

# The equal application of the laws of war: a principle under pressure

#### Adam Roberts\*

Adam Roberts is Senior Research Fellow, Department of Politics and International Relations, Oxford University, Emeritus Fellow of Balliol College, Oxford, and President-Elect of the British Academy. He was Montague Burton Professor of International Relations at Oxford University in 1986—2007.

#### **Abstract**

The 'equal application' principle is that in international armed conflicts, the laws of war apply equally to all who are entitled to participate directly in hostilities, irrespective of the justice of their causes. The principle, which depends on maintaining separation between jus ad bellum and jus in bello, faces serious challenges in contemporary armed conflicts and discourses. Some variations of the principle may be inevitable. However, it has a firm basis in treaties and in historical experience. It is the strongest practical basis that exists, or is likely to exist, for maintaining certain elements of moderation in war. The rival proposition – that the rights and obligations of combatants under the laws of war should apply in a fundamentally unequal manner, depending on which side is deemed to be the more justified – is unsound in conception, impossible to implement effectively and dangerous in its effects.

\* This article 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 its workshop on Symmetry, Oxford, 23–25 June 2005, and also to Dr Hans-Peter Gasser, former Senior Legal Adviser to the International Committee of the Red Cross. An earlier version appeared as 'The equal application of the laws of war', in David Rodin and Henry Shue (eds.), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, Oxford University Press, Oxford, 2008.

# The equal application of the laws of war: a principle under pressure

The 'equal application principle' is 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. Under this principle, the laws of war (otherwise called *jus in bello*, law of armed conflict and international humanitarian law) apply equally to all those who are entitled to participate directly in hostilities – and, so far as the application of the law is concerned, it is not relevant whether a belligerent force represents an autocracy or a democracy, nor is it relevant whether it represents the government of a single country or the will of the international community.

The principle is closely related to, indeed based on, another principle, namely the separation between *jus in bello* and *jus ad bellum* – the law relating to the lawfulness of the use of force.<sup>2</sup> In practice that separation has never been absolute, and is not so today. Among the connections between the two bodies of law are the following. (i) In many modern conflicts, violations of norms of humanitarian law by one or more parties have been cited as a basis for military intervention or economic sanctions by outside powers and international organizations.<sup>3</sup> (ii) One meaning of the principle of proportionality is about the proportionality of a military action in relation to a grievance and/or to the issues at stake in a war, thus forming a link between *jus ad bellum* and the manner of conduct of hostilities.<sup>4</sup> (iii) The self-defence of a state is sometimes seen as a basis for justifying actions that might otherwise be problematic under *jus in bello*.<sup>5</sup> (iv) The use of sanctions and force with international authorization, for example by the UN Security

- 1 The term 'principle of equal application' and variants thereto is used here because it is consistent with the intent of the 'scope of application' provisions of the Geneva Conventions and other treaties on the laws of war. In Rodin and Shue, above note \*, some contributors use the phrase 'symmetry thesis' to refer to this principle. I have not followed this usage because what is at stake is an established legal principle, not a mere thesis or proposition; and the principle does not depend on an assumption that there is symmetry between belligerents.
- 2 For a useful discussion, including extensive references to sources, see Marco Sassòli, '*Ius ad bellum* and *ius in bello* the separation between the legality of the use of force and humanitarian rules to be respected in warfare: crucial or outdated?', in Michael N. Schmitt and Jelena Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines Essays in Honour of Yoram Dinstein*, Martinus Nijhoff, Leiden, 2007, pp. 241–64.
- 3 Adam Roberts, 'Humanitarian issues and agencies as triggers for international military action', International Review of the Red Cross, No. 839 (2000), pp. 673–98.
- 4 Christopher Greenwood, 'The relationship between *ius ad bellum* and *ius in bello*', *Review of International Studies*, Vol. 9 (4) (1983), pp. 221–34. See also 'The applicability of international humanitarian law and the law of neutrality to the Kosovo campaign', *Israel Yearbook on Human Rights*, Vol. 31 (2001), pp. 111–44, esp. at p. 143, where he emphasizes that a *jus ad bellum* requirement that the use of force should be proportionate 'should never be used to undermine the principle of the equal application of the *jus in bello*'.
- 5 See, e.g., the International Court of Justice's reference to 'an extreme circumstance of self-defence' in the advisory opinion on *The Legality of the Threat or Use of Nuclear Weapons*, 1996, para. 105(2) E. Self-defence is discussed further below in the section on certain arguments for varying the law in favour of particular parties, text at note 42.



Council, is sometimes associated with a variation of the normal rights and duties of a belligerent (and also of neutral states) under *jus in bello*.<sup>6</sup>

Granted that the separation of jus in bello and jus ad bellum is less than absolute in contemporary conflicts, it is not surprising that the equal application principle is under serious challenge. There are many arguments to the effect 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. Such arguments, while far from new, have revived in the post-Cold War era, often in the form of mere implications, assumptions or piecemeal decisions, rather than as part of a fully developed critique of the scope of application of the laws of war. These arguments for varying the application of the law in favour of certain parties, which are explored further in a later section of this article, include claims that certain UN-authorized or US-led uses of force are of such a special character that the normal rules should not be applicable to them without significant variation. Often these arguments are based on an assumption that adversary forces are not lawful belligerents - for example, because they have defied the will of the international community on some issue, are engaged in criminality or are associated with 'terrorists'.

