *International Law and the War on Terror*, International Law Studies Vol 79, 152; id, *The Conduct of Hostilities under the Law of International Armed Conflict*², 146.

⁴ Article 2(4) UN Charter.

⁵ There are, however, authors that argue that the rules of international humanitarian law had undesired consequences in legitimating particular forms of violence and thus led to more civilian deaths than might have otherwise been the case. Jochnik/ Normand, ‘The Legitimation of Violence: A critical History of the Laws of War’, in *Harvard International Law Journal* Vol 35, No 1 (1994), 49.

⁶ Osiel, *The End of Reciprocity*, 44.

doubt.⁷ However, the application of the rules is not always as clear as it should be. It is necessary to bring-to-bear simple and clear rules which depend on objective criteria rather than on subjective judgments.⁸ This raises the obvious question of whether to find existing rules that fit or create new ones: Rules that are capable of being applied by all actors involved in an armed conflict. In answering this we need to be aware that the current trend to apply existing laws by creating new definitions and amending old laws by adding more and more detailed regulations is not always the optimal way to address current problems. The more rules that apply to different situations, the more difficult adherence to those rules becomes. Not everyone fighting in an armed conflict is thoroughly versed in the applicable laws, including the laws of international humanitarian law. Moreover, especially targeting decisions often have to be made during the heat of battle.⁹ Nobody can be expected to find the time to read legal commentaries before deciding if he or she¹⁰ is allowed to shoot, wound or capture in a given situation. Thus, we should think about a practicable approach that somewhat reduces the applicable law to basic principles. The more such principles are deeply rooted in common morality, the better the chances that they will be understood and applied by those who actually matter, namely individuals fighting in armed conflicts. The most important point in the context of targeting is the line between combatants and civilians. In trying to provide a clear answer which encompasses the objectives cited above, this work is based principally on the following assumption put forward in a comparable context: “What is oversimplified may be a better humanitarian working-tool than what has become endlessly complicated”.¹¹ Therefore, this present work does not attempt to add new views or more detailed assessments, rather it seeks to find a way to apply existent laws and their interpretations in a coherent way to fit into the four-step test established by the author.

This book is based on the idea that targeting decisions demand a four-step test, which can simply be described as follows: Know the framework. Know yourself. Know your opponent. Know the circumstances. This test is depicted by a decision-making funnel which begins with a relatively large number of questions requiring a considerable amount of time to answer, the number of questions and time needed to answer them then tapers away as the process proceeds. Whereas the first two steps (“Know the

⁷ Von Heinegg/ Epping (eds.), *International Humanitarian Law Facing New Challenges, Symposium in Honour of Knut Ipsen (2007)*, 1.

⁸ See also McCormack, who argues that even though such rules might be violated on a regular basis they could and should provide objective criteria for evaluating conduct in hostilities. Without such rules any evaluation would necessarily be based on subjective and thus arbitrary criteria. McCormack, ‘From Solferino to Sarajevo: A Continuing Role for International Humanitarian Law’, in *Melbourne University Law Review* Vol 21 (1997), 625.

⁹ Corn, Geoffrey/ Corn, Gary, ‘The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens’, in *Texas International Law Journal* Vol 47 Issue 2 (2012), 344.

¹⁰ In the following, the masculine form is employed for the purpose of legibility and is taken to include the feminine form.

¹¹ Best, *War and Law Since 1945*, 262.

framework” and “Know yourself”) may be determined prior to actual involvement in an armed conflict and therefore without major time restraints, the last two steps (“Know the opponent” and “Know the circumstances”) require fast assessment. This funnel is similarly depicted by the number of questions raised in connection to the four steps and also in relation to the page count of the respective chapters dealing with the different steps.

Before delving into the proposed four-step test, the first chapter of this work provides the historical background of the discussion. It starts with an overview of wars and armed conflicts in general and the development of the treatment of the individuals living, working and fighting in such situations. As wars began in a time when there was a virtual legal vacuum on the subject, their conduct was highly influenced by rituals as well as writings of canonists and (legal) scholars. These shall thus be depicted briefly before an overview of the first rules on limitations in warfare is provided. The following chapters then deal with providing details to establish the four-step test.

The first step of the test is referred to as “Know the framework” and involves an extensive examination of various topics. As the first step may be undertaken before an individual actually gets involved in hostilities, time restraints do not yet pose a problem. In dealing with this first step, the book starts to discuss the legal regimes currently applicable in armed conflict situations as well as highlights that the rules on conduct in hostilities should not be influenced by *jus ad bellum* and provides the reasons why. In brief, this deals with the questions of when and under which circumstances resort to the use of force may be justified. Following on from this, the focus moves to rules of international humanitarian law and, as the current applicability of these rules depends on the existence of an armed conflict, the change in terminology from “the law of war” to “the law of armed conflict” is examined.

