Just and Unjust Warriors

The Moral and Legal Status of Soldiers

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OXFORD
UNIVERSITY PRESS

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Great Clarendon Street, Oxford OX2 6DP
Oxford University Press is a department of the University of Oxford.
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in the UK and in certain other countries
Published in the United States
by Oxford University Press Inc., New York

First published 2008

British Library Cataloguing in Publication Data
Data available
Library of Congress Cataloging-in-Publication Data
Data available
Typeset by SPI Publisher Services, Pondicherry, India
Printed in Great Britain
on acid-free paper by
Biddles Ltd., King's Lynn, Norfolk
ISBN 978–0–19–923312–0
1 3 5 7 9 10 8 6 4 2

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The Principle of Equal Application of the Laws of War[1]

Adam Roberts

The principle that the rules relating to the conduct of armed conflict should apply equally to all belligerents in an armed conflict, regardless of its causes and the issues at stake in it, is always under contestation. This principle comes under particular stress when wars are fought on the basis of highly moralistic rhetoric. In many contemporary wars the claim is made—sometimes on both sides—that the conflict is not about the pursuit of interest or of limited goals, but should be seen as a struggle of world-historical importance; as a war between right and wrong; as a fight against adversaries who violate both the law about resort to force and the law about the conduct of war; or as having humanitarian or transformative purposes so fundamental that they may on occasion take priority even over foundational rules of international law such as the non-intervention principle. Furthermore, many military operations have explicit backing from the UN Security Council, thus indicating that they represent the will of the international community and therefore perhaps that they are on a superior moral and legal plane to that of their adversaries. Often the even higher authority of the supreme deity has been asserted. Against this background, it is not surprising that the principle that the laws of war apply equally to all parties in a conflict should be under continuous and intense pressure.

This is a brief historical-cum-legal survey of what may be termed the 'principle of equal application'—that is, the principle that the laws of war apply equally to all belligerent parties in an international armed conflict, irrespective of the question of how the war began or the relative justice of the causes involved.[2] As drawn up in successive waves of negotiation, the laws of war (otherwise called *jus in bello*,

[1] This is a product of research under the auspices of the Oxford Leverhulme Research Programme on 'The Changing Character of War'. For comments on successive drafts I am grateful to participants in the workshop and also to Dr Hans-Peter Gasser, former Senior Legal Adviser to the International Committee of the Red Cross.

[2] The term 'principle of equal application' and variants thereto is used here because it seems most consistent with the intent of the 'scope of application' provisions of the Geneva Conventions and other treaties on the laws of war. Some have used the phrase 'symmetry thesis' to refer to this principle. I have not followed this usage. This is for two reasons. First, because what is at stake is an established legal principle, not a mere thesis or proposition. Second, because the reference to 'symmetry' is misleading:

law of armed conflict, and international humanitarian law) have been intended to apply equally to the various belligerents in a conflict—as their terms make clear.[3] This survey is a defence of this principle, which remains morally persuasive, attractive in its simplicity, and the strongest practical basis that exists, or is likely to exist, for implementing the provisions of the law and maintaining some elements of moderation in war.

Any defence of the 'equal application' principle is necessarily also a critique of its opposite—which can be called the 'unequal application' proposition—that the rights and obligations of combatants under the laws of war should apply unequally to opposing sides in a war, depending on which side is deemed to have the more justified or righteous cause. This proposition can be put more simply, that combatants justified under the *jus ad bellum* should have wider *jus in bello* rights than unjustified combatants; or even that they are 'innocent soldiers' who have done nothing wrong and should thus not be the legitimate target of attack. There are, potentially, two implications of this 'unequal application' proposition: (*a*) that the laws of war should be revised to make explicit allowance for different rules applying to the different sides in a conflict; or (*b*) that the laws should remain the same, but their mode of application should be varied in particular cases. Either way, the 'unequal application' proposition is superficially attractive but it is based on weak reasoning and is dangerous in its potential effects.

Another proposition, which critiques the principle of 'equal application' from a different angle, is that many soldiers in a conflict, even perhaps some or all of those on the 'aggressor' side, may be individually so innocent of blame that they should not be legitimate targets. In this view, the laws of war, by appearing to permit attacks on the soldiers of a belligerent state, can be morally questionable, at least as regards certain conflicts, or certain parties in conflicts. The problem of the 'innocent soldier' is indeed serious. However, as is indicated below, it is not a problem to which existing law and practice are blind. Moreover, it is questionable whether the problem of the innocent soldier could ever be usefully addressed either by unequal application of the laws of war or by viewing the laws of war as an obstacle rather than a solution because of their apparent tolerance of attacks on soldiers.

Sometimes, but by no means always, supporters of the 'unequal application' proposition and its variants base their viewpoint on one or more misleading assumptions about the laws of war—assumptions which have in common that they tend to exaggerate the role and influence of the laws of war. Three of these assumptions need to be addressed briefly here in order to clear the way for exploration of more substantive issues.

the principle of equal application is not based on a general assumption that there is moral or other symmetry between the parties to a conflict.

[3] For details of the treaty provisions providing for equal application, see Section 12.1. All laws-of-war treaties mentioned in this survey may be found in Roberts, Adam and Guelff, Richard (eds.), *Documents on the Laws of War*, 3rd edn. (Oxford: Oxford University Press, 2000).

The *first* misleading assumption is that this body of law grants belligerents certain 'rights', including the right to shoot at the soldiers of an opposing army—with the implication, therefore, that the law can expand or withdraw that right in particular cases. It would be more accurate, both historically and legally, to say that the law *recognizes* certain rights of belligerents, or even that it *suffers* them to take certain actions: it is not the source of such rights. Essentially, the laws of war are not a general regime that governs the whole of war in all its aspects: rather, they are a modest and limited set of rules that establish certain limitations in war. Indeed, a large part of the rules relates, not to the conduct of armed conflict itself, but rather to the treatment of those persons (prisoners, sick and wounded, and inhabitants of occupied territory) who are in the hands of the adversary as a consequence of armed conflict. In other words, the role of law in war is not to constitute 'the rules of the game', but rather to provide a modest body of rules applicable to certain aspects and consequences of war. Seen in this light, it is hard to see how the law could be a basis for a set of ad hoc variations expanding or withdrawing something so intrinsic to war as the right to attack the armed forces of an adversary.

The *second* misleading assumption is that the laws of war amount for the most part to a systematic constraint on the effective conduct of operations—and one that may make a successful outcome more difficult for a belligerent applying them. In this view, relaxing the application of certain rules by the side deemed to be more justified, or granting that side more *jus in bello* privileges, might help that side to achieve a successful outcome. This is an oversimplification of a much more complex reality. The laws of war can properly be seen as providing a set of rules that, while seeking to minimize various side effects of war, are compatible with and may positively assist the effective and professional conduct of operations. By contrast, systematic violations of the law often contribute to failure, especially if they have the effect of assisting coalition-building against the offending state. In short, the view of law as hampering effective action is itself part of the problem.

The *third* misleading assumption sometimes encountered is that the equal application of the laws of war to all belligerents is based on the premise that there is 'moral equality on the battlefield'. The implication of this is that, since it is inappropriate in many cases to view the belligerents as having any kind of moral equality, the equal application of the laws of war is problematic or even plain wrong. However, the laws of war are not dependent on a notion of moral equality between belligerents. On the contrary, the laws of war are compatible with the idea that in any given war there may be very strong reasons for viewing one party as preferable to the other, including in moral terms. It is natural that such reasons should inform not just the preferences of individuals but also the policies of certain states and international bodies. There may be international war crimes investigations into the conduct of belligerent parties (whether conducted by the International Criminal Court, an ad hoc tribunal established by the UN Security Council, or by a state or alliance) that conclude by being more critical of one side than the other. There may be Security Council condemnation of the acts of one

party. For example, in respect of the war in Bosnia in 1992–5 the UN Security Council took certain actions which plainly inclined towards favouring one side in the war, yet at the same time it upheld the principle of equal application of the laws of war.[4] While this basic approach to the war in Bosnia was extremely problematic, it showed that equal application of the laws of war is not the same thing as moral equality on the battlefield. This said, there is one striking feature of most such cases in which a moral distinction has been drawn between belligerent parties: the main basis for international bodies to make such a moral distinction has been violations of the *jus in bello* rather than of the *jus ad bellum*.