The logical outcome of such arguments is what can be termed the 'unequal application proposition', which is that combatants justified under *jus ad bellum* should have wider *jus in bello* rights than unjustified combatants.<sup>7</sup> There are, potentially, two implications of this 'unequal application' proposition: (i) that the laws of war should be revised to make explicit allowance for different rules applying to the different sides in a conflict; or (ii) 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 equal application principle from a slightly 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.

<sup>6</sup> The effects of UN authorization on the principle of equal application are discussed further below in the section on certain arguments for varying the law in favour of particular parties, text at note 53.

<sup>7</sup> For explorations by two philosophers of the proposition that *jus in bello* should be applied in an unequal manner, e.g., to help protect soldiers who are fighting in a cause which has been authoritatively accepted as just under *jus ad bellum*, see the chapters by Jeff McMahan and David Rodin in Rodin and Shue (eds.), above note \*, pp. 19–43, 44–68.

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 – let alone equal application – of the laws of war. 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 instances of largely internal conflict the case for application of the laws of war may be strong. The 2001 agreement extending the application of the 1980 UN Convention on Certain Conventional Weapons (CCW) to non-international armed conflicts is one significant formal recognition of this.8 In addition, the application of the laws of war in largely or wholly internal conflicts may be urged by international bodies including the UN Security Council.9 Similarly, the Council has recognized that in the struggle against terrorism, states must 'comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law'. 10 Even in instances where full application of the laws of war is rejected by states – as in 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.11

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 nine topics:

- 1. Three misleading assumptions about the laws of war.
- 2. Treaty basis of the principle that the laws of war apply equally to all belligerents.
- 3. Four historical reasons for this principle.
- 8 Amendment Article 1 of the 1980 Convention on Certain Conventional Weapons, 21 December 2001. There are 63 states parties to this amendment. Information from www.icrc.org/ihl (last visited 1 October 2008).
- 9 See, e.g., the following UN Security Council resolutions reaffirming (in armed conflicts that were to a significant degree non-international in character) that all parties are bound to comply with their 'obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949': SC Res. 764 of 13 July 1992 on Bosnia and Herzegovina, and SC Res. 1193 of 28 August 1998 on Afghanistan.
- 10 SC Res. 1624 of 14 September 2005, passed at a 'summit' meeting of the UN Security Council attended by heads of state and government.
- 11 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 Additional 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).



- 4. Reciprocity and reprisals: their bearing on equal application.
- 5. Distinctions between different categories of people in the laws of war.
- 6. Certain arguments for varying the application of the law in favour of particular parties.
- 7. The difficulty of agreeing which side is more justified in its resort to force.
- 8. The 'innocent soldier' in the law and conduct of war.
- 9. Conclusion: why the equal application principle should be respected.

## Three misleading assumptions about the laws of war

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 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 laws of war 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.

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 in many cases it is inappropriate to view the belligerents as having any kind of moral equality under jus ad bellum, 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 also some international bodies. There may be international war crimes investigations into the conduct of belligerent parties (whether conducted by the International Criminal Court, by 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 and Herzegovina 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.<sup>12</sup> While this basic approach to the war in Bosnia was problematic, it showed that equal application of the laws of war is not the same thing as moral equality on the battlefield.

# Treaty basis of the principle that the laws of war apply equally to all belligerents

It is a cardinal principle of *jus in bello* that it applies in cases of armed conflict whether or not the inception of the conflict is lawful under *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.<sup>13</sup> In the four 1949 Geneva Conventions 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.'<sup>14</sup> Common Article 2 specifies that the law applies irrespective of whether there is

<sup>12</sup> The application of the laws of war in the war in Bosnia and Herzegovina in 1992–5 is discussed further below under the headings 'UN-authorized forces in enforcement actions' and 'UN peacekeeping forces'.

<sup>13</sup> All laws-of-war treaties mentioned in this survey may be found at www.icrc.org/ihl (last visited 3 September 2008). Agreements concluded up to 1999 are in Adam Roberts and Richard Guelff (eds.), *Documents on the Laws of War*, 3rd edn, Oxford University Press, Oxford, 2000.

<sup>14</sup> For an authoritative account of the origins and meanings of Common Article 1 of the 1949 Geneva Conventions, see Frits Kalshoven, 'The undertaking to respect and ensure respect in all circumstances: from tiny seed to ripening fruit', *Yearbook of International Humanitarian Law*, Vol. 2 (1999), T. M. C. Asser Press, The Hague, 2000, pp. 3–61.



a declaration of war, and even if the state of war is not recognized by one of the parties to a conflict.<sup>15</sup> 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 provision for those who fight in the nobler cause to 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 1977 Protocol I additional to the Geneva Conventions of 1949. 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'. 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 régimes in the exercise of their right of self-determination'. <sup>17</sup> 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 spelled 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.18

## Four historical reasons for equal application of the laws of war

Why has the equal application principle come to be so widely accepted? It is the product of hard-won experience, over at least half a millennium, of four main kinds: (i) between the sixteenth and the eighteenth centuries the equal application principle emerged as part of the underlying philosophy of the laws of war for the good reason that other ideas were more problematic; (ii) in the nineteenth century it became part of a strong and sound tradition of seeking a uniform set of rules in the form of treaties; (iii) in the twentieth and twenty-first centuries the principle has become deeply entrenched in court decisions, state practice and the opinions of lawyers; and (iv) the principle has been reinforced by the practical experience of the International Committee of the Red Cross.

<sup>15 1949</sup> Geneva Conventions, Common Article 2.