In the following, a possible line of demarcation between international and non-international armed conflicts is elaborated and hurdles associated with this traditional approach are raised. For example, different rules apply depending upon the classification of conflicts under the current state of law. It will be shown that even legal scholars who deal with the classification of conflicts in their academic (and in some cases also practical) career usually are not unanimous on how a given conflict has to be classified. This is one of the most problematic issues in relation to armed conflicts as the status of individuals, and thus the question of whether they are legitimate targets in a given situation strongly depends on the classification of the conflict. Compared to international armed conflicts, there is no combatant or prisoner of war status in non-international armed conflicts. Correct classification of individuals is further hindered by the fact that conflicts may transform from non-international to international ones and vice versa. This has happened qua codification, but it may also be triggered by a change of circumstances on the ground, and as such, the issue of transformation of conflicts is also addressed.

Additionally, the metaphoric bridge into “new types” of armed conflict, such as “the war on terror”, “cyber warfare” or “privatised wars” is discussed. An important question

in that regard is whether it is possible to apply existing rules and principles to these “new wars”.

If even scholars who have time and expertise in abundance to classify a given conflict cannot provide a unanimous judgement, how can we expect the individuals actually fighting to know which rights and duties apply? Thus, the present work addresses the question of whether there is a minimum standard applicable, suitable to be applied in all kinds of armed conflicts, to the question of who is a legitimate target. One obvious benefit flowing from this is that the uniform application of rules would enhance legal certainty for those who are part of the hostilities, either voluntarily or involuntarily.

Finally, there are legal principles which apply regardless of the classification of the conflict. The present book examines whether these principles could possibly suffice to provide a framework for lawful and legitimate conduct in hostilities with a special focus on targeting.

Another important question is whether the rules and principles of international humanitarian law are the only provisions applicable to such situations or whether other legal regimes, especially international human rights law, may also be applied. Thus, the applicability of other legal regimes in situations of armed conflict and their relationship is discussed. It is shown that the relationship between international humanitarian law and international human rights law is of major importance for the subject under consideration here: targeting, which (in most cases) means nothing more or less than employing lethal force against an individual - when viewed from the angle of international human rights law an infringement upon somebody’s right to life.

The assessment of the first step of the proposed four-step test is concluded by a discussion of the legitimacy of targeting decisions by applying rules of morality. In this context, the question of how these rules can or should be considered in armed conflicts is raised. The summary and concluding remarks at the end of the chapter are designed to provide a concise overview of the conclusions reached therein.

The second step of the test is referred to as “Know yourself”. Whereas the first step requires lengthy assessments, a determination of one’s own position may proceed more rapidly as some preliminary questions have already been answered during the first step. This (second) step mainly addresses the question of who is authorised to attack a lawful target and may also be examined before actually getting involved in hostilities and therefore without time constraints. Before one may even think about targeting an individual there is a pressing need to be aware of the consequences of doing so. To begin with, his personal status as an attacker has to be determined; if the conclusion drawn is that he is a lawful attacker then one can proceed and ask whether the person he is fighting is a legitimate target. Traditionally, the right to participate in hostilities was derived from the right of the state to wage war. However, within the modern legal framework states are no longer allowed to use force against other states, with only limited exceptions to this rule. Further to this and moving down from the state level, individuals cannot claim a right to directly participate in hostilities. The law merely acknowledges that conflicts happen and that individuals participate therein and it seeks

to limit the consequences thereof. The most important question for individuals involved in hostilities is whether they are authorised to do so, in other words, whether they enjoy “combatant’s privilege”. Simply put, this privilege means that killing an enemy combatant is considered a lawful act of warfare rather than murder. A natural first question in this regard is who may grant this privilege? Is that something that is reserved to states? Has time come to expand it to cover specific non-state actors as well? After having clarified these questions, the next step is to determine who consequently enjoys combatant’s privilege and thus is authorised to directly participate in hostilities. Obviously, as the name itself suggests, this covers the actual “combatants”. In order to determine who belongs to this category, the notion of combatants in international armed conflicts is discussed by dealing with members of state armed forces, members of militias and volunteer groups as well as participants in a *levée en masse*. As combatant status is closely linked to prisoner of war status, an attempt is made to clarify whether these two statuses are intrinsically tied. In doing so, first the famous criteria for prisoner of war status are discussed and then the question of whether these could also be considered criteria for combatant status is raised. Second, an examination is undertaken of whether every person who may be classified as a prisoner of war has to be considered a combatant and third, whether every combatant is, in fact, a prisoner of war upon capture. Finally, the fact that there is no combatant and prisoner of war status in non-international armed conflicts and its consequences are discussed.

In assessing one’s own status, an individual needs to be aware of the fact that he could obviously also fall within the category of those who are not authorised to fight. This category encompasses first and foremost civilians; however, it also extends to non-combatants and persons accompanying the armed forces. Whereas the latter are discussed under the topic of “civilians”, the former are addressed separately.