In this survey, there are only brief references to conflicts within states (i.e. civil wars), and to terrorism. These two phenomena have always raised difficult challenges in relation to application generally—let alone 'equal application'. In both civil wars and counter-terrorist campaigns there is, typically, a legitimate question about whether the law relating to international armed conflict is formally applicable. Governments are generally reluctant to recognize that their adversaries have a formal status as a party to the conflict; and in particular that they can be entitled to full prisoner of war status. Yet in many cases, especially when civil wars become internationalized, the case for application of the laws of war may become strong over time, and may be urged by international bodies including the UN Security Council. Even in cases where full application of the laws of war is rejected—as in the US policy in certain aspects of the 'war on terror'—there may be strong arguments for applying particular provisions of the law such as common Article 3 of the 1949 Geneva Conventions. This was the conclusion of the US Supreme Court in June 2006 in the case of *Hamdan* v. *Rumsfeld*.[5]

The main focus here is on international armed conflicts of various types, and on two central questions. Should one particular form of distinction, based on the justice or legal status of the cause of one side in a conflict, affect the legal protections and duties of belligerents? And do the laws of war have a response to the problem of the 'innocent soldier'? I will approach these questions by breaking them up into eight topics:

1. Treaty basis of the rule that the laws of war apply equally to all belligerents.
2. Four historical reasons for this rule.
3. The principle of reciprocity as a challenge to equal application.
4. Distinctions between different categories of people in the laws of war.
5. Certain arguments for varying the laws of war in favour of particular parties.

[4] The application of the laws of war in the war in Bosnia and Herzegovina in 1992–5 is discussed further under the headings 'UN-authorized forces in enforcement actions' and 'UN peacekeeping forces'.

[5] In its judgment on 29 June 2006 in the case of *Hamdan* v. *Rumsfeld*, which concerned the status and treatment of detainees suspected of involvement in terrorism, the US Supreme Court placed emphasis on both common Article 3 of the 1949 Geneva Conventions, and Article 75 of 1977 Geneva Protocol I. This confirmed a more general tendency to view the provisions of common Article 3 as applicable in a wider range of circumstances than simply civil war within a state (which is what a strict reading of that article's 'scope of application' wording might suggest).

6. The difficulty of agreeing which side is more justified in resort to force.
7. The 'innocent soldier' in the law and conduct of war.
8. Conclusion: why the principle of 'equal application' should be respected.

12.1. TREATY BASIS OF THE RULE THAT THE LAWS OF WAR APPLY EQUALLY TO ALL BELLIGERENTS

It is a cardinal principle of the *jus in bello* that it applies in cases of armed conflict whether or not the inception of the conflict is lawful under the *jus ad bellum*, and applies equally to all belligerents. This principle has been recognized for at least 150 years as a basis of the laws of war, and it finds reflection in numerous treaty provisions. In the four 1949 Geneva Conventions, which constitute the central pillars of the whole contemporary edifice of the laws of war, there is no hint that the nature of the cause of a war, or the justness of any party, could affect the application of the law. Common Article 1 states, in full: 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.'[6] Common Article 2, in spelling out the circumstances of implementation in detail, specifies that the law applies irrespective of whether there is a declaration of war, and even if the state of war is not recognized by one of the parties to a conflict.[7] The Geneva Conventions were negotiated and agreed just a few years after the Allies had fought what was widely held to have been a justified war against a particularly violent and dangerous political system—yet there was no attempt to claim that those who fight in the nobler cause should have privileged application of the rules.

The principle of equal application of the laws of war to all parties to a particular conflict is stated even more explicitly in the 1977 Geneva Protocol I, additional to the four 1949 Geneva Conventions. Its preamble reaffirms 'that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.'[8] Article 1 repeats the 1949 undertaking 'to respect and to ensure respect for the present Convention in all circumstances', and goes on to specify that the situations to which the Protocol applies 'include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in

[6] For an authoritative account of the origins and meanings of common Article 1 of the 1949 Geneva Conventions, see Kalshoven, Frits, 'The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit', *Yearbook of International Humanitarian Law*, vol. 2, 1999 (The Hague: T.M.C. Asser Press, 2000), 3–61.

[7] 1949 Geneva Conventions, common Article 2.

[8] 1977 Geneva Protocol I Additional to the 1949 Geneva Conventions, preamble.

the exercise of their right of self-determination . . .'[9] Many were worried about this formula which seems to favour one side in certain types of war, but the view that one side might have the more just cause was not translated into any argument that the law should apply unequally. On the contrary, the Protocol spelt out in detail how an entity such as a national liberation movement should take the appropriate steps to apply the Conventions and the Protocol, with the same rights and obligations as any other party.[10]

To urge the importance of the principle of equal application of the *jus in bello*, irrespective of considerations of *jus ad bellum*, does not mean that each of these branches of law is in a completely separate and watertight compartment. There are several ways in which the two bodies of law do in practice bear an important relationship to each other. The most important such connection is that the commission of war crimes and crimes against humanity by one party is sometimes given as a stated ground for intervention in a conflict by other parties or by international organizations. On a number of occasions the UN Security Council has followed expressions of concern about violations of international humanitarian law in a particular country with authorizations of forcible interventions. However, as is indicated below, it has not used the fact that forces were acting under UN authority as a reason for proposing unequal application of the law.

While the principle of equal application is based round the idea that all belligerents have a common starting point in such core texts as the 1907 Hague Regulations and the four 1949 Geneva Conventions, this proposition that there is a common core should not be oversimplified. States are not bound quite equally by the laws of war, for two main reasons. First, with the exception of the four 1949 Geneva Conventions, which have formal adherence by virtually all states, the major treaties in the field do not have universal participation; and second, some states interpret their treaty obligations in particular ways, for example, through reservations or declarations made at the time of formal acts of adherence to the treaty concerned.

12.2. FOUR HISTORICAL REASONS FOR EQUAL APPLICATION OF THE LAWS OF WAR

Why has the principle of equal application of the laws of war, irrespective of the causes of the conflict, come to be so widely accepted? It is the product of hard-won experience over at least half a millennium, of four main kinds: (*a*) between the sixteenth and the eighteenth centuries the principle of equal application emerged as part of the underlying philosophy of the laws of war for the good reason that other ideas were more problematic; (*b*) in the nineteenth century it became

[9] 1977 Geneva Protocol I Additional to the 1949 Geneva Conventions, Article 1(1) and 1(4).
[10] 1977 Geneva Protocol I, Article 96(3).

part of a strong and sound tradition of seeking a uniform set of rules in the form of treaties; (*c*) in the twentieth and twenty-first centuries, the principle has become deeply entrenched in court decisions, state practice, and the opinions of lawyers; and (*d*) the principle has been reinforced by the practical experience of the International Committee of the Red Cross. In all these developments, one reason for acceptance of the principle was the perennial difficulty of determining in the course of the war which party should be deemed to be more justified in its resort to force—a matter touched on later in this survey.

12.2.1. Underlying Philosophy of the Laws of War

The *first* reason for emphasis on equal application arises from the underlying philosophy of the laws of war as it emerged between the sixteenth and the eighteenth centuries. There is a long and distinguished tradition of thought which views the laws of war as applicable to both sides in a war. Alberico Gentili (1552–1608) and Hugo Grotius (1583–1645) were among those who played key parts in the emergence of this view. This was despite the fact that both of them believed in the distinction between lawful and unlawful resort to war, and in the deep importance of just war for the maintenance of international society. In particular, Grotius's emphasis on *temperamenta belli*—essentially a moral and prudential plea for moderation in war—put the focus on humane limitations regarding the means by which wars were waged.[11]

The separation of *jus in bello* from *jus ad bellum* was rendered explicit in the writings of Emmerich de Vattel (1714–67), with his insistence that 'regular war, as to its effects, is to be accounted just on both sides', and that 'whatever is permitted to the one in virtue of the state of war, is also permitted to the other.'[12] The position he thus expounded was by no means free of flaws. While he recognized the risk that states might transgress the bounds of 'the common laws of war', he did not specify the effect of such conduct on the equal application of the law. His whole theory was based on the idea of 'natural principles of the law of nations', which he deduced 'from nature itself'.[13] His ideas were open to challenge and his influence was limited. Yet the explicit emphasis on the equal application of the laws of war was important, and chimed with other developments of the period.

At about the same time Jean-Jacques Rousseau developed the idea, based more on political philosophy than on strict law, that all combatants in war are deserving

[11] On the ambiguities of the Grotian tradition of thought about limitations in war and their relation to *jus ad bellum* issues, see Bull, Hedley, Kingsbury, Benedict and Roberts, Adam (eds.), *Hugo Grotius and International Relations* (Oxford: Clarendon Press, 1990), 15–26 (Kingsbury and Roberts), and 194–207 (Draper).