<sup>16 1977</sup> Protocol I, preamble.

<sup>17</sup> Ibid., Article 1(1) and (4).

<sup>18</sup> Ibid., Article 96(3).

## Underlying philosophy of the laws of war

The first historical reason for emphasis on equal application arises from the fact that this principle was a key foundation of the body of political philosophy that contributed to the development of the laws of war 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, even though 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' 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.<sup>19</sup>

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'.<sup>20</sup> 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'.<sup>21</sup> 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.

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 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

<sup>19</sup> On the ambiguities of the Grotian tradition of thought about limitations in war and their relation to jus ad bellum issues, see Hedley Bull, Benedict Kingsbury and Adam Roberts (eds.), Hugo Grotius and International Relations, Clarendon Press, Oxford, 1990, pp. 15–26 (Kingsbury and Roberts), and pp. 194–207 (Draper).

<sup>20</sup> Emmerich de Vattel, *Le droit des gens* (posthumous edition, 1773 [1758]). 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, Sweet, Stevens and Maxwell, London, 1834, pp. 382–3. The citation is from book III, ch. 12, §§ 190–1.

<sup>21</sup> Ibid. §§ 191-2.



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.<sup>22</sup>

Rousseau 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.<sup>23</sup>

## The pursuit of a uniform set of rules

The second historical 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, 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

<sup>22</sup> Jean-Jacques Rousseau, *Du Contrat Social, ou Principes du Droit Politique* (1762), paragraph I.iv, in *Rousseau: The Social Contract and other Later Political Writings*, ed. and trans. Victor Gourevitch, Cambridge University Press, Cambridge, 1997, pp. 46–7.

<sup>23</sup> See, e.g., François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, Macmillan Education, Oxford, 2003, pp. 125, 717.

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 in 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; ...<sup>24</sup>

The 1856 Paris Declaration has special significance. It appears to be the first 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 difficult to create new rules once war has broken out.

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. Today, in 2008, there are 194 states party to the 1949 Geneva Conventions: two more than the current membership of the United Nations. These figures are testimony to the success of the effort to secure at least formal adherence to the laws of war on the basis of their uniform application. The substantial part of the laws of the success of the effort to secure at least formal adherence to the laws of war on the basis of their uniform application.

## Court decisions, state practice and the opinions of lawyers

The third historical reason for equal application is the degree of support that the principle has received in court decisions, in practice, and in writings – to all of

<sup>24 1856</sup> Paris Declaration on Maritime Law, preamble.

<sup>25</sup> Official lists show that as at May 1949 there were 59 member states of the UN. Information from www.un.org/members (last visited 1 October 2008).

<sup>26</sup> Information on states party to the 1949 Geneva Conventions from www.icrc.org/ihl (last visited 1 October 2008).



which only the briefest reference can be offered here. 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 *jus in bello* irrespective of which side had responsibility, or even legal culpability, for the outbreak of the war. In 1946 the International Military Tribunal at Nuremberg, in rejecting certain excuses for non-application of the law, implicitly accepted the equal application principle.<sup>27</sup> 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 ...<sup>28</sup>

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.<sup>29</sup>

## The ICRC's experience

The fourth historical reason for the equal application principle is that its importance has been confirmed by the experience of the International Red Cross and Red Crescent Movement and, above all, 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' that was soon to become the International Committee for Relief to Wounded Soldiers. Throughout the ICRC's existence, its role as an impartial humanitarian organization has been spelled out in laws-of-war treaties, especially in the 1949 Geneva Conventions and in 1977 Additional Protocol I.

The International Conference of the Red Cross and Red Crescent, the main deliberative body of the 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 towards belligerents, thus never to

<sup>27</sup> On the IMT at Nuremberg, see section on reciprocity below, text at note 36.

<sup>28</sup> Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946–April 1949, 15 vols., Government Printing Office, Washington DC, 1949–53, XI, p. 1247.

<sup>29</sup> See, e.g., the clear enunciation of 'universal application of the law of armed conflict' in *The Manual of the Law of Armed Conflict*, UK Ministry of Defence, Oxford University Press, Oxford, 2004, p. 34; and the excellent discussion of 'equal application of the *jus in bello*' by Yoram Dinstein in his *War, Aggression and Self-Defence*, 4th edn, Cambridge University Press, Cambridge, 2005, pp. 156–63.

take sides or engage in controversy, 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.<sup>30</sup>

In its customary law study, published in 2005, the ICRC appears 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'.<sup>31</sup> 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.<sup>32</sup>

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 equal application principle.<sup>33</sup> 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 *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 merits brief consideration here.

## Reciprocity and reprisals: their bearing on equal application

In the long history of the laws of war, two concepts – reciprocity and reprisals – have had a significant bearing on the principle of equal application. Reciprocity is the idea that compliance by one party is in some respects dependent on compliance

<sup>30</sup> Resolution I, 'Respect for international humanitarian law in armed conflicts and action by the ICRC for persons protected by the Geneva Conventions', *Handbook of the International Red Cross and Red Crescent Movement,* 13th edn, ICRC and IFRC, Geneva, 1994, p. 752.

<sup>31</sup> Rule 139, in Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Customary International Humanitarian Law, 2 vols., ICRC and Cambridge University Press, Cambridge, 2005, I (Rules), p. 495.

<sup>32</sup> For a useful listing of such UN resolutions see ibid., II (Practice), pp. 3168–72.

