

# **JUST AND UNJUST WARS**

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A MORAL  
ARGUMENT WITH  
HISTORICAL  
ILLUSTRATIONS

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# War's Means, and the Importance of Fighting Well

The purpose of the war convention is to establish the duties of belligerent states, of army commanders, and of individual soldiers with reference to the conduct of hostilities. I have already argued that these duties are precisely the same for states and soldiers fighting wars of aggression and wars of defense. In our judgments of the fighting, we abstract from all consideration of the justice of the cause. We do this because the moral status of individual soldiers on both sides is very much the same: they are led to fight by their loyalty to their own states and by their lawful obedience. They are most likely to believe that their wars are just, and while the basis of that belief is not necessarily rational inquiry but, more often, a kind of unquestioning acceptance of official propaganda, nevertheless they are not criminals; they face one another as moral equals.

The domestic analogy is of little help here. War as an activity (the conduct rather than the initiation of the fighting) has no equivalent in a settled civil society. It is not like an armed robbery, for example, even when its ends are similar in kind. Indeed, it is the contrast rather than the correspondence that illuminates the war convention. The contrast is readily explicated; we have only

to think about the following sorts of cases. (1) In the course of a bank robbery, a thief shoots a guard reaching for his gun. The thief is guilty of murder, even if he claims that he acted in self-defense. Since he had no right to rob the bank, he also had no right to defend himself against the bank's defenders. He is no less guilty for killing the guard than he would be for killing an unarmed bystander—a customer, say, depositing his money. The thief's associates might praise him for the first killing, which was in their terms necessary, and condemn him for the second, which was wanton and dangerous. But we won't judge him in that way, because the idea of necessity doesn't apply to criminal activity: it was not necessary to rob the bank in the first place.

Now, aggression is also a criminal activity, but our view of its participants is very different: (2) In the course of an aggressive war, a soldier shoots another soldier, a member of the enemy army defending his homeland. Assuming a conventional firefight, this is not called murder; nor is the soldier regarded after the war as a murderer, even by his former enemies. The case is in fact no different from what it would be if the second soldier shot the first. Neither man is a criminal, and so both can be said to act in self-defense. We call them murderers only when they take aim at non-combatants, innocent bystanders (civilians), wounded or disarmed soldiers. If they shoot men trying to surrender or join in the massacre of the inhabitants of a captured town, we have (or ought to have) no hesitation in condemning them. But so long as they fight in accordance with the rules of war, no condemnation is possible.

The crucial point is that there are *rules* of war, though there are no rules of robbery (or of rape or murder). The moral equality of the battlefield distinguishes combat from domestic crime. If we are to judge what goes on in the course of a battle, then, "we must treat both combatants," as Henry Sidgwick has written, "on the assumption that each believes himself in the right." And we must ask "how the duties of a belligerent, fighting in the name of justice, and under the restraints of morality, are to be determined."<sup>1</sup> Or, more directly: without reference to the justice of their cause, how can soldiers fight justly?

## Utility and Proportionality

### *The Argument of Henry Sidgwick*

Sidgwick answers this question with a twofold rule that neatly sums up the most common utilitarian view of the war convention. In the conduct of hostilities, it is not permissible to do "any mischief which does not tend materially to the end [of victory], nor any mischief of which the conduciveness to the end is slight in comparison with the amount of the mischief."<sup>2</sup> What is being prohibited here is excessive harm. Two criteria are proposed for the determination of excess. The first is that of victory itself, or what is usually called military necessity. The second depends upon some notion of proportionality: we are to weigh "the mischief done," which presumably means not only the immediate harm to individuals but also any injury to the permanent interests of mankind, against the contribution that mischief makes to the end of victory.

The argument as stated, however, sets the interests of individuals and of mankind at a lesser value than the victory that is being sought. Any act of force that contributes in a significant way to winning the war is likely to be called permissible; any officer who asserts the "conduciveness" of the attack he is planning is likely to have his way. Once again, proportionality turns out to be a hard criterion to apply, for there is no ready way to establish an independent or stable view of the values against which the destruction of war is to be measured. Our moral judgments (if Sidgwick is right) wait upon purely military considerations and will rarely be sustained in the face of an analysis of battle conditions or campaign strategy by a qualified professional. It would be difficult to condemn soldiers for anything they did in the course of a battle or a war that they honestly believed, and had good reason to believe, was necessary, or important, or simply useful in determining the outcome. Sidgwick apparently thought this conclusion inescapable, once we agree to make no judgment as to the relative utility of different outcomes. For then we must grant that soldiers are entitled to try to win the wars they are entitled to fight. That means that they can do what they must to win; they can do their utmost, so long as what they do is actually related to winning. Indeed, they should do their utmost, so as to end the fighting as quickly as possible. The rules of war rule out only purposeless or wanton violence.

That is not, however, a small achievement. If it were made effective,



tive in practice, it would eliminate a great deal of the cruelty of war. For it has to be said of many of the people who die in the course of a war, soldiers as well as civilians, that their deaths do not "tend materially to the end [of victory]" or that the contribution they make to that end is "slight" indeed. These deaths are nothing more than the inevitable consequence of putting deadly weapons into the hands of undisciplined soldiers, and armed men into the hands of stupid or fanatical generals. Every military history is a tale of violence and destruction out of all relation to the requirements of combat: massacres on the one hand and, on the other, ill-planned and wasteful battles that are little better than massacres.