It is also of major importance to be clear about the fact that there is no intermediate category between those who are authorised to fight and those who are not. Everyone has a status under the laws of armed conflict; there is no grey middle ground that some individuals may fall into. Nevertheless, there are some special questions which have to be addressed, particularly concerning mercenaries, spies and children. Moreover, challenges arising from the changing character of armed conflicts are discussed, with the focus here centred on individuals participating in cyber war, the privatisation of armed conflicts as well as on multinational operations. At the end of this chapter a concise summary and concluding remarks on the status of a potential attacker are given.

The third step of the proposed four-step test is referred to as “Know your opponent” and deals with the question of “Who is a legitimate target?” This question has to be assessed when actually engaged in hostilities and thus requires a faster decision making process than the first two steps. In dealing with this step, this book starts with a short discussion on the general rules on lawful targets before moving on to consider which individuals are legitimate targets because of their status. Following on from this, the question of which conduct turns an individual into a lawful target regardless of that individual’s

status is raised. In this context, the concept of direct participation in armed conflicts is of major importance. It will be demonstrated that private individuals are treated differently from those who are participating with a continuous combat function as members of organised armed groups. Special questions naturally arise concerning human shields, heads of states, religious organisations and other types of leaders, as well as terrorists and cyber warriors. As the present book is based on the assumption that one is either a combatant or civilian under *ius in bello*, intermediate categories which have been suggested by others, such as “unlawful combatants”, “enemy combatants” or “quasi-combatants”, are rejected. As a next step, the question of what really matters in relation to targeting in armed conflict situations is raised: is it status, conduct or a mixture of both? Finally, an overview on the rules on protection of individuals is given, which unsurprisingly, first and foremost includes civilians. Moreover, consideration is given to the fact that there are exceptions from the rule that combatants are always legitimate targets in armed conflicts. These cover those individuals who are *hors de combat*, have clearly expressed their intention to surrender or are parachuting from an aircraft in distress. Further rules on special protection can be found in relation to medical and religious personnel, women, children, civil defence personnel as well as journalists. At the end of this chapter a concise summary and concluding remarks on the status of the potential target are given.

Finally, the fourth and last step of the test is referred to as “Know the circumstances”. At this stage of the process, with the first three steps having been completed, targeting is about to start. As this will occur in the heat of battle, the fourth step will often require quick decisions to be made under extreme stress. In dealing with this step, the book discusses the circumstances which should be established as well as the obligations of the attacker which include things such as a clear definition of targeting, precautions in attack, as well as other considerations. Precautions in attack are assessed by distinguishing the requirement of proportionality in attack from the obligation to provide early warnings whenever feasible. Further considerations cover the issue of the prohibition of indiscriminate attacks which is depicted in contrast to the practice of targeted killings, which seems to have flourished in recent years. Another point which has to be acknowledged in this regard is the wide range of weapons which are prohibited due to their excessive effects. Even more important is the question of whether an obligation to capture rather than kill exists in situations of armed conflicts. Finally, the prohibition to spread terror among the civilian population is discussed briefly. Following the examples from above, this chapter also contains a short summary and some concluding remarks.

In the context of providing an overall conclusion, the main propositions and arguments of the present work are summarised and concisely presented in the final chapter.

Historical overview: Warfare, individuals and groups

One recognises that armed fighting between individuals and groups undoubtedly predates any and all recorded history. As the main purpose of this chapter is to analyse the historical basis of the present rules and principles, only a short overview of historical legal developments is given. To begin with, it must be noted that the present work is mainly confined to European societies,¹² with other developments outside of Europe being mentioned only briefly if at all. Special attention is paid to modern developments, especially to the period after the Treaty of Westphalia of 1648 which introduced the “nation-state”, thus triggering what is called the “state-centred approach” of public international law.

In dealing with the history of armed conflict, it is necessary to start at a time when legal rules on warfare did not exist. The first limitations on warfare appeared as early as several centuries BCE. Throughout this time and during the Middle Ages in Europe, the separation of *jus ad bellum* and *jus in bello* – as widely acknowledged today – was not yet known. Thus, although this work deals with targeting and therefore *jus in bello* issues, in providing a brief historical overview it is imperative in this chapter also to cover issues of *jus ad bellum*, as embodied in the Just War theory for example. All of this, however, is kept as brief and concise as possible.

Finally, the reader should be aware that this historical overview is designed to indicate general trends rather than all the details. As this work is concerned with the question of targeting of individuals and groups in modern armed conflicts, the historical overview is concerned principally with previous developments in relation to their treatment and status which, as shown in the following, arose early on in history.