[12] Emmerich de Vattel, *Le droit des gens* (1758), posthumous edition, 1773. The edition cited here is *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, ed. Joseph Chitty (London: Sweet, Stevens & Maxwell, 1834), 382–3. The citation is from book III, chap. 12, §§ 190–1.

[13] Vattel, *Law of Nations*, 382–3. Book III, chap. 12, §§ 191–2.

of such protection as can be provided. In his view, combatants in war are essentially innocent. Rousseau was a consistent advocate of limitations in war—in particular through doctrines that would prohibit the killing of prisoners and the enslavement of conquered peoples. His view of war was influenced by the fact that—at least by comparison with events in the twentieth and twenty-first centuries—the eighteenth century was a time of limited wars, fought with limited means for limited objectives. It was against this background that he developed a view of war that had profound and enduring implications for the application of the laws of war:

> War is then not a relationship between one man and another, but a relationship between one State and another, in which individuals are enemies only by accident, not as men, nor even as citizens, but as soldiers; not as members of the fatherland, but as its defenders. Finally, any State can only have other States, and not men, as enemies, inasmuch as it is impossible to fix a true relation between things of different natures....
>
> Since the aim of war is the destruction of the enemy State, one has the right to kill its defenders as long as they bear arms; but as soon as they lay down their arms and surrender they cease to be enemies or the enemy's instruments, and become simply men once more, and one no longer has a right over their life. It is sometimes possible to kill the State without killing a single one of its members; and war confers no right that is not necessary to its end. These principles are not those of Grotius; they are not founded on the authority of poets, but follow from the nature of things, and are founded on reason.[14]

Rousseau's advocacy of restraint in war is open to some objections. He did not succeed completely in reconciling his view of soldiers as simply 'enemies by accident' with his advocacy elsewhere of the militia system in which each citizen is pledged to defend the fatherland. Also, his attacks on Grotius, implying that he was too tolerant of whoever wielded power, were not always fair. Indeed, Rousseau's emphasis on restraint in war was in more of a Grotian tradition than he liked to admit. Yet his emphasis on the equal application of the rules to all belligerents was one of his most important legacies. It is not by accident that the International Committee of the Red Cross was to be founded (in 1863) in his beloved Geneva, nor that it has frequently drawn on Rousseau's classic statement quoted above as a key foundational basis for the law that the Red Cross supports and the activities it undertakes.[15]

12.2.2. The Pursuit of a Uniform Set of Rules

The second reason for equal application of the laws of war is that the modern laws of war, as they have emerged in treaty form since the mid-nineteenth century,

[14] Jean-Jacques Rousseau, *Du Contrat Social; ou Principes du Droit Politique* (1762), paragraph I.iv, in Victor Gourevitch (ed. and trans.), *Rousseau: The Social Contract and other Later Political Writings* (Cambridge: Cambridge University Press, 1997), 46–7.

[15] See e.g. Bugnion, François, *The International Committee of the Red Cross and the Protection of War Victims* (Oxford: Macmillan Education, 2003), 125 and 717.

have been based on recognition of the need for a uniform and universally accepted set of rules. Having different rules applying to, or applied by, different belligerent parties has long been seen as a recipe for chaos. In the Crimean War (1853–6), different European states followed different rules about the capture of property at sea. There were inconsistent practices between allies, causing much confusion and inefficiency, especially in their relations with states that were neutral in this conflict. After the war, as part of the peace agreement concluded at Paris, the parties to the peace negotiations agreed the terms of the 1856 Paris Declaration on Maritime Law, which begins memorably:

> Considering:
>
> That maritime law, in time of war, has long been the subject of deplorable disputes;
>
> That the uncertainty of the law and of the duties in such a matter, gives rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties, and even conflicts;
>
> That it is consequently advantageous to establish a uniform doctrine on so important a point; ...[16]

The Paris Declaration has special significance. It appears to be the first ever multilateral convention that was open to accession by all states. In other words, it is the first example of what is now seen as the standard form in which international law finds expression. It may seem paradoxical that the type of instrument which is the very basis of modern international law emerged in the field of the laws of war. However, it was no accident. War is pre-eminently a field in which certain rules of conduct are needed—and they have to be available before the outbreak of hostilities, as it is so inherently difficult to create new rules once war has broken out. The Paris Declaration was the outcome of bitter experience leading to a proper desire for uniform application of rules—not just between adversaries, but also among allies, and between the belligerents and neutrals.

This pressure to develop rules that are uniform for all belligerents is a continuous thread running through the subsequent development of the laws of war. The four 1949 Geneva Conventions provide striking evidence—both in the manner of their original negotiation and in the subsequent adherence by states. The negotiations at Geneva in April–August 1949, convened by the Swiss government, were attended by the representatives of sixty-four states: this was five more states than the membership of the United Nations at the time.[17] Today, in 2008, there are 194 states parties to the 1949 Geneva Conventions: two more than the current membership of the United Nations. These figures are testimony to the success of

[16] 1856 Paris Declaration on Maritime Law, preamble.

[17] Official lists showing the growth in UN membership show that as from May 1949 there were 59 member states of the UN. Information on member states of the UN from http://www.un.org/members, accessed 9 June 2007.

the effort to secure at least formal adherence to the laws of war on the basis of their uniform application.[18]

The laws of war are the outcome of long-drawn-out processes of negotiation. While these rules do often have to be interpreted and applied with some degree of flexibility in particular wars, it is implausible to suppose that belligerents could agree on variations that were precisely intended to favour one side. It is equally hard to imagine any general negotiation for the laws of war succeeding in producing an agreed and widely accepted treaty based on the unequal application of the law depending on who was deemed to be more justified in a particular conflict under the *jus ad bellum*. The gains from the pursuit of uniform rules since the mid-nineteenth century would be at risk.

12.2.3. Court Decisions, State Practice, and the Opinions of Lawyers

Although in the course of the twentieth century the idea of the illegality of the aggressive use of force gained strength, this did not lead to a weakening of the principle of equal application of the *jus in bello* irrespective of which side had responsibility, or even legal culpability, for the outbreak of the war. The concept of equal application has become deeply entrenched in court decisions, state practice, and the opinions of lawyers—to all of which only the briefest reference can be offered here. In 1946, the International Military Tribunal at Nuremberg, in rejecting certain excuses for non-application of the law, implicitly accepted the equal application principle.[19] Subsequently, the US military tribunals, also at Nuremberg, explicitly accepted the principle. This was clearest in the *Hostages* case (*USA* v. *Wilhelm List et al.*), in which US Military Tribunal V, citing the international lawyer L. Oppenheim as its authority, ruled on 19 February 1948:

> Whatever may be the cause of a war that has broken out, and whether or no the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other, and as between the belligerents and neutral states. This is so, even if the declaration of war is *ipso facto* a violation of international law...[20]

A significant body of subsequent state practice and legal writing attests to the continued salience of the principle of equal application of the laws of war.[21]

[18] Information on states parties to the 1949 Geneva Conventions from http://www.icrc.org/ihl, accessed 9 June 2007.

[19] On the IMT at Nuremberg, see section on reciprocity below, text at n. 26.

[20] *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, October 1946 – April 1949*, 15 vols. (Washington, DC: Government Printing Office, 1949–53), vol. 11, 1247.

[21] See e.g. the clear enunciation of 'universal application of the law of armed conflict' in UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), 34; and the excellent discussion of 'equal application of the *jus in bello*' by the international lawyer

12.2.4. ICRC's Experience

The experience of the Red Cross movement has reinforced the organization's sense of the crucial importance of the impartial application of the law. This is particularly true of the movement's main body concerned with taking action in wars—the International Committee of the Red Cross, founded in 1863 as 'the Geneva Committee'. Throughout the ICRC's existence, its role as an impartial humanitarian organization has been spelt out in laws-of-war treaties, especially in the 1949 Geneva Conventions and in 1977 Geneva Protocol I.