<sup>33</sup> Jelena Pejic, 'Non-discrimination and armed conflict', *International Review of the Red Cross*, No. 841 (2001), pp. 183–94.



by the other party. Reprisals is the idea that certain otherwise illegal acts of retaliation 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. Both ideas, in their own distinct ways, reflect the proposition that if one side does not comply with *jus in bello*, then its adversary may be entitled to depart from some of the rules. While both of these ideas are thus based on possible variations in the application of *jus in bello*, neither of them link this to *jus ad bellum*. Despite this, both ideas are relevant to the present enquiry because of the light they shed on the proposition that significant variations in the application of the laws of war as between belligerents may be practicable and useful.

## Reciprocity

Elements of the principle and practice of reciprocity could be found in the following:

- The provisions, 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; and that the rules will also govern relations with a state that is not a party, provided that the state concerned 'accepts and applies' the treaty's provisions.<sup>34</sup>
- 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.<sup>35</sup>

The idea that the laws of war are applicable only in circumstances where there is reciprocity has evolved, and has been duly modified. Many developments have contributed to a recognition that there is an obligation to respect the law that does not depend completely on reciprocity. Three such developments derive directly from the experience of warfare in the twentieth century. (i) 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 a war were not parties to a particular treaty. (ii) 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 violations by Iraq, in a range of matters including treatment of prisoners and

<sup>34 1949</sup> Geneva Conventions, Common Article 2, the terms of which are reflected in 'scope of application' provisions of a number of subsequent treaties on the laws of war.

<sup>35</sup> Some of the states that had made such reservations to the 1925 Geneva Protocol subsequently withdrew them, because preserving any right of like-for-like retaliation against biological or chemical weapons was considered inconsistent with their obligations under the 1972 Biological Weapons Convention and the 1993 Chemical Weapons Convention prohibiting possession of such weapons.

<sup>36</sup> The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany, HMSO, London, 23 vols., 1946–51, Part 22, p. 467.

wanton destruction resulting in pollution of the air above Kuwait and of the waters of the Gulf, did not lead to demands that the US-led coalition should abandon adherence to the law. (iii) 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 inter-state war, adversaries did not meet the requirements for prisoner-of-war status and the formal applicability of the treaty regime to the conflict was not accepted. The UK role in Northern Ireland after the disasters of 1971–2 is a possible case in point.

All three of these developments suggest a retreat from certain strict notions of reciprocity. Indeed, they suggest that, at times, observance of the law may be regarded as a duty irrespective of the adversary's actions: not 'equal application', but rather 'invariable application'. They indicate that the laws of war are capable of being applied in, or adapted to, a wider range of circumstances than was originally envisaged in the treaties.

This conclusion is reinforced by the 1969 Vienna Convention on the Law of Treaties. Although this provides that a party's material breach of a multilateral treaty may enable other parties to suspend the treaty in whole or in part, it specifies that this cannot be done with respect to 'provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties'. This clearly prohibits belligerents from suspending (whether as reprisals or in the name of reciprocity) key humanitarian provisions of laws-of-war treaties.

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'.<sup>38</sup> While there has certainly been a legal trend in this direction, it is not self-evident that reciprocity in the application of the laws of war is completely dead in legal theory or in the practice of states. As to legal agreements, the ICRC study did not discuss the provisions of Common Article 2 of the 1949 Geneva Conventions, which suggest an element of reciprocity in the implementation of the conventions in wartime, and which have been reflected in later treaties.<sup>39</sup> As regards the practice of states in armed conflict, while simple notions of a right of reprisal have come under heavy pressure, it is hard to believe that the principle of reciprocity has entirely ceased to have residual value as one means of inducing compliance with the law.

Although reciprocity may still constitute one basis, however imperfect, 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 *jus ad bellum*. Indeed, reciprocity and unequal application

<sup>37 1960</sup> Vienna Convention on the Law of Treaties, Article 60(5).

<sup>38</sup> Rule 140 in Henckaerts and Doswald-Beck, above note 31, I, pp. 498–9. In the account of this and the preceding rule there is no exploration of reciprocity in observance of the conventions.

<sup>39</sup> Including the 1999 Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict, Article 3(2).



do not fit well together: to have two separate bases for varying the application of the law would be a recipe for confusion. 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.

## Belligerent reprisals

In theory, belligerent reprisals are a precise and well-defined means of responding to a serious problem. They are based on the proposition that certain specific acts that would otherwise be contrary to the law may be carried out by a belligerent with the stated purpose of compelling an opponent to desist from violations of the laws of war. The history of reprisals in modern war does not inspire confidence in this particular approach. On the contrary, it suggests that such departures from strict application of the law, even in response to a pattern of violations, are often open to misunderstanding and can lead to an escalation of hostilities and a general pattern of violations of the law. 40 This chequered history of reprisals has led to progressive restrictions on the right of belligerents to engage in them. In particular, 1977 Additional Protocol I contains important prohibitions on various types of reprisal. However, certain declarations and reservations made at ratification of Protocol I or accession thereto 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.<sup>41</sup> 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.

## Distinctions between different categories of people in the laws of war

Although the laws of war, as they have evolved over centuries, do not draw a distinction between belligerents based on the presumed morality of their respective causes, they do encompass numerous distinctions between different classes of people based on the nature of their relationship to the armed conflict and their right (or otherwise) to participate in hostilities. For example, particular legal

<sup>40</sup> For a critical view of reprisals see Frits Kalshoven, Belligerent Reprisals, Sijthoff, Leyden, 1971.