A. Ancient history

A well-known 13th century religious scholar once noted that even the “human state of nature”¹³ recognised times of peace and times of conflict. As mentioned above, the earliest instances of armed fighting undoubtedly predate recorded history. Kinship-based groups such as tribes expanded over the years, allying with neighbours and those having similar religious beliefs or common objectives, but attacking those perceived as threats, competitors, or martially weak.¹⁴ Tribal or endemic warfare consisted mainly of raids by unorganised hosts directed against groups in the immediate neighbourhood

¹² This is especially due to the fact that until the 1970s, most codified rules of international humanitarian law were strongly influenced by Western culture as well as European powers. Sassoli/ Bouvier/ Quintin, *How Does Law Protect in War? Vol I*, 5.

¹³ The “state of nature” is a term first appearing in the writings of *Thomas Aquinas*. Aquinas, *De Veritate*, Question 19, Article 1, Answer 13, English translation by James V McGlynn, available at <http://dhspriority.org/thomas/QDdeVer19.htm> (31.12.2017).

¹⁴ Gat, *War in Human Civilization*, 264 ff.

with the objective of seizing territory, goods, women,¹⁵ or to exact revenge.¹⁶ Such raids were likely based on numerical superiority and surprise, while they also had ritualised attempts to limit casualties and the duration of fighting.¹⁷ Their leaders were individuals with a right to issue orders, which was typically based on things ranging from martial ability to their allegedly divine origin.¹⁸

The first written limitations on warfare appeared as early as in the 4th century BCE; these were, however, confined to Asia. One example was the famous book “The Art of War” by Sun Tzu¹⁹, which prohibited injuring wounded enemies or attacking elderly men. At the same time, in India, the “Book of Manu” and the “Mahabharata” contained comparable provisions.²⁰

Over time, a move from tribal society, rural petty-states and hegemonic lordships to larger more state-like entities took place. City-states evolved as religious, economic and military centres,²¹ many of the exact details involved in this process are, however, still largely unsettled.²² With the development of the first city-states, the organisation of warfare started to change, even though the bulk of military forces still consisted of farmers supported by the local population during their military service. As societies grew in size a continuous process of political conglomeration took place and full-time ruling elites as well as military commanders started to emerge.²³ As Gat empirically shows, trade and religious authority were the consequence as well as the cause for political unification.²⁴ Fighters were mainly men who could afford to buy their own arms and fought at their own risk. Babylonian rules stipulated to treat prisoners with restraint. The Hebrews distinguished immediate enemies who could be killed regardless of gender or age and more remote enemies, non-combatants of which should be spared.²⁵ At least one author argues that wars made the world a safer place since they led to societies seeking safety in numbers and thus reduced the risk of one individual dying because of a violent act.²⁶

¹⁵ Keeley, *War before Civilization : the Myth of the Peaceful Savage*, 28.

¹⁶ It could be shown that revenge as a potential cause of war was usually confined to segmented societies whereas it did not play a role in unsegmented ones. Kelly, *Warless societies and the origin of war*, 76.

¹⁷ Kelly, *Warless societies and the origin of war*, 4 f.

¹⁸ Van Creveld, *Aufstieg und Untergang des Staates*, 21.

¹⁹ Sun Tzu, *The Art of War* (circa 6th century BCE), English Translation by Thomas Cleary in Cleary, *SunTzu – The Art of War*.

²⁰ *Book of Manu*, English Translation by George Bühler, *Sacred Books of the East*, Vol 25, available at <http://www.sacred-texts.com/hin/manu.htm> (31.12.2017); O’Connell in Fleck, *The Handbook of International Humanitarian Law*³, 16.

²¹ Gat, *War in Human Civilization*, 264 ff.

²² Van Creveld, *Aufstieg und Untergang des Staates*, 32.

²³ The fundamental concept that warfare and societies co-evolve can even be traced back to hunter-gatherer societies. See Kelly, *Warless societies and the origin of war*, 73.

²⁴ Gat, *War in Human Civilization*, 402 ff.

²⁵ Holy Bible, Deuteronomy 20.

²⁶ Morris, *Krieg – Wozu er gut ist*, 14 f.

In Europe, before the mid-5th century BCE, first rules on conduct in war were provided by a list of twelve unwritten Greek conventions governing intra-state conflicts. These already included a rule according to which “[w]ar is an affair of warriors, thus non-combatants should not be the primary targets of attack”.²⁷ Intra-Greek warfare then was dominated by a highly organised formation of massed infantry known as the hoplite phalanx. Hoplites were free male adults who could afford the investment in arms and armour and had the time to fight when called upon to do so. Usually, they comprised of rich farmers.²⁸ During the early history of Greek city-states, short wars between them predominantly occurred in a fixed campaigning season and were confined to a geographically limited battlefield. Compared to those intra-Greek conflicts governed by the said conventions, no rules applied when Greeks fought non-Greeks.²⁹ Minor differences were apparent in Athens’ warfare, where the mass of ordinary citizens was engaged in democratic politics and stability of society was thus less dependent on adherence to hoplite ideology and the twelve unwritten rules of law that sustained it. Consequently, Athens could afford to break these rules.³⁰ As time passed by, the hoplite phalanx battles continued to exist, although they were no longer constrained to a fixed campaigning season or limited in duration. Moreover, the use of mercenaries becoming prominent was one of a number of developments that led to a growing involvement of non-combatants in conflicts as the latter became not only the victims, but the actual targets of strategies aimed at social and economic disruption.³¹