Sidgwick's twofold rule seeks to impose an economy of force. It requires discipline and calculation. Any intelligent military strategy, of course, imposes the same requirements. On Sidgwick's view, a good general is a moral man. He keeps his soldiers in check, keyed for battle, so that they don't run amuck among civilians; he sends them to fight only after having thought through a battle plan, and his plan is aimed at winning as quickly and as cheaply as possible. He is like General Roberts at the battle of Paardeberg (in the Boer War), who called off the frontal assaults on the Boer trenches ordered by Kitchener, his second in command, saying that the loss of life "did not appear . . . to be warranted by the exigencies of the situation."<sup>3</sup> A simple decision, though not as common in war as one might expect. I don't know if it was made out of any deep concern for human life; perhaps Roberts was thinking only of his honor as a general (who does not send his men to be slaughtered), or perhaps he was worried about the capacity of the troops to renew the fighting on the following day. It was in any case exactly the sort of decision that Sidgwick would require.

But though the limits of utility and proportionality are very important, they do not exhaust the war convention; indeed, they don't explain the most critical of the judgments we make of soldiers and their generals. If they did, moral life in wartime would be a great deal easier than it is. The war convention invites soldiers to calculate costs and benefits only up to a point, and at that point it establishes a series of clearcut rules—moral fortifications, so to speak, that can be stormed only at great moral cost. Nor can a soldier justify his violation of the rules by referring to the necessities of his combat situation or by arguing that nothing else but what he did would have contributed significantly to victory. Soldiers who reason in that way can never violate Sidgwick's limits, since

all that Sidgwick requires is that soldiers . . . reason in that way. But justifications of this kind are not acceptable, or not always acceptable, either in law or morality. They have been "generally rejected," according to the U.S. Army's handbook of military law, ". . . for acts forbidden by the customary and conventional laws of war, inasmuch as [these laws] have been developed and framed with consideration for the concept of military necessity."<sup>4</sup> Now, what sorts of acts are these, and what are the grounds for forbidding them, if Sidgwick's criteria don't apply? I will have to explain later on how "military necessity" is taken into account in framing the prohibitions; I am concerned now with their general character.

Belligerent armies are entitled to try to win their wars, but they are not entitled to do anything that is or seems to them necessary to win. They are subject to a set of restrictions that rest in part on the agreements of states but that also have an independent foundation in moral principle. I don't think that these restrictions have ever been expounded in utilitarian fashion, though it is no doubt a good thing that they be expounded and that military conduct be shaped to their requirements. When we abstract from the utility of particular outcomes, focus exclusively on *jus in bello*, utilitarian calculations are radically constrained. It might be said that if every war in a series extending indefinitely into the future were to be fought with no other limits than those proposed by Sidgwick, the consequences for mankind would be worse than if every war in that same series were fought within limits fixed by some additional set of prohibitions.\* But saying that does not suggest which prohibitions are the right ones. And any effort to figure out the right ones by calculating the likely effects over time of fighting wars in certain ways (an enormously difficult task) is sure to run up against unconstrained utilitarian arguments: that victory here and now will end the series of wars, or reduce the probability of future fighting, or avoid immediate and horrifying consequences. Hence anything should be permitted that is useful and proportionate to the

\* The alternative utilitarian argument is that of General von Moltke: additional prohibitions merely drag out the fighting, while "the greatest kindness in war is to bring it to a speedy conclusion." But if we imagine a series of wars, this argument probably won't work. At any given level of restraint, let's say, a war will take so many months. If one of the belligerents breaks the rules, it might end more quickly, but only if the other side fails or is unable to reciprocate. If both sides fight at a lower level of restraint, the war may be shorter or longer; there isn't going to be any general rule. And if restraints have broken down in one war, they are unlikely to be maintained in the next, so any immediate benefits probably won't show up in the balance over time.



victory being sought. Utilitarianism is obviously most effective when it points to outcomes about which we have (relatively) clear ideas. For that reason, it is more likely to tell us that the rules of war should be overridden in this or that case than it is to tell us what the rules are—beyond Sidgwick's minimum injunctions which can't and don't ever have to be overridden.

Until the constraints are lifted and the substantial effects of victory and defeat are weighed in the balance, utilitarianism provides only a general endorsement of the war convention (the twofold rule and any others commonly accepted); after that, it is unlikely to specify rules at all but only particular courses of action. When to lift the constraints is one of the hardest questions in the theory of war. I will try to answer it in Part Four, and I will describe at that time the positive role of utilitarian calculation: to mark out those special cases where victory is so important or defeat so frightening that it is morally, as well as militarily, necessary to override the rules of war. But such an argument is not possible until we have recognized rules beyond Sidgwick's and understood their moral force.

Meanwhile, it is worth dwelling for a moment on the precise nature of the general endorsement. The utility of fighting limited wars is of two sorts. It has to do not only with reducing the total amount of suffering, but also with holding open the possibility of peace and the resumption of pre-war activities. For if we are (at least formally) indifferent as to which side wins, we must assume that these activities will in fact be resumed and with the same or similar actors. It is important, then, to make sure that victory is also in some sense and for some period of time a settlement among the belligerents. And if that is to be possible, the war must be fought, as Sidgwick says, so as to avoid "the danger of provoking reprisals and of causing bitterness that will long outlast" the fighting.<sup>5</sup> The bitterness that Sidgwick has in mind might, of course, be the consequence of an outcome thought to be unjust (like the annexation of Alsace-Lorraine in 1871), but it may also result from military conduct thought to be unnecessary, brutal or unfair, or simply "against the rules." So long as defeat follows from what are widely regarded as legitimate acts of war, it is at least possible that it will leave behind no festering resentment, no sense of scores unsettled, no deeply felt need for individual or collective revenge. (The government or officers' corps of the defeated state may have reasons of its own to encourage such feelings, but that is another matter.) An analogy might be drawn, once again, with a family

feud, its origin long forgotten, its justice no longer at issue. A feud of this sort may be carried on for many years, marked by the occasional killing of a father or a grown-up son, an uncle or a nephew, first of one family, then of the other. So long as nothing more happens, the possibility of reconciliation remains open. But if someone in a fit of anger or passion, or even by accident or mistake, kills a woman or a child, the result may well be a massacre or a series of massacres, not stopping until one of the families is wiped out or driven away.<sup>6</sup> The case is at least similar to intermittent war among states. Some limits must be commonly accepted, and more or less consistently maintained, if there is ever to be a peace short of the complete submission of one of the belligerents.