The International Conference of the Red Cross and Red Crescent, the main deliberative body of the Red Cross movement, has repeatedly passed resolutions favouring equal application of international humanitarian law. For example, the 25th International Conference, held in Geneva in 1986, strongly reiterated the traditional Red Cross principles of neutrality as between belligerents, and of impartiality in the relief of suffering, without discrimination based on nationality, race, religious beliefs, class, or political opinions. It also passed a resolution stating, *inter alia*, that the International Conference:

1. regrets that disputes about the legal classification of conflicts too often hinder the implementation of international humanitarian law and the ICRC's work,
2. appeals to all Parties involved in armed conflicts to fully respect their obligations under international humanitarian law and to enable the ICRC to carry out its humanitarian activities.[22]

In its customary law study, published in 2005, the ICRC appears simply to take it for granted that the rules must be applied equally. It indicates that this is an absolute obligation, not one dependent on reciprocity between the parties. Its distillation of customary international law regarding compliance is: 'Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control.'[23] In addition, as the ICRC study notes, UN Security Council and General Assembly resolutions on a wide range of conflicts have called on all the parties to implement international humanitarian law.[24]

For the ICRC, the principle of impartiality, which is the essential basis of its capacity to work in the field, is intimately linked to the principle of equal

Yoram Dinstein in his *War, Aggression and Self-Defence*, 4th edn. (Cambridge: Cambridge University Press, 2005), 156–63.

[22] *Handbook of the International Red Cross and Red Crescent Movement*, 13th edn. (Geneva: International Committee of the Red Cross, and International Federation of Red Cross and Red Crescent Societies, 1994), 752.

[23] Rule 139 in International Committee of the Red Cross, *Customary International Humanitarian Law*, vol. I, *Rules* (Cambridge: Cambridge University Press, 2005), 495.

[24] A useful listing of such UN resolutions is in ICRC, *Customary International Humanitarian Law*, vol. II, *Practice*, part 2, 3168–72.

application.[25] Likewise, the principle of humanity means that it would make no sense to make the application of the rules dependent on political criteria. Since the ICRC not only works at the rough end, dealing with the practicalities of humanitarian relief in war, but also has a significant role in the development and implementation of the *jus in bello*, its strongly held view favouring equal application of the laws of war merits respect. However, the ICRC's emphasis on equal application is so absolute that it sometimes appears to neglect the principle of reciprocity, which cannot be rejected entirely.

12.3. THE PRINCIPLE OF RECIPROCITY AS A CHALLENGE TO EQUAL APPLICATION

In the long history of the laws of war, there have always been some elements of the idea of reciprocity—that is, that compliance by one party is in some respects dependent on compliance by the other party. Thus, by implication, if one side does not comply with the *jus in bello*, then its adversary may be entitled to depart from the rules, possibly leading to a situation which might be one of 'equal non-application'. Elements of the principle and practice of reciprocity can be found in the following:

- the provision, found in numerous treaties of the laws of war, that the rules apply to all cases of armed conflict between the parties to the treaty concerned.
- common Article 2 of the 1949 Geneva Conventions, especially its provision that the Convention will also govern relations with a state that is not a party to it provided that the state concerned 'accepts and applies the provisions thereof'.
- the reservation made by many states party to the 1925 Geneva Protocol on Gas and Bacteriological Warfare to the effect that the Protocol was binding only in relation to other states bound by it, and would cease to be binding if an enemy or its allies failed to respect the prohibitions embodied in the Protocol.

The idea that the laws of war are applicable only in circumstances where there is reciprocity has evolved, and been duly modified. Many developments have contributed to a recognition that the obligation to respect the law does not depend completely on reciprocity. Three such developments derive directly from the experience of warfare in the twentieth century. (*a*) The 1946 Judgment of the International Military Tribunal at Nuremberg stated that the laws of war, provided that the rules in question were generally accepted as 'being declaratory of the laws and customs of war', had to be implemented even if some of the belligerents in

[25] Pejic, Jelena, 'Non-Discrimination and Armed Conflict', *International Review of the Red Cross*, Geneva, no. 841 (March 2001), 183–94.

a war were not parties to a particular treaty.[26] (*b*) In certain wars in which one side conspicuously violated basic provisions of the laws of war there has been no suggestion that this would have entitled the other side to abandon its policy of adherence to the law. For example, in the 1991 Gulf War a number of conspicuous violations by Iraq, in a range of matters including treatment of prisoners and wanton destruction resulting in pollution of the air above Kuwait and the waters of the Gulf, did not lead to demands that the US-led coalition should abandon all adherence to the law. (*c*) In certain conflicts in which the forces of states have been used against non-state entities using terrorist methods, there has been a recognition on the part of the state that certain rules based on the laws of war should be applied, even if the circumstances were different from those of normal interstate war, and even if the adversaries did not qualify for prisoner-of-war status. The UK role in Northern Ireland after the disasters of 1971–2 is a case in point.

All three of these developments suggest a retreat from certain strict notions of reciprocity. They indicate that the laws of war can be viewed as a key part of the duties of states and the professionalism of soldiers, and should be applied in a wider range of circumstances than was originally envisaged in the treaties. These cases do not suggest the existence of overwhelming pressure to apply the law selectively, depending on which side is considered morally or legally superior. On the contrary, all three modifications to the pure idea of reciprocity suggest the importance of applying the laws of war without exception or modification, even if the adversary is deficient in the application of the law.

In its customary law study, the ICRC concluded (citing much practice in support) that 'the obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity.'[27] However, there is some ground for doubt about this proposition, especially as the ICRC study failed to discuss the provisions of common Article 2 of the 1949 Geneva Conventions: as noted above, these suggest an element of reciprocity in the implementation of the conventions in wartime. Thus the principle of reciprocity may still have some residual value. If it were to be accepted as one basis for applying the laws of war, there is no serious suggestion in any legal writings that it could be accompanied by unequal application depending on an evaluation of the cause of each side under the *jus ad bellum*: indeed, reciprocity and unequal application do not fit together at all. If, alternatively, the principle of reciprocity is as dead as the ICRC suggests, it is clear that what replaces it is a strong obligation on states to observe the same body of rules in all armed conflicts or occupations in which they are engaged, irrespective of the statements or actions of adversaries. Either way, there is no space for the idea of 'unequal application'.

[26] *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany* (London: HMSO, 23 vols., 1946–51), Part 22, 467.

[27] Rule 140 in ICRC, *Customary International Humanitarian Law*, vol. I, *Rules*, 498–9. In the account of this and the preceding rule there is no exploration of reciprocity in observance of the conventions.

12.4. DISTINCTIONS BETWEEN DIFFERENT CATEGORIES OF PEOPLE IN THE LAWS OF WAR

The laws of war (i.e. *jus in bello*) as they have evolved over centuries do not draw a clear distinction between belligerents based on the presumed morality of their respective causes. However, it may be useful to show that the laws of war do encompass numerous distinctions between different classes of people based on the nature of their relationship to the armed conflict. For example, particular legal protections and duties apply to each of the following distinct categories of people.

- Combatants entitled to prisoner of war status if captured
- Civilians in occupied territory
- Civilians in or near areas of combat
- Medical personnel
- Representatives of the ICRC
- Unlawful (or unprivileged) combatants
- Persons suspected of war crimes (i.e. crimes under *jus in bello*)
- Nationals of a state which is not at war with either of the belligerents
- Personnel in UN operations other than enforcement operations
- UN forces when they are involved in armed hostilities

This tendency to identify different categories of individuals is fundamentally different from the approach of human rights law, which seeks to identify rights that pertain to all human beings, generally without distinctions being drawn. The laws-of-war emphasis on distinct categories is essential for the application of legal rules in warfare, for reasons that are obvious. For example, soldiers on active duty simply cannot have the same immunities as, say, Red Cross workers or civilians.

This capacity of the law to distinguish between different categories of people might be thought to suggest a capacity to distinguish between people on the basis of their status under the *jus ad bellum*. This has never really worked—despite the fact that there are many reasons, explored in the next section, why such variations in application of the law might be thought desirable.

12.5. CERTAIN ARGUMENTS FOR VARYING THE LAW IN FAVOUR OF PARTICULAR PARTIES

Naturally, there are often pressures to accord particular privileges to one party or another under the laws of war. There is even some practice that amounts to a claim for special rights under the law. Possible arguments for according such privileges in an international armed conflict include:

- A state or alliance which is acting in self-defence, following an initial act of aggression by the adversary should be entitled to take measures against that adversary that would not be lawful in other circumstances.
- Unequal combats, in which a weaker party faces a larger and more powerful adversary, often involve pressures to violate the rules, and sometimes give rise to claims that one side should be entitled to certain exemptions, or is not bound at all by the *jus in bello*.
- A state against which violations of the laws of war are committed should be entitled to engage in belligerent reprisals.
- Major powers, especially those with a world-wide series of military commitments, can claim that equal application of certain rules, and submission to supranational judicial procedures, would be detrimental to their status and to the efficient execution of their international roles.
- A UN-authorized military force, conducting an enforcement action, might be proclaimed to be immune from all hostile action, so any attacks on it would constitute a war crime.
- UN peacekeeping operations have legal protection from attack, and might thus appear to be a case where the laws of war do already apply unequally.