Similarly, the early Roman Empire witnessed barely any rules applicable to fighting non-Romans. As *Stacey* points out, “the conduct of [Roman] war was essentially unrestrained. Prisoners could be enslaved or massacred; plunder was general; and no distinction was recognized between combatants and non-combatants”.³²

From the quote above it becomes clear that in classical antiquity’s international law two major regimes of law existed;³³ war³⁴ and peace, the two being mutually exclusive, only

²⁷ Ober, ‘Classical Greek Times’, in Howard/Andreopoulos/Shulman (eds), *The Laws of War – Constraints on Warfare in the Western World*, 13 citing Hanson, *The Western Way of War*, 15 ff.

²⁸ Ober, ‘Classical Greek Times’, in Howard/Andreopoulos/Shulman (eds), *The Laws of War – Constraints on Warfare in the Western World*, 14 ff.

²⁹ Ober, ‘Classical Greek Times’, in Howard/Andreopoulos/Shulman (eds), *The Laws of War – Constraints on Warfare in the Western World*, 18; Greenwood in Fleck, *The Handbook of International Humanitarian Law*², 16.

³⁰ Ober, ‘Classical Greek Times’, in Howard/Andreopoulos/Shulman (eds), *The Laws of War – Constraints on Warfare in the Western World*, 20 f.

³¹ Ober, ‘Classical Greek Times’, in Howard/Andreopoulos/Shulman (eds), *The Laws of War – Constraints on Warfare in the Western World*, 23.

³² Stacey, ‘The Age of Chivalry’, in Howard/Andreopoulos/Shulman (eds), *The Laws of War – Constraints on Warfare in the Western World*, 27.

³³ Famous proponents of that view are *Grotius*, who followed *Cicero*. In contemporary writings, views differ. *Dinstein*, inter alia, holds that legally there is no intermediate status, although there might be merits of a mixed status. *Dinstein*, *War, Aggression and Self-Defence*⁵, 15. Others argue for an intermediate status. See inter alia Schwarzenberger, ‘Jus Pacis ac Belli? – Prolegomena to a Sociology of International Law’, in *American Journal of International Law* Vol 37 (1943), 460 reproduced in Schmitt (ed),

one ever applied, meaning that in conflict peacetime rights and obligations were suspended.³⁵

The 1st century BCE Roman statesman *Cicero* is thought to be one of the first European writers who dealt with what is called the “Just War theory”. According to him, no war was just³⁶ unless preceded by an official demand for satisfaction or a warning and a formal declaration of war.³⁷ To be able to fulfil these conditions, he required a true enemy to be a state possessing “a republic, a senate-house, a treasury [as well as] harmonious and united citizens”.³⁸ Non-international wars hardly ever met the conditions laid down by this theory, which therefore was only applied to international wars.³⁹

Legitimate authority was thought to derive from an allegedly divine origin of the leader. Usually however, traditional just war thinking at this time was not concerned so much with the question of *who* may wage war but was rather focused on finding just causes for war, which were mainly drawn from religious beliefs. Some four centuries after *Cicero*, *Augustine of Hippo* claimed that “the purpose of all war is peace”.⁴⁰ He declared that “[t]hey who have waged war in obedience to the divine command, or in conformity with His laws, have represented in their persons the public justice or the wisdom of the government, and in this capacity have put to death wicked men; such persons have by no means violated the commandment, ‘Thou shalt not kill’”. In taking this approach though, he thought that women, children and the aged should not be harmed.⁴¹ According to him, law could also be clearly distinguished from politics and

‘International Law Across the Spectrum of Conflict – Essays in Honour of Professor L C Green On the Occasion of His Eightieth Birthday’, in *International Law Studies* Vol 75 (2000), 483 ff; Jessup, ‘Should international law recognize an Intermediate Status between peace and war’, in *The American Journal of International Law* Vol 48 (1954), 98.

³⁴ Although *Henricus de Segusio*, an early writer, distinguished seven types of war, he already subdivided them in external and internal wars. Whilst the former were fought by Christians against “infidels”, the latter were fought by Christian princes against each other. Reid, Jr, ‘The Rights of Self-Defence and Justified Warfare in the Writings of the Twelfth- and Thirteenth-Century Canonists’ in Pennington/Eichbauer (eds), *Law as Profession and Practice in Medieval Europe – Essays in Honor of James A Brundage*, 84 ff.