It is probably true that any limits will be useful here, so long as they are in fact commonly accepted. But no limit is accepted simply because it is thought that it will be useful. The war convention must first be morally plausible to large numbers of men and women; it must correspond to our sense of what is right. Only then will we recognize it as a serious obstacle to this or that military decision, and only then can we debate its utility in this or that particular case. For otherwise we would not know which obstacle out of the infinite number that are conceivable, and the very large number that are historically recorded, is to be the subject of our debates. With regard to the rules of war, utilitarianism lacks creative power. Beyond the minimal limits of "conductiveness" and proportionality, it simply confirms our customs and conventions, whatever they are, or it suggests that they be overridden; but it does not provide us with customs and conventions. For that, we must turn again to a theory of rights.

## Human Rights

### *The Rape of the Italian Women*

The importance of rights may best be suggested if we look at an historical example placed, as it were, on the margin of Sidgwick's argument. Consider, then, the case of the Moroccan soldiers fighting with Free French forces in Italy in 1943. These were mercenary troops who fought on terms, and the terms included license to rape and plunder in enemy territory. (Italy was enemy territory until

the Badoglio regime joined the war against Germany in October, 1943; I don't know if the license was then withdrawn; if so, the withdrawal seems to have been ineffective.) A large number of women were raped; we know the number, roughly, because the Italian government later offered them a modest pension.<sup>7</sup> Now, the argument for giving soldiers privileges of this sort is a utilitarian one. It was made long ago by Vitoria in the course of a discussion of the right of sack: it is not unlawful to put a city to sack, he says, if it is "necessary for the conduct of the war . . . as a spur to the courage of the troops."<sup>8</sup> If this argument were applied to the case at hand, Sidgwick might respond that "necessary" is probably the wrong word here and that the contribution of rape and plunder to military victory is "slight" in comparison with the harm caused to the women involved. That is not an unpersuasive response, but it is not entirely convincing either, and it hardly gets at the root of our condemnation of rape.

What is it we object to in the license given those Moroccan soldiers? Surely our judgment does not hang on the fact that rape is only a trivial or inefficient "spur" to masculine courage (if it is a spur at all: I doubt that brave men are the most likely rapists). Rape is a crime, in war as in peace, because it violates the rights of the woman who is attacked. To offer her as bait to a mercenary soldier is to treat her as if she were not a person at all but a mere object, a prize or trophy of war. It is the recognition of her personality that shapes our judgment.\* And this is true even in the absence of a philosophical conception of human rights, as the following passage from the Book of Deuteronomy—the first attempt that I have found to regulate the wartime treatment of women—clearly indicates:<sup>9</sup>

When thou goest forth to battle against thine enemies, and the Lord thy God deliverest them into thy hands, and thou carriest them away captive, and seest among the captives a woman of goodly form,

\* In a powerful essay entitled "Human Personality," Simone Weil has attacked this way of talking about what we can and cannot do to other people. Rights talk, she claims, turns "what should have been a cry of protest from the depth of the heart . . . into a shrill nagging of claims and counter-claims . . ." And she applies her argument to a case very much like ours: "if a young girl is being forced into a brothel she will not talk about her rights. In such a situation, the word would sound ludicrously inadequate." (*Selected Essays*: 1934-1943, ed. Richard Rees, London, 1962, p. 21) Weil would have us refer ourselves instead to some notion of the sacred, of the image of God in man. Perhaps some such ultimate reference is necessary, but I think she is wrong in her claim about the "sound" of rights talk. In fact, arguments about human rights have played a significant part in the struggle against oppression, including the sexual oppression of women.

and thou hast a desire unto her, and wouldst take her to thee to wife; then thou shalt bring her home to thy house . . . and she shall . . . bewail her father and mother a full month; and after that thou mayest go in unto her, and be her husband, and she shall be thy wife. And . . . if thou have no delight in her, then thou shalt let her go whither she will; but thou shalt not sell her . . . for money, thou shalt not deal with her as a slave . . .

This falls far short of contemporary views, though I expect it would be as difficult to enforce today as it was in the time of the Judean kings. Whatever theological or sociological account of the rule is appropriate, it is clear that what is at work here is a conception of the captive woman as a person who must be respected, despite her capture; hence the month of mourning before she is sexually used, the requirement of marriage, the ban on slavery. She has lost some of her rights, we might say, but not all of them. Our own war convention requires a similar understanding. Both the prohibitions that are covered by Sidgwick's twofold rule and those that lie beyond it are properly conceptualized in terms of rights. The rules of "fighting well" are simply a series of recognitions of men and women who have a moral standing independent of and resistant to the exigencies of war.