<sup>41</sup> The limitations on reprisals in 1977 Additional 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 United Kingdom – statement 'm' in Roberts and Guelff, above note 13, p. 511 – is notably explicit on this point.

protections, duties and prohibitions 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
- mercenaries
- 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 *jus ad bellum*. There are many reasons, as indicated in the next section, why such variations in application of the law might be thought desirable.

# Certain arguments for varying the application of the law in favour of particular parties

Naturally there are often pressures to apply the laws of war selectively, or even to accord particular privileges to one party or another, on account of the justice of the cause. There is even some practice that amounts to a claim for special rights under the law. Possible arguments for applying the law unequally as between the parties to 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 *jus in bello*.
- Major powers, especially those with a worldwide series of military commitments, sometimes 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 that 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. The purpose of the very brief survey that follows is simply to outline each of these arguments and to give a rough indication of whether they have influenced the conduct of belligerents, and not to engage in appraisal or rebuttal.

## State or alliance fighting a war in self-defence

The argument that an initial act of aggression is a crime of a nature 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 *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, which is contrary to the existing law.

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.<sup>42</sup>

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

<sup>42 &#</sup>x27;Radio report to the American people on the Potsdam Conference', 9 August 1945, *Public Papers of the Presidents of the United States: Harry S. Truman, 1945*, GPO, Washington DC, 1961, p. 212. This broadcast was on the day of the Nagasaki bombing.

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. The question as to whether it is desirable to give formal legitimacy to that tendency must be asked.

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 Article 2 of the 1899 and 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 Additional 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.

## Unequal combat

Most military contests are unequal, with the inequalities assuming many forms. In some cases the inequalities are of such a character that there is a genuine question whether the laws of war are fully applicable anyway, while in other cases the applicability of the law is basically accepted, but there may be claims for unequal application of the law as regards particular issues. Here, the first form of unequal combat to be considered is that which includes an element of established government versus unlawful insurgency.

Many wars (including some international ones) encompass situations in which organized armed forces under government control are in combat against lightly armed irregular forces, often termed 'guerrillas' or 'terrorists'. In such situations forces representing governments frequently deny the right of their adversaries to participate in hostilities at all: rather, the insurgent forces are seen as criminals and outlaws. In asymmetric combat of this kind there are pressures on both sides to violate basic rules, or to regard them as not strictly applicable to the situation at hand.<sup>43</sup> Often the irregular forces have little interest in observing the law, partly because they appear to have no chance of being treated upon capture as prisoners of war, and partly because their organization and targeting both depend on some blurring of the crucial distinction between soldiers and civilians. For their part, and especially if they are poorly trained and led, the government forces involved in countering irregulars may be under pressures (such as the

<sup>43</sup> Toni Pfanner, 'Asymmetrical warfare from the perspective of humanitarian law and humanitarian action', *International Review of the Red Cross*, No. 857 (2005), pp. 149–74. In the conclusion he states, 'International humanitarian law should not be overstretched. It cannot be extended to situations other than those it was intended to cover without giving wrong directives' (p. 173).



difficulty of distinguishing combatant from civilian) that lead to violations of basic rules.<sup>44</sup>

If the conflict is a pure case of civil war, the application of the full range of the laws of war governing international armed conflict is likely to be called into question: governments of all political colours have historically opposed granting to rebels within their territories the same status and rights as the soldiers of a foreign state. The issue becomes more complex in situations such as the following types, all three of which are familiar features of our times: (i) the 'internationalized civil war' in which outside countries intervene on one or both sides in a civil war; (ii) a belligerent in an international war faces guerrilla opposition within territory it has occupied; or (iii) an international war is part of an overall international campaign against terrorism. In all three cases international armed conflict overlaps with a conflict against parties who are seen by their adversaries as not entitled to participate in hostilities. It is not surprising that in these circumstances there are pressures to apply the laws of war unequally.

Asymmetric warfare can also arise in the context of wars of a purely international character. The principle of equal application applies to such asymmetric wars, and has often been explicitly accepted by belligerents as applicable. For example, in asymmetric bombing campaigns from Iraq 1991 onwards, the United States has accepted that a laws-of-war framework applies. This is not necessarily a triumph for the principle of equal application. A key problem regarding the conformity of these US-led bombing campaigns to the laws of war concerns the notably broad US definition of 'military objectives', which has come to encompass the adversary regime's sources of power.<sup>45</sup>

In armed conflicts between sovereign states of conspicuously unequal capacities there is sometimes a particular kind of unequal application, or rather abuse, of the law. Some relatively less powerful states (as well as non-state bodies) have engaged in consistently unlawful operations against the more powerful adversary such as hostage-taking, co-location of their military objects with civilian objects, use 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. Such unlawful operations have been prevalent during the period of 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 United States 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

<sup>44</sup> See especially A. P. V. Rogers, 'Unequal combat and the law of war', *Yearbook of International Humanitarian Law*, Vol. 7 (2004), pp. 3–34. See especially the list of reasons why things go wrong, at pp. 33–4.

<sup>45</sup> This issue is explored further in Adam Roberts, 'Air power, accuracy, and the law of targeting: why no brave new world?', in Richard B. Jaques (ed.), *Issues in International Law and Military Operations*, International Law Studies, Vol. 80, US Naval War College, Newport, Rhode Island, 2006, pp. 133–50.

strategy of using – or misusing – law as a substitute for traditional means to achieve an operational objective'. 46

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 a supreme deity. However, insofar 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 *jus ad bellum* entitles belligerents to ignore aspects of *jus in bello* is as disturbing here as it is in other instances.