³⁵ Greenwood in Fleck, *The Handbook of International Humanitarian Law*², 45.

³⁶ Cicero, however, already represented the idea of moral equivalence between warring states. Cicero, *The Verrine Orations*, translated by C.H.G. Greenwood (1935), 431 cited by Neff, *War and the Law of Nations – A General History*, 24.

³⁷ Cicero, *De Officiis*, Book 1, sections 1.11.33 ff.

³⁸ Cicero, *Philippics* 4, translated by Yonge, reprinted in *The Orations of Marcus Tullius Cicero: Literally Translated by C. D. Yonge*, Vol 4 (1852).

³⁹ Bartels, ‘Timelines, borderlines and conflicts – The historical evolution of the legal divide between international and non-international armed conflicts’, in *International Review of the Red Cross* Vol 91 No 873 (2009), 42.

⁴⁰ In principle, *Augustine of Hippo* thought of all Christians to be pacifists. He nevertheless acknowledged that peacefulness in the face of a grave wrong could be a sin, if such wrong could be stopped by violence.

⁴¹ *Augustine of Hippo*, *City of God*, Book XV, Chpt 4.

questions of morality.⁴² Although concerned with the Just War theory, he nevertheless stopped short of laying down conditions for wars to be considered as just. It took another nine hundred years or so until *Aquinas* elaborated further on the Just War theory and started to elaborate the conditions of such, which went on to be a major influence on the development of *jus ad bellum*.

B. The Middle Ages

From ancient times as well as throughout the Middle Ages, war often was seen as a way for one group to secure for themselves what they needed to live.⁴³ Prisoners of any sort taken in conflict and those wounded in battle were at the mercy of the enemy.⁴⁴ As suggested above, some sovereigns followed humane rules, however most of them would be considered cruel by modern standards and regarded captured or wounded enemies as “cattle that could be slaughtered”.⁴⁵ The prospects for some captured and wounded did however improve as the custom to release them upon payment of a ransom slowly evolved.⁴⁶

In the 7th century CE, rules on conduct in hostilities emerged almost everywhere in the world. The warrior caste in Japan had its own medieval code of honour that required humanity in battle and towards prisoners.⁴⁷

In Central Europe during the Middle Ages, three institutions were linked in political and legal relations, namely the Holy Roman Empire, the papacy and the feudal system, which was the main socio-economic system of the time.⁴⁸ Feudalism involved a specialised class of warriors mostly sustained by land allocation.⁴⁹ In a way, one could describe feudal society as a “universal society, linked by Christianity and the Catholic Church as a certain supranational authority”.⁵⁰ As the Church saw all Christians as a part of its power base it began to deter and limit Christian sovereigns from fighting among themselves for secular reasons, preferring them to wage war under the aegis of

⁴² That view became less and less popular after the First World War. However, it continued to influence thinking until the late 20th century. It could even be said that it still provides the rhetorical basis for the distinction between combatants and civilians. Kennedy, *Of War and Law*, 46 f.

⁴³ Kinsella/ Carr, ‘Introduction’, in Kinsella/Carr (eds), *The Morality of War: A Reader*, 1.

⁴⁴ Morgenthau, ‘Political Power and International Morality’, in Kinsella/Carr (eds), *The Morality of War: A Reader*, 29.

⁴⁵ Pictet, *Commentary I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC (1952), 10.

⁴⁶ Pictet, *Commentary III Geneva Convention relative to the Treatment of Prisoners of War*, ICRC (1960), 4.

⁴⁷ The “Bushi-Do”. O’Connell in Fleck, *The Handbook of International Humanitarian Law*³, 18.

⁴⁸ Rosas, *The legal status of prisoners of war*, 45.

⁴⁹ Gat, *War in Human Civilization*, 332 ff.

⁵⁰ Rosas, *The legal status of prisoners of war*, 46.

the Church. The power to wage wars thus shifted from the sovereign to the papacy.⁵¹ Within medieval European society, a system with legal subjects having the same legal rights and capacities to act was not yet in place. Instead, a number of different rulers with different forms of autonomy existed.⁵² Consequently, in relation to warfare, reliance on sub-state actors was the norm. These were mainly feudal knights or mercenaries such as the famous condottieri,⁵³ meaning that war was deeply embedded in society rather than led in the name of “states” as we know them today.⁵⁴

The fact that Christianity gave sanctity to human life whereas wars involve killing and were therefore morally suspect,⁵⁵ raised troubling ethical questions. The Just War theory⁵⁶, which was developed by Christian writers⁵⁷, tried to resolve these by limiting the occasions when states were justified to go to war as well as by defining legitimate conduct in wars⁵⁸ and therefore imposing constraints on the conduct of international wars. Total warfare was rejected as unjust, as war was seen as an evil which may only be permitted for Christian men under restricted circumstances.⁵⁹ Whilst – as depicted above – *Augustine of Hippo* had stopped short of explicitly stating the conditions for just causes of war,⁶⁰ *Aquinas* did elaborate on his arguments to define such conditions.⁶¹ The latter confirmed that it was never lawful to kill the innocent⁶² and his thoughts on

⁵¹ The power of the Church climaxed in the times between the reign Pope Gregor VII. and Pope Klemens IV. Van Creveld, *Aufstieg und Untergang des Staates*, 73.