A legitimate act of war is one that does not violate the rights of the people against whom it is directed. It is, once again, life and liberty that are at issue, though we are now concerned with these two as they are individually rather than collectively possessed. I can sum up their substance in terms I have used before: no one can be forced to fight or to risk his life, no one can be threatened with war or warred against, unless through some act of his own he has surrendered or lost his rights. This fundamental principle underlies and shapes the judgments we make of wartime conduct. It is only inadequately expressed in positive international law, but the prohibitions established there have this principle as their source. Lawyers sometimes talk as if the legal rules were simply humanitarian in character, as if the ban on rape or on the deliberate killing of civilians were nothing more than a piece of kindness.<sup>10</sup> But when soldiers respect these bans, they are not acting kindly or magnanimously; they are acting justly. If they are humanitarian soldiers, they may indeed do more than is required of them—sharing their food with civilians, for example, rather than merely not raping or killing them. But the ban on rape and murder is a matter of right. The law recognizes this right, specifies, limits, and sometimes distorts it, but doesn't establish it. And we can recog-



nize it ourselves, and sometimes do, even in the absence of legal recognition.

States exist to defend the rights of their members, but it is a difficulty in the theory of war that the collective defense of rights renders them individually problematic. The immediate problem is that the soldiers who do the fighting, though they can rarely be said to have chosen to fight, lose the rights they are supposedly defending. They gain war rights as combatants and potential prisoners, but they can now be attacked and killed at will by their enemies. Simply by fighting, whatever their private hopes and intentions, they have lost their title to life and liberty, and they have lost it even though, unlike aggressor states, they have committed no crime. "Soldiers are made to be killed," as Napoleon once said; that is why war is hell.\* But even if we take our standpoint in hell, we can still say that *no one else is made to be killed*. This distinction is the basis of the rules of war.

Everyone else retains his rights, and states remain committed, and entitled, to defend these rights whether their wars are aggressive or not. But now they do this not by fighting but by entering into agreements among themselves (which fix the details of non-combatant immunity), by observing these agreements and expecting reciprocal observance, and by threatening to punish military leaders or individual soldiers who violate them. This last point is crucial for an understanding of the war convention. Even an aggressor state can rightly punish war criminals—enemy soldiers, for example, who rape or kill civilians. The rules of war apply with equal force to aggressors and their adversaries. And we can now see that it is not merely the moral equality of soldiers that requires this mutual submission; it is also the rights of civilians. Soldiers fighting for an aggressor state are not themselves criminals: hence their war rights are the same as those of their opponents. Soldiers fighting against an aggressor state have no license to become criminals: hence they are subject to the same restraints as their opponents. The enforcement of these restraints is one of the forms of law enforcement in international society, and the law can be enforced even by criminal states against "policemen" who deliberately

\* In quoting this sentence I do not mean to endorse the military nihilism it represents. Napoleon, especially in his later years, was given to statements of this sort, and they are not uncommon in the literature on war. One writer claims that they illustrate a quality of leadership that he calls "robustness." Napoleon's exclamation, "I do not care a fig for the lives of a million men" is, he says, an extreme example of robustness. One could think of better names. (Alfred H. Burne, *The Art of War on Land*, London, 1944, p. 8.)

kill innocent bystanders. For these bystanders do not forfeit their rights when their states wrongly go to war. An army warring against aggression can violate the territorial integrity and political sovereignty of the aggressor state, but its soldiers cannot violate the life and liberty of enemy civilians.

The war convention rests first on a certain view of combatants, which stipulates their battlefield equality. But it rests more deeply on a certain view of noncombatants, which holds that they are men and women with rights and that they cannot be used for some military purpose, even if it is a legitimate purpose. At this point, the argument is not entirely dissimilar from that which obtains in domestic society, where a man fighting in self-defense, for example, is barred from attacking or injuring innocent bystanders or third parties. He can attack only his attackers. In domestic society, however, it is relatively easy to distinguish bystanders and third parties, whereas in international society, because of the collectivist character of states and armies, the distinction is harder to make. Indeed, it is often said that it cannot be made at all, for soldiers are only coerced civilians, and civilians are willing supporters of their armies in the field. And then it cannot be what is due to the victims but only what is necessary for the battle that determines our judgments of wartime conduct. Here is the critical test, then, for anyone who argues that the rules of war are grounded in a theory of rights: to make the combatant/noncombatant distinction plausible in terms of the theory, that is, to provide a detailed account of the history of individual rights under the conditions of war and battle—how they are retained, lost, exchanged (for war rights) and recovered. That is my purpose in the chapters that follow.



# Noncombatant Immunity and Military Necessity

## The Status of Individuals

The first principle of the war convention is that, once war has begun, soldiers are subject to attack at any time (unless they are wounded or captured). And the first criticism of the convention is that this principle is unfair; it is an example of class legislation. It does not take into account that few soldiers are wholeheartedly committed to the business of fighting. Most of them do not identify themselves as warriors; at least, that is not their only or their chief identity; nor is fighting their chosen occupation. Nor, again, do they spend most of their time fighting; they neglect war whenever they can. I want to turn now to a recurrent incident in military history in which soldiers, simply by not fighting, appear to regain their right to life. In fact, they do not regain it, but the appearance will help us understand the grounds on which the right is held, and the facts of the case will clarify the meaning of its forfeiture.

### Naked Soldiers

The same tale appears again and again in war memoirs and in letters from the front. It has this general form: a soldier on patrol or on sniper duty catches an enemy soldier unaware, holds him in

his gunsight, easy to kill, and then must decide whether to shoot him or let the opportunity pass. There is at such moments a great reluctance to shoot—not always for moral reasons, but for reasons that are relevant nonetheless to the moral argument I want to make. No doubt, a deep psychological uneasiness about killing plays a part in these cases. This uneasiness, in fact, has been offered as a general explanation of the reluctance of soldiers to fight at all. In the course of a study of combat behavior in World War II, S. L. A. Marshall discovered that the great majority of men on the front line never fired their guns.<sup>1</sup> He thought this the result above all of their civilian upbringing, of the powerful inhibitions acquired in its course against deliberately injuring another human being. But in the cases I shall list, this inhibition does not seem a critical factor. None of the five soldiers who wrote the accounts was a “non-firer,” nor, so far as I can tell, were the other men who figure importantly in their stories. Moreover, they give reasons for not killing or for hesitating to kill, and this the soldiers interviewed by Marshall were rarely able to do.