All these arguments are serious, and illustrate only too clearly the range of pressures for unequal application of the law. They are considered in turn.

12.5.1. State or Alliance Fighting a War in Self-Defence

The argument that an initial act of aggression is a crime such as to put one side in a war in a special legal category as regards application of *jus in bello* is just one example of the type of claim that can be made in support of the 'unequal application' approach. In the conduct of warfare, it is often possible to detect an implicit claim that the adversary's violations (including in the original decision to resort to force) provide an excuse for extreme acts by one's own side that might otherwise be doubtful under the *jus in bello*. The long history of such claims attests to the attraction of the idea of unequal application of the laws of war, but it also suggests that there are many dangers in such an approach.

A possible example of a claim to special rights in war on account of (among other things) the opponent's initiation of war is in this statement made by President Truman in a broadcast to the American people three days after the bombing of Hiroshima on 6 August 1945:

> Having found the bomb we have used it. We have used it against those who attacked us without warning at Pearl Harbor, against those who have starved and beaten and executed American prisoners of war, against those who have abandoned all pretense of obeying

international laws of warfare. We have used it in order to shorten the agony of war, in order to save the lives of thousands and thousands of young Americans.

And we shall continue to use it until we completely destroy Japan's power to make war. Only a Japanese surrender will stop us.[28]

Japan in fact surrendered five days later, on 14 August 1945. Whatever one thinks of the US atomic bombing of Hiroshima and Nagasaki, or of President Truman's statements in justification, the case does suggest that there is already more than enough of a tendency to use the circumstances of how a conflict broke out as a justification for extreme acts in response. There has to be a question as to whether it is desirable to give formal legitimacy to that tendency.

Another version of the argument that the defensive side should be privileged is the idea that a party fighting a defensive war against invaders on its own territory should be allowed to engage in actions that might otherwise be prohibited. To some extent, there is already provision for this in the laws of war; for example, the reference to the *levée en masse* in the 1907 Hague Regulations was particularly sought by small states that feared attack by more powerful ones. Other outcomes of such thinking have included the proposition, which finds reflection in 1977 Geneva Protocol I, that a party fighting defensively to oppose ongoing foreign control is entitled to hide among the population, being only required to put on uniforms or insignia immediately before engaging in acts of military resistance.

12.5.2. Unequal Combat

A closely related body of thought and practice arises from the unequal nature of many military contests. Inequality can assume many forms, only some of which give rise to specific claims for unequal application of the law.

One particular focus of concern is the type of armed conflict (which may be international or non-international) in which organized armed forces under governmental control are in combat against irregular forces that are lightly armed and have little or no commitment to the laws of war. Often such irregular forces show little interest in the law. Unequal combat of this kind puts a strain on the whole idea of application of the law, equal or otherwise. In particular, there are many reasons why the governmental forces concerned, especially if poorly trained and led, may be under severe pressures that lead to violations of the law.[29]

In such conflicts, there is sometimes a particular kind of unequal application, or rather abuse, of the law. Several states, and non-state bodies, have engaged in consistently unlawful operations such as hostage-taking against the more powerful adversary's nationals, co-location of military objects with civilian objects, use

[28] 'Radio Report to the American People on the Potsdam Conference', 9 August 1945. Text in *Public Papers of the Presidents of the United States: Harry S. Truman, 1945* (Washington, DC: GPO, 1961), 212. 9 August was the day of the Nagasaki bombing.

[29] See esp. Rogers, A. P. V., 'Unequal Combat and the Law of War', *Yearbook of International Humanitarian Law*, vol. 7, *2004* (The Hague: T.M.C. Asser Press, 2006), 3–34. See especially the list of reasons why things go wrong, at 33–4.

of human shields, use of suicide bombers disguised as civilians, indiscriminate attacks, use of proxy forces to engage in unlawful operations while denying all responsibility for their actions, and deliberate attacks on civilians. All such actions are violations of the laws of war. Such operations have been particularly prevalent in the period of the US military dominance since the end of the Cold War, and can be seen as a response to the US ability to fight war from the air with impunity and with a high degree of accuracy. In many cases, they are intended to lure the USA and its coalition partners into causing civilian damage and incurring international criticism: as such, they are part of what Charlie Dunlap of the US Air Force has called 'lawfare', or 'the strategy of using—or misusing—law as a substitute for traditional means to achieve an operational objective'.[30]

In pursuing an approach to operations which violates basic rules of the laws of war, many parties do not attempt to make specific arguments showing why they should be exempted from an otherwise valid body of law. Often they simply assert their absolute right to take such action as they see fit, or even claim authority from the supreme deity. However, in so far as legal arguments can be inferred from the public statements of such parties, they appear to be based on a mixture of *jus ad bellum* and *jus in bello* considerations. The particular claim that a virtuous cause under the *jus ad bellum* entitles belligerents to ignore aspects of the *jus in bello* is as disturbing here as it is in other instances.

In some unequal combats, modest and limited claims are made, or implied, that militarily weaker parties, because they cannot act in the same manner as their adversaries and cannot observe the law in the same way, are in some way exempted from certain obligations under the laws of war. Sometimes such claims are limited and specific to a tactical situation, and may be based on an underlying respect for the law. One example might be that a party lacking a safe rear area adjacent to its ongoing military operations, or even any permanent control over territory at all, might argue that it should be relieved of the obligation to keep prisoners of war in camps that are not exposed to the fire of the combat zone.

12.5.3. Belligerent Reprisals

One framework for something like an unequal application of the rules has proven very problematical. This is the institution of belligerent reprisals—that is, otherwise illegal acts of retaliation that may be carried out by one party to a conflict in response to illegal acts of warfare and intended to cause the enemy to comply with the law. In general, the history of reprisals in modern war does not inspire confidence in this particular departure from the strictly equal application of the laws

[30] Dunlap, Brig. Gen. Charles, 'Air and Information Operations: A Perspective on the Rise of "Lawfare" in Modern Conflicts', presentation prepared for the US Naval War College Conference on Current Issues in International Law and Military Operations, Newport RI, 25–7 June 2003. For a brief summary of his views on 'lawfare', see his chapter, 'Legal Issues in Coalition Warfare: A US Perspective', in Helm, Anthony M. (ed.), *The Law of War in the 21st Century: Weaponry and the Use of Force*, International Law Studies, vol. 82 (Newport, RI: US Naval War College, 2006), at 227–8.

of war: on the contrary, it suggests that such departures from strict application of the law are often open to misunderstanding and can quickly lead to escalation of hostilities and a general pattern of violations of the law.[31] (Truman's statement, cited above, about the use of the atomic bomb contains an element of the idea of reprisals, though the aim in that case was not Japanese compliance with *jus in bello*, but simply Japanese surrender.)

The chequered history of reprisals has led to progressive restrictions on the right of belligerents to engage in them. In particular, 1977 Geneva Protocol I contains important prohibitions on various types of reprisal. However, certain declarations and reservations made at ratification or accession of Protocol I indicate that some states are concerned to keep open the possibility of reprisals, especially if an adversary makes serious and deliberate attacks against civilians and civilian objects.[32] This concern may well be justified. However, the fact that the ancient institution of reprisals is not completely dead does not mean that there would be merit in introducing, through the idea of 'unequal application' of the laws of war, further possibilities of varying the application of the law on the ground of a claimed legal or moral distinction between adversaries.

12.5.4. Major Powers Question Particular Rules and Procedures

Major powers have often had doubts about the equal application of the laws of war. Sometimes, of course, they have sought to influence the development of the law in their favour—as evidenced, for example, by the natural interest of major powers in the inter-war years in prohibiting certain forms of submarine warfare that threatened their control of the sea.[33] However, if major powers do not succeed in shaping the law in ways compatible with their interests, they sometimes seek a degree of 'unequal application' either by choosing not to become parties to certain treaties that are perceived as problematic, or by rejecting international procedures for implementing the laws of war. It is sobering to note that China, India, Russia, and the USA are not parties to the 1997 Ottawa Convention on Anti-Personnel Mines, nor to the 1998 Rome Statute of the International Criminal Court. India and the USA are not parties to either of the 1977 Additional Protocols to the Geneva Conventions.

The USA is the best-known and most criticized of these cases of partial abstention from the current laws of war regime. The USA refused to ratify 1977 Geneva Protocol I because it was perceived (rightly or wrongly) as a 'terrorist's charter', or (slightly more plausibly) as privileging participants in national liberation

[31] For a critical view of reprisals, see Kalshoven, Frits, *Belligerent Reprisals* (Leyden: Sijthoff, 1971).

