

ARE ALL SOLDIERS CREATED EQUAL? – ON THE EQUAL APPLICATION OF THE LAW TO MILITARY ENHANCED SOLDIERS

The ability to deploy military enhanced soldiers seems to be just around the corner. The DOD Study Group on Bioethics recently suggested that, by 2050, the military will be able to deploy soldiers with diverse enhancements, including, inter alia, ocular enhancements to imaging, sight, and situational awareness; restoration and programmed muscular control through an optogenetic bodysuit sensor web; auditory enhancement for communication and protection; and direct neural enhancement of the human brain for two-way data transfer. These changes will create soldiers with abilities that are significantly different from other soldiers. While most of the legal scholarship on technological developments and armed conflicts focuses on the potential harm that emerging technologies can cause to civilians and more broadly to the other party to the conflict, this research focuses on the legal protection of the enhanced soldiers themselves, and more specifically on the equal application of the rules to such soldiers.

It is well accepted that the laws of armed conflict apply equally to all soldiers. This principle emerged as a corrective to past legal arguments like the notorious historical claim that the prohibition on the use of expanding bullets should not apply to "savages" due to their different capabilities. This study explores the question of equal application of the law in the context of enhanced soldiers whose abilities are significantly different from other soldiers. Take for example changes that will affect the need of enhanced soldiers to sleep or increase their ability to resist pain. Should these changes affect the application of the prohibition against torture and cruel, inhumane or degrading treatment for such enhanced soldiers or the legality of the use of certain weapons against these soldiers? The answer to these questions sheds light not only on the treatment of enhanced soldiers, but more broadly on the notion of the equal application of the law of armed conflict and international human rights law.

While the question of different treatment of military enhanced soldiers has mostly been overlooked in the literature, those who have addressed it suggest that different treatment may be justified. For example, it was suggested that sleep deprivation, acknowledged as constituting, at least, inhuman and degrading treatment, might not be regarded the same for enhanced soldiers that require less sleep than regular soldiers. Such positions are based on the subjective element of the "pain and suffering" requirement for an act to be regarded as torture, or cruel inhuman or degrading treatment. In contrast to these

positions, the paper presents an initial argument that defends the equal application of the rules to enhanced soldiers. This argument is based on a one directional interpretation of the above-mentioned subjective element. It focuses on second order arguments regarding the danger of states abusing a less restrictive approach and the potential of detrimental implications that reach far beyond the question of military enhanced soldiers.