<sup>1</sup> I have taken the first case from a letter written by the poet Wilfred Owen to his brother in England on May 14, 1917.<sup>2</sup>

When we were marching along a sunken road, we got the wind up once. We knew we must have passed the German outposts somewhere on our left rear. All at once, the cry rang down, “Line the bank.” There was a tremendous scurry of fixing bayonets, tugging of breech covers, and opening pouches, but when we peeped over, behold a solitary German, haring along toward us, with his head down and his arms stretched in front of him, as if he were going to take a high dive through the earth (which I have no doubt he would like to have done). Nobody offered to shoot him, he looked too funny...

Perhaps everyone was waiting for an order to shoot, but Owen’s meaning is undoubtedly that no one wanted to shoot. A soldier who looks funny is not at that moment a military threat; he is not a fighting man but simply a man, and one does not kill men. In this case, indeed, it would have been superfluous to do so: the comical German was soon taken prisoner. But that is not always possible, as the remaining cases suggest, and the reluctance or refusal to kill has nothing to do with the existence of a military alternative. There is always a nonmilitary alternative.

<sup>2</sup> In his autobiography *Good-bye to All That*, Robert Graves recalls the only time that he “refrained from shooting a German” who was neither wounded nor a prisoner.<sup>3</sup>

While sniping from a knoll in the support line, where we had a concealed loop-hole, I saw a German, about seven hundred yards away, through my telescopic sights. He was taking a bath in the German third line. I disliked the idea of shooting a naked man, so I handed the rifle to the sergeant with me. "Here, take this. You're a better shot than I am." He got him; but I had not stayed to watch.

I hesitate to say that what is involved here is a moral feeling, certainly not a moral feeling that is conceived to extend across class lines. But even if we describe it as the disdain of an officer and a gentleman for conduct that appears to be unmanly or unheroic, Graves's "dislike" still depends upon a morally important recognition. A naked man, like a funny man, is not a soldier. And what if the obedient and presumably unfeeling sergeant had not been with him?

3) During the Spanish Civil War, George Orwell had a similar experience as a sniper working from a forward position in the republican lines. It would probably never have occurred to Orwell to hand his gun down the hierarchy of ranks; in any case, his was an anarchist battalion, and there was no hierarchy.<sup>4</sup>

At this moment a man, presumably carrying a message to an officer, jumped out of the trench and ran along the top of the parapet in full view. He was half-dressed and was holding up his trousers with both hands as he ran. I refrained from shooting at him. It is true that I am a poor shot and unlikely to hit a running man at a hundred yards. . . . Still, I did not shoot partly because of that detail about the trousers. I had come here to shoot at "Fascists," but a man who is holding up his trousers isn't a "Fascist," he is visibly a fellow-creature, similar to yourself, and you don't feel like shooting at him.

Orwell says, "you don't feel like" rather than "you should not," and the difference between these two is important. But the fundamental recognition is the same as in the other cases and more fully articulated. Moreover, Orwell tells us that this "is the kind of thing that happens all the time in wars," though with what evidence he says that, and whether he means that one doesn't feel like shooting or that one doesn't shoot "all the time," I don't know.

4) Raleigh Trevelyan, a British soldier in World War II, has published a "diary of Anzio" in which he recounts the following episode:<sup>5</sup>

There was a wonderfully vulgar sunrise. Everything was the color of pink geraniums, and birds were singing. We felt like Noah must have done when he saw his rainbow. Suddenly Viner pointed across the

stretch of scrubby heath. An individual, dressed in German uniform, was wandering like a sleep-walker across our line of fire. It was clear that for the moment he had forgotten war and—as we had been doing—was reveling in the promise of warmth and spring. "Shall I bump him off?" asked Viner, without a note of expression in his voice. I had to decide quickly. "No," I replied, "just scare him away."

Here, as in the Orwell passage, the crucial feature is the discovery of a man "similar to yourself," doing "as we had been doing." Of course, two soldiers shooting at one another are quite precisely similar; one is doing what the other is doing, and both are engaged in what can be called a peculiarly human activity. But the sense of being a "fellow-creature" depends for obvious reasons upon a different sort of identity, one that is entirely dissociated from anything threatening. The fellowship of spring (reveling in the sun) is a good example, though even that is not untouched by the pressures of "military necessity."

Only Sergeant Chesteron didn't laugh. He said that we should have killed the fellow, since his friends would now be told precisely where our trenches were.

Sergeants seem to bear much of the burden of war.

5) The most reflective of the accounts I have found is by an Italian soldier who fought the Austrians in World War I: Emilio Lussu, later a socialist leader and anti-fascist exile. Lussu, then a lieutenant, together with a corporal, had moved during the night into a position overlooking the Austrian trenches. He watched the Austrians having morning coffee and felt a kind of amazement, as if he had not expected to find anything human in the enemy lines.<sup>6</sup>

Those strongly defended trenches, which we had attacked so many times without success had ended by seeming to us inanimate, like desolate buildings uninhabited by men, the refuge only of mysterious and terrible beings of whom we knew nothing. Now they were showing themselves to us as they really were, men and soldiers like us, in uniform like us, moving about, talking, and drinking coffee, just as our own comrades behind us were doing at that moment.