⁵² Ipsen, *Völkerrecht*⁶, 18 f.

⁵³ Those were mercenaries hired especially by the emerging bourgeoisie in the towns to fight their private wars. See Rosas, *The legal status of prisoners of war*, 46; Major, ‘Mercenaries and international law’, in *Georgia Journal of International and Comparative Law* Vol 22 No 1 (1992), 105. Although structures differed, they can be compared to the German Landsknechte, English mercenaries or Swiss Reisläufer. Cockayne, ‘The global reorganization of legitimate violence: military entrepreneurs and the private face of international humanitarian law’, in *International Review of the Red Cross* Vol 88 No 863 (2006), 465. Today, wars are financed by other financial sources. These include the trafficking of drugs, diamonds or even human beings. Eppler, *Vom Gewaltmonopol zum Gewaltmarkt?*, 63.

⁵⁴ Van Creveld, *Aufstieg und Untergang des Staates*, 179.

⁵⁵ Kinsella/ Carr, ‘Introduction’, in Kinsella/Carr (eds), *The Morality of War: A Reader*, 2.

⁵⁶ The exact definition of a “just war”, however, varied somewhat from author to author.

⁵⁷ Such as *Augustine of Hippo*, *Aquinas* and others. The first written discussion of just war, however, can be found in the Indian *Mahabharata*. On the old Indian law codes, *Book of Manu* and *Mahabharata* see Rosas, *The legal status of prisoners of war*, 45 with further references.

⁵⁸ Kinsella/ Carr, ‘Introduction’, in Kinsella/Carr (eds), *The Morality of War: A Reader*, 3.

⁵⁹ Draper, ‘Combatant Status: An historical perspective’, in *Military Law and Law of War Review* (1972), 136.

⁶⁰ According to *Augustine of Hippo*, war had to be waged by the appropriate authority, had to have a just cause and should have been fought with right intentions, which could be securing peace or punishing wrongful acts of others. Summarised by Kinsella/ Carr, ‘Introduction’, in Kinsella/Carr (eds), *The Morality of War: A Reader*, 3. See also supra (Ancient history).

⁶¹ According to *Aquinas*, war could only be just if it had a just purpose, was waged by an authority, such as a state and its central objective was peace. *Aquinas*, *Summa Theologica*, Second Part of the second Part, Question 40 available at <http://www.newadvent.org/summa/3064.htm> (31.12.2017).

⁶² *Aquinas*, *Summa Theologica*, reprinted in Kinsella/Carr (eds), *The Morality of War: A Reader*, 69.

proportionality in war are said to have led to an acceptance in society that those who were not directly engaged in hostilities or resisting soldiers with force shall have a right to protection and life which was then thought to be based in natural law.⁶³ *Neff* describes natural law as “the idea that the entire world was under the rule of a single universal, transcultural set of moral principles” and holds that, from the just war viewpoint of medieval Christian thinking, war was simply a way of enforcing that law.⁶⁴ Medieval theologians and canonists believed that any dispute as to the application or interpretation of the Just War theory was to be resolved authoritatively by the Church⁶⁵ or, as *Neff* vividly put it, “[w]ars were fought on earth, but (at least in theory) for purposes made in heaven”.⁶⁶

Throughout the Middle Ages a great variety of different wars were fought, ranging from defensive wars to resist invasions, wars of expansion and crusades⁶⁷ to wars between rival lords or rival cities. The chivalrous laws of war, which required soldiers in times of war to act honourably and in a civilized manner, adjudged by the standards of the day,⁶⁸ were best embodied in the 10th and 11th centuries. The bearing of arms in this period was seen as a noble dignity connected with a code of conduct, the violation of which in some cases even led to the loss of warrior status. Fighting was seen as a Christian profession rather than a public service, although fighting in a public conflict entailed one doing so as an individual. This meant that one fought with one’s own rights, but also with one’s own equipment and at one’s own risk. The chivalric code applied exclusively to (Christian) feudal knights⁶⁹ bearing heraldic insignia,⁷⁰ however its functionality extended cover to members of the knightly class of all nations⁷¹ and specified conditions of ransom for captured officers and rules for the division of spoils after victory.⁷² The protection of civilians or specific prohibitions on attacks against civilians were also seen as part of the “*jus armorum*”.⁷³

⁶³ Aquinas, *Summa Theologica*, Second Part of the second Part, Question 64 available at <http://www.newadvent.org/summa/3064.htm> (31.12.2017).