[32] The limitations on reprisals in 1977 Geneva Protocol I are mainly in Articles 51–56. Certain states, when indicating adherence to the treaty, made reservations and declarations to these articles. That of the UK (statement 'm' in Roberts and Guelff, *Documents on the Laws of War*, 3rd edn., 511) is notably explicit on this point.

[33] See e.g. the terms of the 1936 London Procès-Verbal on Submarine Warfare Against Merchant Ships.

struggles. It rejected the Ottawa landmine convention because it continued to see certain military utility in landmines, including those on the border between North and South Korea. It rejected the ICC Statute for a wide variety of reasons, including concern that members of the US forces, deployed in a wide range of situations globally, might be subjected to politically motivated investigations or prosecutions. At the same time as refusing ratification of these agreements, the USA indicated that it would observe those parts of them that it regarded as reflecting customary international law, or as acceptable as a matter of policy.

At the same time, the USA has developed an approach to the conduct of war which concentrates on weakening the enemy's government rather than its armed forces. This approach, which can be problematic vis-à-vis the laws of war, is discussed further below in the section on the 'innocent soldier' in the law and conduct of war.[34]

In addition, there is the familiar problem that the USA views the laws of war, including treaties to which the USA is a party, as of limited application in the 'war on terror', principally on the grounds that the terrorist movements which it is combating do not meet the criteria laid down in the laws of war for prisoner of war status. This is a special version of the 'unequal application' proposition according to which the cause represented by al-Qaeda is so deeply wrong that those deemed to be adherents of the movement should not benefit from the standard treatment for detainees and prisoners of war as outlined in the conventions on the laws of war.

The positions taken by the USA and other powers that seek in various ways to limit the full application of the law, or even to apply it unequally in a particular conflict, contain many distinct strands, some stronger and more durable than others. As regards the specific question of what light the US practice sheds on the 'unequal application' proposition, the answer has to be: it adds to the doubts. The two issues on which the USA has come closest to advocating 'unequal application' are in its attitude to detainees in the 'war on terror', and in its attitude to the International Criminal Court. In both of these matters, the US position is widely perceived internationally as essentially hypocritical, with the USA advocating standards and procedures for others that it does not follow consistently or rigorously itself.

12.5.5. UN-Authorized Forces in Enforcement Actions

The proposition that UN-authorized coalitions, charged with using force to achieve a specific objective of the international community, should have a privileged position in the laws of war is superficially attractive. If the UN Security Council wished to support this position, it could make the claim that under the UN Charter it has the powers to do so. Article 103 provides that states' obligations under the Charter shall prevail over their obligations under any other

[34] See below, 249–52.

international agreement. The Council is well aware of this, and certain of its resolutions have explicitly given precedence to the provisions of the resolution concerned over any international agreement or contract that member states had entered into.[35] This might seem to be a legal basis, and an authoritative procedure, for varying the application of the laws of war.

Yet in practice neither the Security Council nor major states leading coalitions under its authorization have sought to apply the laws of war unequally in ongoing armed conflicts. This could have been because of respect for the *jus cogens* status of such basic rules as those in the Geneva Conventions, or because of the more practical consideration that troop-contributing states saw no advantage in casting any doubt on the full application of the laws of war. Thus the general assumption has been that UN-authorized national armed forces should be bound by the laws of war in the same manner as their adversaries. Examples of explicit recognition of the principle of equal application include:

- *The US-led coalition in the Korean War, 1950–3*: In 1951, the US-led UN Command in Korea instructed all forces under it to observe the provisions of all four 1949 Geneva Conventions, even if participants had not yet ratified them.
- *The US-led forces in the 1991 Gulf War*: Statements from the US leadership of the coalition reflected the explicit assumption that the laws of war applied to coalition operations.
- *The US-led 'multinational force' in Iraq following the 2003 invasion*: SC Resolution 1546 of 8 June 2004 explicitly called on all forces in Iraq 'to act in accordance with international law, including obligations under international humanitarian law'.

While the principle of equal application is clear from such cases, there have been some variations. Thus in respect of the occupation of Iraq, a Security Council resolution of May 2003 proclaimed certain goals for the occupation that went beyond the confines of the 1907 Hague Regulations and the 1949 Geneva Civilians Convention.[36] This variation, while reflecting the exigencies of a particular situation and the imperious nature of the US transformative vision for Iraq, is open to interpretation as favouring one party as against another. However, it is significant that this rare case of 'unequal application' occurred during an occupation rather than an armed conflict as such, and at a time when opposition to the occupation of Iraq had not yet coalesced.

Some Security Council resolutions have undoubtedly involved a degree of discrimination against one side in an ongoing armed conflict in matters relating to its use of force on the battlefield. For example, in respect of the war in Bosnia

[35] See e.g. SC Res. 757 of 30 May 1992, imposing economic sanctions on the Federal Republic of Yugoslavia (Serbia and Montenegro), paragraph 11.

[36] SC Res. 1483 of 22 May 2003, paragraph 8. For a discussion, see Zwanenberg, Marten, 'Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation', *International Review of the Red Cross*, Geneva, no. 854 (December 2004), 745–68.

in 1992–5 several UN measures had the principal effect of prohibiting certain military acts by the Bosnian Serbs and by their co-belligerents in the Yugoslav armed forces. This was the case with the ban on military flights that was established in October 1992.[37] A subsequent resolution in March 1993 extending the ban and providing for enforcement measures (which were carried out through NATO) contained at least the implicit message that the Serb forces should not attack NATO aircraft carrying out their mandate to ensure compliance with the ban, but at the same time it required any measures taken by NATO to be 'proportionate to the specific circumstances and the nature of the flights'.[38] Similarly, the resolutions in 1993 establishing the six 'safe areas' in Bosnia prohibited armed attacks or any other hostile acts against these areas.[39] While all this might seem to be applying the rules in a partial way, with a main aim being to restrain Serb military activities, it was not asserted that Serb military actions in violation of these resolutions would necessarily constitute war crimes. When, in May 1993, the Statute of the International Criminal Tribunal for the Former Yugoslavia was adopted by the UN Security Council, its specific purpose was to address 'serious violations of international humanitarian law committed in the former territory of Yugoslavia since 1991', not to charge people with ignoring or undermining UN Security Council resolutions, nor indeed for violations of the *jus ad bellum*. The ICTY Statute's list of crimes was soundly based in long-established law under the *jus in bello*, and it did not at any point assert that violations of the terms of UN Security Council resolutions constituted a crime per se.[40] The Statute applied to all parties taking military action in the former Yugoslavia, and could potentially apply to actions of outside forces, including NATO. In general, these actions in relation to the war in Bosnia suggest a strong concern to maintain the principle of equal application of the laws of war, even at the same time as leaning towards one side in the war.

12.5.6. UN Peacekeeping Forces

In the early 1990s, there were repeated severe challenges to the special status of UN peacekeeping forces. The principle of their immunity from attack was openly flouted in certain conflicts, UN peacekeepers being attacked and abducted in Angola, Rwanda, Somalia, and Bosnia. This led to new law-making, resulting in the *1994 UN Convention on the Safety of UN and Associated Personnel*. Not a

[37] SC Res. 781 of 9 October 1992, establishing the ban on military flights over Bosnia. The ban did not apply to UNPROFOR flights or to other flights in support of UN operations.

[38] SC Res. 816 of 31 March 1993, extending the ban to encompass helicopters and authorizing members states to use 'all necessary measures' to enforce the ban.

[39] SC Res. 819 of 16 April 1993, establishing Srebrenica as a 'safe area'; SC Res. 824 of 6 May 1993, extending the concept of 'safe areas' to Sarajevo, Tuzla, Zepa, Gorazde, and Bihac; and SC Res. 836 of 4 June 1993, providing for enforcement by UNPROFOR and by member states (i.e. NATO).

[40] Statute of the International Criminal Tribunal for the Former Yugoslavia, annexed to SC Res. 827 of 25 May 1993. I know of no evidence of any discussion that violations of Security Council resolutions might form part of the subject matter of the tribunal.