A young officer appears and Lussu takes aim at him; then the Austrian lights a cigarette and Lussu pauses. "This cigarette formed an invisible link between us. No sooner did I see its smoke than I wanted a cigarette myself. . . ." Behind perfect cover, he has time to think about his decision. He felt the war justified, "a hard necessity." He recognized that he had obligations to the men under his



command. "I knew it was my duty to fire." And yet he did not. He hesitated, he writes, because the Austrian officer was so entirely oblivious to the danger that threatened him.

I reasoned like this: To lead a hundred, even a thousand, men against another hundred, or thousand, was one thing; but to detach one man from the rest and say to him, as it were: "Don't move, I'm going to shoot you. I'm going to kill you"—that was different . . . "To fight is one thing, but to kill a man is another. And to kill him like that is to murder him."

Lussu, like Graves, turned to his corporal but (perhaps because he was a socialist) with a question, not an order. "Look here—I'm not going to fire on a man alone, like that. Will you?" . . . "No, I won't either." Here the line has been clearly drawn between the member of an army who makes war together with his comrades and the individual who stands alone. Lussu objected to stalking a human prey. What else, however, does a sniper do?

It is not against the rules of war as we currently understand them to kill soldiers who look funny, who are taking a bath, holding up their pants, reveling in the sun, smoking a cigarette. The refusal of these five men, nevertheless, seems to go to the heart of the war convention. For what does it mean to say that someone has a right to life? To say that is to recognize a fellow creature, who is not threatening me, whose activities have the savor of peace and camaraderie, whose person is as valuable as my own. An enemy has to be described differently, and though the stereotypes through which he is seen are often grotesque, they have a certain truth. He alienates himself from me when he tries to kill me, and from our common humanity. But the alienation is temporary, the humanity imminent. It is restored, as it were, by the prosaic acts that break down the stereotypes in each of the five stories. Because he is funny, naked, and so on, my enemy is changed, as Lussu says, into a man. "A man!"

The case might be different if we imagine this man to be a wholehearted soldier. In his bath, smoking his morning cigarette, he is thinking only of the coming battle and of how many of his enemies he will kill. He is engaged in war-making just as I am engaged in writing this book; he thinks about it all the time or at the oddest moments. But this is an unlikely picture of an ordinary soldier. War is not in fact his enterprise, but rather surviving this battle, avoiding the next. Mostly, he hides, is frightened, doesn't

fire, prays for a minor wound, a voyage home, a long rest. And when we see him at rest, we assume that he is thinking of home and peace, as we would be. If that is so, how can it be justified to kill him? Yet it is justified, as most of the soldiers in the five stories understand. Their refusals seem, even to them, to fly in the face of military duty. Rooted in a moral recognition, they are nevertheless more passionate than principled decisions. They are acts of kindness, and insofar as they entail any danger at all or lower minutely the odds for victory later, they may be likened to superogatory acts. Not that they involve doing more than is morally required; they involve doing less than is permitted.

The standards of permissibility rest on the rights of individuals, but they are not precisely defined by those rights. For definition is a complex process, historical as well as theoretical in character, and conditioned in a significant way by the pressure of military necessity. It is time now to try to see what that pressure can and cannot do, and the "naked soldier" cases provide a useful instance. In the nineteenth century, an effort was made to protect one type of "naked soldier": the man on guard duty outside his post or at the edge of his lines. The reasons given for singling out this lone figure are similar to those expressed in the five stories. "No other term than murder," wrote an English student of war, "expresses the killing of a lone sentry by a pot shot at long range. It [is] like shooting a partridge sitting." "The same idea is obviously at work in the code of military conduct that Francis Lieber drafted for the Union Army in the American Civil War: "Outposts, sentinels, pickets are not to be fired upon, except to drive them in . . ." "Now, a war is easily imaginable in which this idea was extended, so that only soldiers actually fighting, hundreds against hundreds, thousands against thousands, as Lussu says, could be attacked. Such a war would be constituted as a series of set battles, formally or informally announced in advance, and broken off in some clear fashion. The pursuit of a defeated army could be allowed, so neither side need be denied the possibility of a decisive victory. But perpetual harassment, sniping, ambush, surprise attack—all these would be ruled out. Wars have indeed been fought in this way, but the arrangements have never been stable, because they give a systematic advantage to the army that is larger and better equipped. It is the weaker side that persistently refuses to fix any limits on the vulnerability of enemy soldiers (the extreme form of this refusal is guerrilla war), pleading military necessity. What does this mean?



## The Nature of Necessity (1)

The plea takes a standard form. This or that course of action, it is said, "is necessary to compel the submission of the enemy with the least possible expenditure of time, life, and money."<sup>9</sup> That is the core of what the Germans call *kriegsraison*, reason of war. The doctrine justifies not only whatever is necessary to win the war, but also whatever is necessary to reduce the risks of losing, or simply to reduce losses or the likelihood of losses in the course of the war. In fact, it is not about necessity at all; it is a way of speaking in code, or a hyperbolical way of speaking, about probability and risk. Even if one grants the right of states and armies and individual soldiers to reduce their risks, a particular course of action would be *necessary* to that end only if no other course improved the odds of battle at all. But there will always be a range of tactical and strategic options that conceivably could improve the odds. There will be choices to make, and these are moral as well as military choices. Some of them are permitted and some ruled out by the war convention. If the convention did not discriminate in this way, it would have little impact upon the actual fighting of wars and battles; it would simply be a code of expediency—which is what Sidgwick's twofold rule is likely to come to, under the pressure of actual warfare.