In some unequal combats, more 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 claim to be relieved of the obligation to keep POWs in camps that are not exposed to the fire of the combat zone.

## 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. 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 United States 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 United States are not parties to either of the 1977 Protocols additional to the Geneva Conventions.

<sup>46</sup> Brig. Gen. Charles Dunlap, '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, 25–27 June 2003. For a brief summary of his views on 'lawfare', see his chapter, 'Legal issues in coalition warfare: a US perspective', in Anthony M. Helm (ed.), *The Law of War in the 21st Century: Weaponry and the Use of Force*, International Law Studies, Vol. 82, US Naval War College, Newport, RI, 2006, at pp. 227–8.

<sup>47</sup> See, e.g., the terms of the 1936 London Procès-Verbal on Submarine Warfare against Merchant Ships.

<sup>48</sup> Information on states parties to these treaties from www.icrc.org/ihl (last visited 1 October 2008).



The United States is the best-known and most criticized of these cases of partial abstention from the current laws-of-war regime. Although it has taken action in 2008 to ratify five agreements on the laws of war, 49 it remains a non-party to certain key agreements. The United States refused to ratify 1977 Additional Protocol I, perceiving it (rightly or wrongly) as a 'terrorist's charter', or (slightly more plausibly) as privileging participants in national liberation struggles. Despite refusing ratification of Protocol I, the United States indicated that it would observe those parts of this agreement that it regarded as reflecting customary international law, or as acceptable as a matter of policy; but since 2004 it has ceased to make this commitment.<sup>50</sup> As for the Ottawa landmine convention, the United States refused to become a party mainly because it continued to see a 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.<sup>51</sup> At the same time, the United States 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 52

In addition, there is the familiar problem that the United States views the laws of war, including treaties to which the United States 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. In this special version of the 'unequal application' proposition, 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 – or even (in some interpretations) from the plain meaning of basic rules of universal application set out in the 1984 Convention on Torture.

The positions taken by the United States and other powers that seek in various ways to limit the full application of the law, or even to apply it unequally

<sup>49</sup> In September 2008 the US Senate gave favourable advice and consent to US ratification of the following five agreements: 1954 Hague Cultural Property Convention, 2001 CCW amended Article 1 (expanded scope of application), 1980 CCW Protocol III (incendiary weapons), 1995 CCW Protocol IV (blinding laser weapons), and 2003 CCW Protocol V (explosive remnants of war). Information from www. senate.gov/pagelayout/legislative/one\_item\_and\_teasers/trty\_rtf.htm (last visited 1 October 2008). Acts of ratification with depositaries were expected to follow promptly.

<sup>50</sup> Several US official publications indicated that the US viewed certain provisions of 1977 Protocol I as either legally binding as customary international law or acceptable practice although not legally binding. See, e.g., *Operational Law Handbook 2003*, US Army, International and Operational Law Department, Judge Advocate General's School, Charlottesville, VA, ch. 2, p. 11. Subsequent editions of this handbook have not contained this statement.

<sup>51</sup> US attempts to secure immunity for its forces from investigation and prosecution by the ICC have included UN Security Council resolutions mentioned below in note 54; and the pursuit of bilateral immunity agreements (often called 'Article 98 agreements') with individual states.

<sup>52</sup> See below discussion of the problem of the 'innocent soldier', pp. 28–31.

in a particular conflict, contain many distinct strands, some stronger and more durable than others. As regards the specific question of what light US practice sheds on the 'unequal application' proposition, the answer has to be that it adds to the doubts about it. The two issues on which the United States has come closest to advocating 'unequal application' are evident 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 hypocritical, with the United States advocating standards and procedures for others that it does not follow consistently or rigorously itself. On both these matters 'unequal application' contributed to a degree of US isolation even from some of its close allies.

#### UN-authorized forces in enforcement actions

The capacity of the United Nations to implement sanctions, to establish peacekeeping forces, and to authorize uses of force, raises complex questions about whether the laws of war (including the law of neutrality) apply in exactly the same manner to such actions as they do to states acting individually or in alliances. Some writers have sought to advance the radical proposition that forces acting under the authority of the United Nations, whether in enforcement or peacekeeping mode, should have a general immunity from attack.<sup>53</sup> On a more limited issue, the UN Security Council, citing among its reasons 'that it is in the interests of international peace and security to facilitate Member States' ability to contribute to operations established or authorized by the United Nations Security Council', sought in 2002 and 2003 a general exemption of limited duration from investigation and prosecution by the International Criminal Court for personnel from a contributing state that is not a party to the Rome Statute who are taking part in any UNestablished or authorized operation. This resolution, passed at US instigation, linked a jus ad bellum issue to a partial exemption from jus in bello, but the resolution did not imply that personnel in a UN operation (whether in peacekeeping or enforcement mode) were exempt from the substantive rules of the laws of war, only that the enforcement should be within national jurisdictions.<sup>54</sup>

Although they sometimes merge in practice, the two basic modes of UN action by forces in the field – enforcement and peacekeeping – are conceptually distinct, especially as regards the application of the laws of war. Forces engaged in enforcement actions will be considered first, before the separate matter of UN peacekeepers.

<sup>53</sup> See, e.g., Walter Gary Sharp, 'Protecting the avatars of international peace and security', *Duke Journal of International and Comparative Law*, Vol. 7 (1996), pp. 93–183. This article contained as an appendix (pp. 175–83) a draft additional protocol to the 1949 Geneva Conventions which would have provided that personnel in any operation authorized or mandated by the competent organ of the UN may in no circumstances be attacked.