⁶⁴ *Neff, War and the Law of Nations – A General History*, 9.

⁶⁵ *Dinstein, War, Aggression and Self-Defence*⁵, 68.

⁶⁶ *Neff, War and the Law of Nations – A General History*, 3.

⁶⁷ Crusades were military campaigns fought by Europe’s nobility under the aegis of the Roman Catholic Church, the first dating back to 1095. Laffan, ‘The Crusades’, in *Selected Documents of European History Vol I* (1992), reprinted in Reichberg/Syse/Begby (eds), *The ethics of war*, 454.

⁶⁸ *Solis, The Law of Armed Conflict*, 5.

⁶⁹ *Rosas, The legal status of prisoners of war*, 45; *Solis, The Law of Armed Conflict*, 5.

⁷⁰ Abraham, ‘Essential liberty “versus” temporary safety: The Guantanamo Bay Internees and combatant status?’, in *The South African Law Journal* Vol 121 No 4 (2004), 836.

⁷¹ *Friedman, The Law of War – A Documentary History*, Vol 1, 10.

⁷² *Friedman, The Law of War – A Documentary History*, Vol 1, 10.

⁷³ *Keen, The Laws of War in the Late Middle Ages*, 17; *Slim, ‘Why protect civilians? Innocence, immunity and enmity in war’*, in *International Affairs* Vol 79 No 3 (2003), 487 f.

Despite these efforts, unarmed civilian populations were still targeted or otherwise overly affected by warfare, for example by attacks of unruly knights.⁷⁴ This led some modern day commentators to the conclusion that seeing justice and mercy as the basis of chivalrous laws is a “romanticized view”⁷⁵ which obscures that the rules “actually served to protect the lives and property of privileged knights and nobles, entitling them to plunder and kill peasant soldiers, non-Christian enemies, and civilians of all religions and ethnicities”.⁷⁶ Chivalry and martial honour were not confined to European societies but were certainly reflected in most cultures, from the Western traditions to various warrior codes of the ancient and medieval Near East, China, India and Japan to mention but a few. Although they differed considerably, they had at least in common some degree of clemency towards the harmless, helpless or those who have surrendered and requested mercy.⁷⁷

The 10th and 11th centuries in France were marked by further efforts by the Church to restrain conduct in war, which finally led to the “Peace of God” decrees⁷⁸ and the “Truce of God”⁷⁹ declared by the Archbishop of Arles.⁸⁰ At the same time, the first European attempts to define and protect non-combatants can be noted as emerging.⁸¹ Moreover, even the belligerents started to see advantages in mutual restraint,⁸² not all of which were based on notions of religion, morality and humanity. Indeed, the introduction of the notion of reciprocity saw most officers, for example, deciding not to kill prisoners for fear that the same treatment would be accorded to their own men.

⁷⁴ Slim, ‘Why protect civilians? Innocence, immunity and enmity in war’, in *International Affairs* Vol 79 No 3 (2003), 487.

⁷⁵ LeBlanc, ‘Victims of Convenience: How redefining combatant status endangers US soldiers’, in *Eyes on the ICC* Vol 4 No 1 (2007), 12.

⁷⁶ Jochnik/ Normand, ‘The Legitimation of Violence: A critical History of the Laws of War’, in *Harvard International Law Journal* Vol 35, No 1 (1994), 61; Watkin, ‘Warriors without Rights? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy’, in *Harvard School of Public Health-Program on Humanitarian Policy and Conflict Research* (2005), 12.

⁷⁷ Gill, ‘Chivalry: A Principle of the Law of Armed Conflict?’, in Matthee/ Toebes/ Brus (eds), *Armed Conflict and International Law: In Search of the Human Face Liber Amicorum in Memory of Avril McDonald*, 35.

⁷⁸ Those were proclaimed by the local clergy and granted non-combatants immunity from violence. The first protected persons were peasants and the clergy, but over time protection was expanded to cover children and women as well as merchants and their goods. Moreover, a prohibition to invade churches was common. See Slim, ‘Why protect civilians? Innocence, immunity and enmity in war’, in *International Affairs* Vol 79 No 3 (2003), 493.

⁷⁹ This encompassed respect for holy places including a right to refuge or asylum in churches as well as a temporary suspension of hostilities for proscribed days. O’Connell in Fleck, *The Handbook of International Humanitarian Law*³, 18.

⁸⁰ Friedman, *The Law of War – A Documentary History*, Vol 1, 9.

⁸¹ Stacey, ‘The Age of Chivalry’, in Howard/Andreopoulos/Shulman (eds), *The Laws of War – Constraints on Warfare in the Western World*, 29ff with further references.

⁸² Parker, ‘Early Modern Europe’, in Howard/Andreopoulos/Shulman (eds), *The Laws of War – Constraints on Warfare in the Western World*, 42.