"Reason of war" can only justify the killing of people we already have reason to think are liable to be killed. What is involved here is not so much a calculation of probability and risk as a reflection on the status of the men and women whose lives are at stake. The case of the "naked soldier" is resolved in this way: soldiers as a class are set apart from the world of peaceful activity; they are trained to fight, provided with weapons, required to fight on command. No doubt, they do not always fight; nor is war their personal enterprise. But it is the enterprise of their class, and this fact radically distinguishes the individual soldier from the civilians he leaves behind.\* If he is warned that he is always in danger, it is not so

\* In his moving account of the French defeat in 1940, Marc Bloch has criticized this distinction: "Confronted by the nation's peril and by the duties that it lays on every citizen, all adults are equal and only a curiously warped mind would claim for any of them the privilege of immunity. What, after all, is a 'civilian' in time of war? He is nothing more than a man whose weight of years, whose health, whose profession . . . prevents him from bearing arms effectively . . . Why should [these factors] confer on him the right to escape from the common danger?" (*Strange*

great a disruption of his life as it would be in the case of the civilian. Indeed, to warn the civilian is in effect to force him to fight, *but the soldier has already been forced to fight*. That is, he has joined the army because he thinks his country must be defended, or he has been conscripted. It is important to stress, however, that he has not been forced to fight by a direct attack upon his person; that would repeat the crime of aggression at the level of the individual. He can be personally attacked only because he already is a fighter. He has been made into a dangerous man, and though his options may have been few, it is nevertheless accurate to say that he has allowed himself to be made into a dangerous man. For that reason, he finds himself endangered. The actual risks he lives with may be reduced or heightened: here notions of military necessity, and also of kindness and magnanimity, have free play. But the risks can be raised to their highest pitch without violating his rights.

It is harder to understand the extension of combatant status beyond the class of soldiers, though in modern war this has been common enough. The development of military technology, it might be said, has dictated it, for war today is as much an economic as a military activity. Vast numbers of workers must be mobilized before an army can even appear in the field; and once they are engaged, soldiers are radically dependent on a continuing stream of equipment, fuel, ammunition, food, and so on. It is a great temptation, then, to attack the enemy army behind its own lines, especially if the battle itself is not going well. But to attack behind the lines is to make war against people who are at least nominally civilians. How can this be justified? Here again, the judgments we make depend upon our understanding of the men and women involved. We try to draw a line between those who have lost their rights because of their warlike activities and those who have not. On the one side are a class of people, loosely called "munitions workers," who make weapons for the army or whose work directly contributes to the business of war. On the other side are all those people who, in the words of the British philosopher G. E. M. Anscombe, "are not fighting and are not engaged in supplying those who are with the means of fighting."<sup>10</sup>

*Defeat*, trans. Gerard Hopkins, New York, 1968, p. 130) But the theoretical problem is not to describe how immunity is gained, but how it is lost. We are all immune to start with; our right not to be attacked is a feature of normal human relationships. That right is lost by those who bear arms "effectively" because they pose a danger to other people. It is retained by those who don't bear arms at all.

The relevant distinction is not between those who work for the war effort and those who do not, but between those who make what soldiers need to fight and those who make what they need to live, like all the rest of us. When it is militarily necessary, workers in a tank factory can be attacked and killed, but not workers in a food processing plant. The former are assimilated to the class of soldiers—partially assimilated, I should say, because these are not armed men, ready to fight, and so they can be attacked only in their factory (not in their homes), when they are actually engaged in activities threatening and harmful to their enemies. The latter, even if they process nothing but army rations, are not similarly engaged. They are like workers manufacturing medical supplies, or clothing, or anything else that would be needed, in one form or another, in peacetime as well as war. An army, to be sure, has an enormous belly, and it must be fed if it is to fight. But it is not its belly but its arms that make it an army. Those men and women who supply its belly are doing nothing peculiarly warlike. Hence their immunity from attack: they are assimilated to the rest of the civilian population. We call them *innocent* people, a term of art which means that they have done nothing, and are doing nothing, that entails the loss of their rights.

This is a plausible line, I think, though it may be too finely drawn. What is more important is that it is drawn under pressure. We begin with the distinction between soldiers engaged in combat and soldiers at rest; then we shift to the distinction between soldiers as a class and civilians; and then we concede this or that group of civilians as the processes of economic mobilization establish its direct contribution to the business of fighting. Once the contribution has been plainly established, only "military necessity" can determine whether the civilians involved are attacked or not. They ought not to be attacked if their activities can be stopped, or their products seized or destroyed, in some other way and without significant risk. The laws of war have regularly recognized this obligation. Under the naval code, for example, merchant seamen on ships carrying military supplies were once regarded as civilians who had, despite the work they were doing, a right not to be attacked, for it was possible (and it sometimes still is) to seize their ships without shooting at them. But whenever seizure without shooting ceases to be possible, the obligation ceases also and the right lapses. It is not a retained but a war right, and rests only on the agreement of states and on the (doctrine of military necessity.) The history of submarine warfare nicely illustrates this

process, through which groups of civilians are, as it were, incorporated into hell. It will also enable me to suggest the point at which it becomes morally necessary to resist the incorporation.