<sup>54</sup> SC Res. 1422 of 12 July 2002. Renewed by SC Res. 1487 of 12 June 2003. Not renewed in 2004 owing to the controversy over the Abu Ghraib scandal. Not renewed subsequently.



The application of the laws of war to forces fighting with UN authorization has many dimensions.<sup>55</sup> As indicated, one question that has attracted attention is whether forces fighting with UN authority for UN-proclaimed objectives should be granted immunity from attack. If the UN Security Council wished to support this position – or indeed to grant peacekeepers immunity – 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 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.<sup>56</sup> 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 as a matter of general principle to apply the laws of war unequally in ongoing operations. 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 application of the laws of war. Thus the general assumption has been that UN-authorized national or coalition armed forces should be bound by the laws of war in the same manner as their adversaries. Examples of explicit recognition of the equal application principle include:

- The US-led coalition in the Korean War, 1950–53. 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. Security Council 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 equal application principle is clear from such cases, there have been some variations. Thus in respect of the occupation of Iraq under the Coalition Provisional Authority, a Security Council resolution of May 2003 appeared to relieve certain states of the responsibilities, and stigma, of occupying powers when it indicated that 'other States that are not occupying powers are working now or in the future may work under the Authority'; and the same resolution

<sup>55</sup> For a useful exploration see Christopher Greenwood, 'International humanitarian law and united nations military operations', *Yearbook of International Humanitarian Law*, Vol. 1 (1998), pp. 3–34.

<sup>56</sup> See, e.g., SC Res. 757 of 30 May 1992, imposing economic sanctions on the Federal Republic of Yugoslavia (Serbia and Montenegro), para. 11.

went on to proclaim certain goals for the occupation that went beyond the confines of the 1907 Hague Regulations and the Fourth Geneva Convention (protection of civilians) of 1949.<sup>57</sup> These variations, while reflecting the exigencies of a particular situation and the imperious nature of the US transformative vision for Iraq, are open to interpretation as favouring one party 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 into a new phase of hostilities.

Some Security Council resolutions authorizing particular uses of force 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. In respect of the war in Bosnia in 1992–5, for example, several UN measures relating to the authorizations of military actions by NATO and the United Nations Protection Force (UNPROFOR) also prohibited certain military acts by the Bosnian Serbs and by their co-belligerents in the Yugoslav armed forces. One such case was the ban on military flights that was established in October 1992.58 A subsequent resolution in March 1993 extending the ban and providing for enforcement measures (which were to be 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'. 59 Similarly, the resolutions in 1993 establishing the six 'safe areas' in Bosnia prohibited armed attacks or any other hostile acts against those areas.<sup>60</sup> While all this might seem to be applying 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 (ICTY) was adopted by the UN Security Council, its specific purpose was to address 'serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991', not to charge people with ignoring or undermining UN Security Council resolutions, nor indeed for violations of jus ad bellum. The ICTY Statute's list of crimes was soundly based in long-established law under jus in bello, and it did not at any point assert that violations of the terms of UN Security Council

<sup>57</sup> SC Res. 1483 of 22 May 2003, preamble and para. 8. For a discussion see Marten Zwanenberg, 'Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation', *International Review of the Red Cross*, No. 854 (2004), pp. 745–68.

<sup>58</sup> 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.

<sup>59</sup> 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.

<sup>60</sup> 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).



resolutions constituted a crime per se.<sup>61</sup> 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.

## UN peacekeeping forces

Unlike armed forces authorized to take military action to achieve UN purposes, UN peacekeeping forces have generally been considered to have immunity from attack. They are not participants in hostilities: indeed, they are typically deployed in a post-conflict situation. However, in the early 1990s UN peacekeeping forces were often deployed, or their mission was continued, in the midst of ongoing armed conflict. 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 lawmaking, resulting in the 1994 UN Convention on the Safety of United Nations and Associated Personnel. Not a 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. However, it does so only to a limited extent, 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.<sup>62</sup>

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'.<sup>63</sup>

Thus the application of the Convention on the Safety of UN Personnel is primarily to UN peacekeeping forces. Even in that regard, in the light of events since its text was concluded in 1994 and entered into force in 1999, its value

<sup>61</sup> Statute of the International Criminal Tribunal for the former Yugoslavia, adopted by SC Res. 827 of 25 May 1993. In the drafting process there was no suggestion that violations of Security Council resolutions per se might form part of the subject matter of the Tribunal.

<sup>62 1994</sup> 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) and (e)(iii).

<sup>63</sup> Promulgated in UN Doc. ST/SGB/1999/13 of 6 August 1999. Reprinted in Roberts and Guelff, above note 13, pp. 725–30.

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 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. Fatalities decreased in 1996–9 as the UN involvements in certain other ongoing conflicts were wound down. However, in the period 2004–7, following an increase in UN peacekeeping commitments, there was an increase in fatalities, although not to quite the level of 1993–5.<sup>64</sup> While all these figures must be viewed with caution, they do raise a question about the effectiveness of the 1994 Convention; they also raise a question about the value of legal rules seeking to privilege a particular group of soldiers.<sup>65</sup>

## 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 *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 as to what constitutes the crime of aggression. The record of attempts to establish such standards is not encouraging. In the League of Nations

<sup>64</sup> See detailed statistics in 'UN peacekeeping fatalities by year and incident type', available at www.un.org/ Depts/dpko/fatalities (last visited 3 September 2008).