Table 12.1. The UN figures for deaths of peacekeepers

Year	Total fatalities	Fatalities due to malicious action	
1993	252	127	
1994	168	71	(treaty adopted on 9 Dec. 1994)
1995	126	34	
1996	55	11	
1997	49	5	
1998	37	12	
1999	39	11	(treaty entry into force 15 Jan. 1999)
2000	60	18	
2001	72	6	
2002	88	7	
2003	108	30	
2004	117	7	
2005	131	25	
2006	107	17	

document of the laws of war as such, it confirms the principle that personnel on certain UN operations shall have immunity from attack; and it criminalizes attacks on them. In all the treaties with a bearing on the conduct of war, this is the one which might seem to come closest to privileging one particular group of soldiers over others. This treaty might thus appear superficially to be an exception to the rule that the laws of war apply equally to all parties. Actually, it is the exception that proves the rule. That is because it specifically provides:

> This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.[41]

This statement reflects the long-standing principle that UN forces engaged in armed conflict are subject to the laws of war in the normal way. Further confirmation of this came in 1999 with the UN Secretary-General's 'Bulletin on Observance by United Nations Forces of International Humanitarian Law'.[42]

In any case, in the light of events since its text was concluded in 1994, the value of the Convention on the Safety of UN Personnel appears uncertain. There may have been an effect in helping to reduce the number of fatalities among UN peacekeepers, but it is hard to prove. The UN figures for deaths of peacekeepers are given in Table 12.1.[43]

[41] 1994 UN Convention on the Safety of United Nations and Associated Personnel, Article 2(2). The provisions of this convention are reflected in the 1998 Rome Statute of the International Criminal Court, Article 8(2)(b)(iii) & 8(2)(e)(iii).

[42] Promulgated in UN doc. ST/SGB/1999/13 of 6 August 1999. Reprinted in Roberts and Guelff, *Documents on the Laws of War*, 3rd edn., 725–30.

[43] 'UN Peacekeeping: Fatalities by Year and Incident Type', accessed 9 June 2007, available at: http://www.un.org/Depts/dpko/fatalities.

The high casualty figures during 1993–5 were largely due to the untypical situation of maintaining UN peacekeeping personnel in the midst of ongoing conflicts in Somalia and Bosnia. The fatalities decreased in 1996–9 as the UN involvements in certain other ongoing conflicts were wound down. However, after the treaty entered into force in 1999 there was a small increase in fatalities, though not to anything like the level of 1993–5. While all these figures have to be viewed with caution, they do raise a question about the effectiveness of the 1994 Convention. These figures also raise a question about the value of legal rules seeking to privilege a particular group of soldiers.

12.6. THE DIFFICULTY OF AGREEING WHICH SIDE IS MORE JUSTIFIED IN ITS RESORT TO FORCE

When war is raging, it has always been difficult to secure agreement among the belligerent parties as to which side is the more legitimate under the *jus ad bellum*. Even getting agreement among third parties and international bodies has been remarkably difficult. Situations in which a clear and widely accepted distinction can be drawn between the just and the unjust users of force are rare. This problem remains difficult today despite the existence of the UN Security Council as a major body charged with making determinations about threats to the peace and breaches of the peace. The following two considerations illustrate some of the hazards in reaching determinations about the lawfulness of uses of force.

The first is essentially factual, and concerns the nature of wars. Their causes can seldom be identified in simple terms of right versus wrong. A war which begins with a plainly wrong act such as aggression out of the blue against a recognized independent state, or a wilful act of violence which is self-evidently contrary to an international treaty regime, is a rarity—as are military responses that are free of taint in one form or another. Wars much more commonly begin with deep fears and grievances on both sides, understandable but clashing interests, conflicting understandings of key events and the responsibility for them, and rival complaints about violations of international law by the adversary. They may begin as civil wars and then become internationalized. On both sides, there may be amalgams of high moral purposes and more mundane motives.

The second consideration is legal. There is a notable lack of reliable objective standards regarding what constitutes the crime of aggression. The record of attempts to establish such standards is not encouraging. In the League of Nations in the inter-war years the efforts to define aggression ran into numerous difficulties. At the International Military Tribunal at Nuremberg in 1945–6, in determinations of guilt and sentencing, there were more difficulties regarding the charges of aggression or 'crimes against peace' (i.e. crimes concerning the *jus ad bellum*) than there were regarding the charges of 'war crimes' and 'crimes

against humanity' (i.e. crimes concerning the *jus in bello*).[44] The adoption in 1945 of the United Nations Charter, with its recognition of self-defence as the main justification for the use of force by states, strengthened the international legal basis for determining when the use of force is lawful. However, the application of its rules to certain types of situation (such as preventive uses of force, assistance to liberation movements, and humanitarian intervention) has been problematical. Indeed, since 1945 the United Nations has run into numerous difficulties in its many attempts to define aggression. In 1974, it concluded such a definition only in the modest form of a General Assembly resolution rather than a treaty.[45] This pattern has continued. As noted, the 1993 ICTY Statute did not include aggression within the Yugoslav Tribunal's subject matter. In contrast, the 1998 Rome Statute of the International Criminal Court leaves open the possibility of a definition of aggression to be encompassed within the Statute seven years after its entry into force (which was on 1 July 2002).[46] However, of this being achieved there is no chance. The best instrument that exists for determining whether a particular use of force is illegal remains the UN Security Council. Yet this body only rarely interprets the actions of parties to conflicts as being generally 'illegal' on one side and 'legal' on the other in a *jus ad bellum* sense; and even when it has done so, as it essentially did over Korea in 1950 and Kuwait in 1990, it has not called for unequal application of the laws of war.

These two types of consideration, factual and legal, point to the inherent ambiguity or arguability of most decisions to use force. They help explain why international trials of political and military leaders regarding responsibility for the initiation of war have been extremely rare. Such trials of subordinates have been even rarer: the international legal liability of the ordinary soldier for crimes under the *jus ad bellum* is not clear. In these circumstances, the idea that there could be a distinctive variable geometry *jus in bello* regime which varied according to the supposedly agreed *jus ad bellum* nature of a conflict resembles the proverbial house built on shifting sands.

12.7. THE 'INNOCENT SOLDIER' IN THE LAW AND CONDUCT OF WAR

Does the argument for the equal application of the law mean that nothing can be done about the innocent soldier? After all, soldiers may be innocent not only because they are on the side considered to be acting more in conformity with the *jus ad bellum* but also because they are fighting (even if on the 'wrong' side) in a war they did not create, and into which they were dragged more or less reluctantly

[44] For findings of guilt, sentences, and dissenting opinion at Nuremberg on 1 October 1946, see *The Trial of German Major War Criminals: Proceedings of the IMT at Nuremberg*, Part 22, 485–547.

[45] GA Res. 3314 (XXIX) of 14 December 1974, which includes 'Annex: Definition of Aggression'.

[46] 1998 Rome Statute of the International Criminal Court, Articles 5(2), 121 & 123.

by their rulers. This view, recognized and respected at least since the time of Jean-Jacques Rousseau whose eloquent expression of it was cited above, has informed the development of the laws of war. Yet there is no room for complacency, as the achievements of the law in alleviating the lot of the soldier are limited.

It might be argued that the problem of the 'innocent soldier' is a matter of a fundamental human right of each human being, namely, the right to life. It could thus be seen as a problem to be addressed by international human rights law. The human rights stream of law merges with the laws of war at many points, and is often relevant to situations of armed conflict and military occupation.[47] However, in relations between belligerents in an armed conflict, which is the crucial issue at stake here, it is not self-evident that human rights law—designed first and foremost to govern relations between citizens and their own government—supplants the laws of war, which remain the main point of reference.

The laws of war can easily seem to be rigid on the principle that the soldier is a legitimate target in war. The massive killings of soldiers on both sides in the First World War were not self-evidently violations of the then-existing laws of war—an uncomfortable fact that may help explain why, in the inter-war years, the laws of war were viewed as of limited significance. The conscripts on both sides in the hideous carnage of the First World War, or the Iraqi troops in occupied Kuwait in 1990–1, can indeed be deemed innocent in this sense, and worthy of protection.

The laws of war have never been blind to the claims of soldiers. The 1864 Geneva Convention, a pioneering treaty in this field, stated: 'Wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for.'[48] Or, as the 1868 St Petersburg Declaration on explosive projectiles put it in its preambular clauses:

> Considering that the progress of civilization should have the effect of alleviating as much as possible the calamities of war;
>
> That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
>
> That for this purpose it is sufficient to disable the greatest possible number of men;
>
> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;...[49]

The prohibitions of superfluous injury and unnecessary suffering are reflected in several subsequent agreements, including the 1980 UN Convention on

[47] For a recent survey, see Roberts, Adam, 'Human Rights Obligations of External Military Forces', in *The Rule of Law in Peace Operations: 'Recueils' of the International Society for Military Law and the Law of War*, 17th International Congress, Scheveningen, 16–21 May 2006 (Brussels: ISMLLW, 2006 [i.e. February 2007]), 429–49.

[48] 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Article 6.

[49] 1868 St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, preamble.

Conventional Weapons;[50] and the 1998 Rome Statute of the International Criminal Court.[51] In addition, of course, the laws of war make extensive provision for the protection of soldiers who are injured, who surrender, or who are taken prisoner.

Some of the most important means of reducing the costs of war borne by essentially innocent soldiers may derive, not so much from observance of formal legal provisions, but rather from other approaches to, or changes in, the conduct of war. In particular, three approaches—all of them involving moral ambiguity—have been evident in the conduct of certain operations in the post–Cold War period:

a. Force protection: Belligerents can seek to protect their own forces from the effects of war by taking a wide range of measures. Among the means to this end are: provision of body armour; avoidance of close contact with the enemy; and use of remote vehicles and remotely delivered weapons. Extraordinary results may be achieved by such measures, as was indicated by the almost casualty-free (for the USA) waging of war by the US Air Force over Kosovo in 1999 and Afghanistan in 2001. Such measures are in principle consistent with the laws of war. However, in practice there can be tensions. Acts of force protection, especially as one part of campaigns against adversaries who locate themselves among the people, often involve a risk of killing civilians—for example, in a school close to an anti-aircraft position, or in a crowd from which one shot may have been fired. An armed force perceived as ultra-protective of its own personnel, but willing to risk the lives of civilians as well as the adversary's soldiers, is liable to be viewed with suspicion and even hatred. Force protection is no cure-all, and in some circumstances the safety of forces may be achieved as much by their mixing with the population (even at some risk) as by the use of firepower. However, force protection remains one important means of reducing risks to soldiers.

b. Avoiding direct attacks on enemy personnel: Belligerents can take numerous actions which, while allowing for effective prosecution of a war, may save members of the adversary's armed forces from its effects. Three possible means of achieving this can be identified. The first is that aspect of the strategy of indirect approach which emphasizes that the aim of war is not the defeat of the enemy in battle, but rather the use of manoeuvre and threat in such a way as to compel the adversary to surrender.[52] The second approach to the problem of saving enemy personnel is the credible announcement that all those who surrender will have humane treatment in accordance with the Geneva Conventions, thus possibly increasing the numbers willing to give themselves up before being attacked. The third approach involves limiting attacks, wherever possible, to enemy equipment

[50] 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, and its Protocols.

[51] 1998 Rome Statute of the International Criminal Court, Article 8(2)(b)(xx).

[52] For the classic exposition, see Liddell, Hart, B. H. *Strategy: The Indirect Approach*, rev. edn. (London: Faber, 1967).

as distinct from enemy personnel. For example, in the 1991 Gulf War the US-led coalition went to exceptional lengths, mainly through leaflets, to inform Iraqi soldiers that they would not be targets if they got out of their military vehicles and stayed away from them—a campaign that appears to have had considerable effect.[53] Actions such as those of the types indicated here are completely consistent with the laws of war, and may significantly reduce the numbers of enemy soldiers who die in a campaign.

c. Concentrating on weakening the enemy's government rather than armed forces: Sometimes in war the attempt is made to target the enemy regime and its apparatus of governmental power as distinct from its armed forces. The operations of the US armed forces in the 1999 war over Kosovo and in the 2001 war in Afghanistan showed evidence of thinking along these lines. This approach can have the effect of reducing the adversary's military casualties. However, it is often problematic vis-à-vis the laws of war, mainly because it may involve attacks on targets widely perceived to be civilian rather than military.[54]

In short, a great deal has been done in the attempt to alleviate the fate of the innocent soldier, and more no doubt could be done. Most of the efforts in this direction (with the possible exception of certain attacks on governmental power) are either contained in, or at least consistent with, the laws of war. It must be doubtful whether unequal application of the law would do more to protect soldiers.

12.8. CONCLUSION: WHY THE PRINCIPLE OF 'EQUAL APPLICATION' SHOULD BE RESPECTED

There are nine persuasive reasons for maintaining the principle of equal application of the laws of war, irrespective of the *jus ad bellum* aspects of a particular conflict.

1. Advocacy of the 'unequal application' proposition often stems from a misunderstanding of the nature of the existing laws of war. At least three distinct misunderstandings of the law may be involved. (*a*) That the law grants belligerents certain 'rights', including the right to shoot at the soldiers of an opposing army—and therefore that the law can expand or withdraw that right in particular cases. It is more accurate to say that the law *recognizes* certain rights of belligerents, and it cannot vary these at will. (*b*) That the laws of war are predicated on some

[53] For details, see Roberts, Adam, 'The Laws of War in the 1990–91 Gulf Conflict', *International Security*, Cambridge, Mass., vol. 18, no. 3 (Winter 1993/94), 170–2. For a wide range of propaganda leaflets, including those used in the 1991 Gulf War to encourage Iraqis to walk away from their military vehicles, see the Aerial Propaganda Leaflet Database of the website of the PsyWar Society, available at http://www.psywar.org/apdsearchform.php

[54] For a critical evaluation of the US strategy of bringing the effects of war home to enemy civilians, see Thomas, Ward, 'Victory by Duress: Civilian Infrastructure as a Target in Air Campaigns', *Security Studies*, London, vol. 15, no. 1 (January–March 2006), 1–33.

notion of moral equivalence between the combatants. In reality, to accept that certain common rules must be observed in a conflict, for a variety of reasons both ethical and practical, does not imply acceptance of moral equivalence between the parties. (*c*) That the laws of war amount to a serious constraint on the effective conduct of operations. In this view, relaxing the application of certain rules by the side deemed to be more justified might help that side to achieve a successful outcome. Again, the reality is largely otherwise: the laws of war can properly be seen as providing a set of rules that seek to minimize various side effects of war, but are compatible with the effective and professional conduct of operations.

2. The key reason for the separation of *jus in bello* from *jus ad bellum* is both philosophical and practical. The principle of separation was not always accepted, but emerged and gained strength over time because other approaches proved more problematical. The fact that this principle is now widely accepted by states, including in treaties which have gained a very high level of formal participation, represents an advance that should not be jeopardized.

3. It is completely normal in wars for both sides to consider that they represent virtue. Yet if each side claims not only that it alone embodies virtue but also that the law should therefore be applied asymmetrically, the result would be a nonsense. The inevitable consequence of the existence of rival claims to a right to privileged status under the laws of war would be that, even more than at present, the laws of war would be misused in propaganda warfare.

4. When the laws of war have been developed or interpreted in a way that can be perceived as privileging one side in a conflict because of the nature of its cause, the other side has shown a tendency to ignore or downgrade the law. The US non-ratification of 1977 Geneva Protocol I, which it has perceived (perhaps wrongly) as favouring guerrilla and terrorist movements, is a possible case in point.

5. Although technically it has the power to do so, the UN Security Council has not suggested or implied that UN-authorized national armed forces engaged in armed conflicts should not be bound by the laws of war in the same manner as their adversaries. Indeed, the overall tendency of Security Council resolutions in the post–Cold War era has been to require the application of the laws of war in a wider range of circumstances and conflicts than a strict interpretation of their 'scope of application' provisions might suggest.

6. The 'unequal application' proposition has not been accompanied by any detailed outline of what any revision of the existing law would look like; what institutions, procedures, and principles would govern the unequal application of the law; or whether there is a serious prospect of a belligerent complying with a legal regime which was explicitly tilted against that belligerent.

7. At a time when *jus in bello* is under considerable pressure, not least from both sides (in different ways) in the 'war on terror', a philosophical-cum-legal approach that provides some basis for relativizing the application of the law on account of the alleged justice of the cause could only too easily be misused, for example, to minimize still further the already attenuated body of rules applied to

detainees. Even if it was in no way the intention of those exploring the question of moral inequality on the battlefield, this could be the unintended and unwelcome consequence.

8. While the alleviation of the lot of the 'innocent soldier' is a serious issue, it is improbable that it could be addressed usefully by varying the laws of war in a particular conflict so that, say, it was prohibited to attack the soldiers of a defending side. A better approach, soundly based in existing law and practice, is to focus on general immunities for certain types of person; on provisions aimed at preventing superfluous injury and unnecessary suffering; and on other strategies and policy measures, including force protection, aimed at limiting the impact of war on soldiers.

9. The final reason was not explored at length in this survey because it is so simple, even self-evident. So far as the laws of war are concerned, troops generally need to be trained to observe a single set of rules. If their training is on the basis that the application of the rules, by their adversaries and by themselves, may vary in every mission, the law will risk losing not only its moral value but also its practical value as a single widely respected grab bag of rules that are inherent in the idea of military professionalism.