<sup>65</sup> For a critical general survey of the UN Security Council's involvement in a range of matters relating to the laws of war see Andréa Viotti, 'In search of symbiosis: the Security Council in the humanitarian domain', *International Review of the Red Cross*, No. 865 (2007), pp. 131–53.



in the inter-war years, the efforts to define aggression encountered 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 jus ad bellum) than there were regarding the charges of 'war crimes' and 'crimes against humanity' (i.e., crimes concerning jus in bello).66 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, but 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 problematic. Indeed, since 1945 the United Nations has likewise 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.<sup>67</sup> 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). 68 However, there is no chance at all of this being achieved. 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 to 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 *jus ad bellum* is not clear. In these circumstances, the idea that there could be a distinctive *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.

## 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

<sup>66</sup> 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, pp. 485–547.

<sup>67</sup> GA Res. 3314 (XXIX) of 14 December 1974, which includes 'Annex: Definition of Aggression'.

<sup>68 1998</sup> Rome Statute of the International Criminal Court, Articles 5(2), 121 and 123.

because they are on the side considered to be acting more in conformity with *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 by their rulers. This view, recognized and respected at least since the time of Jean-Jacques Rousseau, has informed the development of the laws of war. Yet there is no room for complacency, as achievements in alleviating the lot of the soldier have been 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. 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 which may help to 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.'<sup>70</sup> Or, as the 1868 St Petersburg Declaration renouncing the use of certain 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;

<sup>69</sup> For a recent survey see Adam Roberts, '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, ISMLLW, Brussels, 2006 (i.e. February 2007), pp. 429–49.

<sup>70 1864</sup> Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Article 6.



That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;  $\dots^{71}$ 

The prohibitions of superfluous injury and unnecessary suffering are reflected in several subsequent agreements, including the 1980 UN Convention on Conventional Weapons,<sup>72</sup> and the 1998 Rome Statute of the International Criminal Court.<sup>73</sup> 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. The St Petersburg acceptance of the purpose of disabling 'the greatest possible number of men' remains problematic, and is discussed further below.

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, as follows.

## 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 United States) 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.

<sup>71 1868</sup> St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, preamble.

<sup>72 1980</sup> 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.

<sup>73 1998</sup> Rome Statute of the International Criminal Court, Article 8(2)(b)(xx).

## Avoiding direct attacks on enemy personnel

Is it really inevitable that belligerents should have as a purpose 'to disable the greatest possible number of men'? 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. 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 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. 75 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.

## 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 government 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-àvis the laws of war, mainly because it may involve attacks on targets widely perceived to be civilian rather than military.<sup>76</sup>

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

<sup>74</sup> For the classic exposition see B. H. Liddell Hart, *Strategy: The Indirect Approach*, rev. edn, Faber, London, 1967.

<sup>75</sup> For details see Adam Roberts, 'The laws of war in the 1990–91 Gulf conflict', *International Security*, Vol. 18 (Winter 1993/94), pp. 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 www.psywar.org/leaflets.php (last visited 3 September 2008).

<sup>76</sup> For a critical evaluation of the US strategy of bringing the effects of war home to enemy civilians, see Ward Thomas, 'Victory by duress: civilian infrastructure as a target in air campaigns', *Security Studies*, Vol. 15 (January–March 2006), pp. 1–33.



doubtful whether unequal application of the law would do more to protect soldiers.

# Conclusion: why the equal application principle should be respected

The principle of equal application of the laws of war, irrespective of the *jus ad bellum* aspects of a particular conflict, was not always accepted, but emerged and gained strength over time because other approaches proved more problematic. It is closely associated with the idea that the soldiers involved in an international armed conflict have a right to participate in hostilities. The essential foundation of the principle of equal application, namely the separation of *jus in bello* from *jus ad bellum*, faces serious challenges from several directions, and there have been some modifications of it in practice, especially as regards UN operations. Yet a principle may be important precisely because there are significant challenges to it, some of which may need to be accommodated, others rejected.

Equal application is not the same as universal application. The continued effectiveness of the principle of equal application depends in part on maintaining the distinction between international armed conflict (in which the principle is most clearly relevant) and other kinds of conflict (in some of which the principle is difficult to apply). Yet in certain situations that differ in some respects from the pure case of international armed conflict between sovereign states there can be persuasive reasons for maintaining the principle of equal application – as the UN Security Council indicated regarding the wars in Bosnia in 1992 and Afghanistan in 1998.

The most fundamental weakness of the 'unequal application' proposition derives from the fact that, in the midst of war, it is always difficult to secure agreement on which side exemplifies justice. In addition, proposals for 'unequal application' often stem from a misunderstanding of the nature of the existing laws of war. Such proposals have not been accompanied by any detailed outline of what any revision of the existing law would look like, nor have they shown recognition of the fact that 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 often shown a tendency to ignore or downgrade the law. 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.

Nor is the 'unequal application' proposition likely to address effectively the undoubtedly serious issue of what to do about the problem of the 'innocent soldier'. Attempts to privilege one belligerent over another may merely add an additional layer of confusion to an already difficult situation. 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 in matters relating to force protection and targeting, aimed at limiting the impact of war on soldiers.

The final problem of the 'unequal application' proposition is practical. So far as the laws of war are concerned, those who have the right to participate in hostilities 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 standing but also its practical value as a single, widely respected grab-bag of rules that are inherent in the idea of military professionalism.