#### *Submarine Warfare: The Laconia Affair*

Naval warfare has traditionally been the most gentlemanly form of fighting, possibly because so many gentlemen went into the navy, but also and more importantly because of the nature of the sea as a battlefield. The only comparable land environment is the desert; these two have in common the absence or relative absence of civilian inhabitants. Hence battle is especially pure, a combat between combatants, with no one else involved—just what we intuitively want war to be. The purity is marred, however, by the fact that the sea is extensively used for transport. Warships encounter merchant ships. The rules governing this encounter are, or were, fairly elaborate.<sup>11</sup> Worked out before the invention of the submarine, they bear the marks of their technological as well as their moral assumptions. A merchant ship carrying military supplies could lawfully be stopped on the high seas, boarded, seized, and brought into port by a prize crew. If the merchant seamen resisted this process at any stage, whatever force was necessary to overcome the resistance was also lawful. If they submitted peacefully, no force could be used against them. If it was impossible to bring the ship into port, it could be sunk, "subject to the absolute duty of providing for the safety of the crew, passengers, and papers." Most often, this was done by taking all three on board the warship. The crew and passengers were then to be regarded not as prisoners of war, for their encounter with the warship was not a battle, but as civilian internees.

Now, in World War I, submarine commanders (and the state officials who commanded them) openly refused to act in accordance with this "absolute duty," pleading military necessity. They could not surface before firing their torpedoes, for their ships were lightly armed above decks and highly vulnerable to ramming; they could not provide prize crews from their own small number, unless they, too, were to return to port; nor could they take merchant seamen on board, for there was no room. Hence their policy was to "sink on sight," though they did accept some responsibility to assist survivors after the ship was down. "Sink on sight" was especially the policy of the German government. The only alternative, its defenders have argued, was not to use submarines at all, or to use them ineffectively, which would have conceded control of the



sea to the British navy. After the war was over, perhaps because the Germans lost it, the traditional rules were reaffirmed. The London Naval Protocol of 1936, ratified by all the major participants in the last and the next great war (by the Germans in 1939), explicitly provided that "in their action with regard to merchant ships, submarines must conform to the rules of international law to which surface ships are subject." This is still the "binding rule," according to respected authorities on naval law, though anyone who defends the rule must do so "notwithstanding the experience of the Second World War."<sup>12</sup>

We can best gain access to this experience by turning immediately to the famous "Laconia order" issued by Admiral Doenitz of the German U-boat command in 1942. Doenitz required not only that submarines strike without warning, but also that they do nothing whatsoever to help the crew members of a sunken ship: "All attempts to rescue the crews of sunken ships should cease, including picking up men from the sea, righting capsized lifeboats, and supplying food and water."<sup>13</sup> This order provoked great indignation at the time, and after the war its promulgation was among the crimes with which Doenitz was charged at Nuremberg. But the judges refused to convict on this charge. I want to look closely at the reasons for their decision. Since their language is obscure, however, I shall also ask what their reasons might have been and what reasons we might have for requiring or not requiring rescue at sea.

The issue clearly was rescue and nothing else; despite the "binding rule" of international law, the policy of "sink on sight" was not challenged by the court. The judges apparently decided that the distinction between merchant ships and warships no longer made much sense.<sup>14</sup>

Shortly after the outbreak of the war, the British Admiralty . . . armed its merchant vessels, in many cases convoyed them with armed escort, gave orders to send position reports upon sighting submarines, thus integrating merchant vessels into the warning system of naval intelligence. On October 1, 1939, the Admiralty announced [that] British merchant ships had been ordered to ram U-boats if possible.

At this point, the court seemed to reason, merchant seamen had been conscripted for military service; hence it was permissible to attack them by surprise exactly as if they were soldiers. But this argument, by itself, is not a very good one. For if the conscription of merchant seamen was a response to illegitimate submarine attacks (or even to the strong probability of such attacks), it cannot

be invoked to justify those same attacks. It must be the case that the "sink on sight" policy was justified in the first place. The invention of the submarine had made it "necessary." The old rules were morally if not legally suspended because supply by sea—a military enterprise whose participants had always been liable to attack—had ceased now to be subject to nonviolent interdiction.

The "Laconia order" reached much further than this, however, for it suggested that seamen helpless in the sea, unlike wounded soldiers on land, need not be helped once the battle was over. Doenitz's argument was that the battle, in fact, was never over until the submarine was safe in its home port. The sinking of a merchant vessel was only the first blow of a long and tense struggle. Radar and the airplane had turned the wide seas into a single battlefield, and unless the submarine immediately began evasive maneuvers, it was or might be in great trouble.<sup>15</sup> Seamen had once been better off than soldiers, a privileged class of near-combatants treated as if they were civilians; now, suddenly, they were worse off.

Here again is the argument from military necessity, and again we can see that it is above all an argument about risk. The lives of the submarine crew would be endangered, Doenitz claimed, and the probability of detection and attack increased by this or that extent, if they attempted to rescue their victims. Now, this is clearly not always the case: in his account of the destruction of an allied convoy in the Arctic Sea, David Irving describes a number of incidents in which German submarines surfaced and offered assistance to merchant seamen in lifeboats without increasing their own risks.<sup>16</sup>

Lieutenant-Commander Teichert's U-456 . . . had fired the striking torpedoes. Teichert took his submarine alongside the lifeboats and ordered the Master, Captain Strand, to come aboard; he was taken prisoner. The seamen were asked whether they had sufficient water and they were handed tinned meat and bread by the submarine officers. They were told that they would be picked up by destroyers a few days later.

This occurred only a few months before Doenitz's order prohibited such assistance, and under conditions which made it perfectly safe. Convoy PQ 17 had dispersed, abandoned by its escorts; it was no longer in any sense a fighting force; the Germans controlled the air as well as the sea. The battle was clearly over, and military necessity could hardly have justified a refusal to help. I should think that if such a refusal, under similar circumstances, could be attributed to the "Laconia order," Doenitz would indeed be



guilty of a war crime. But nothing like this was demonstrated at Nuremberg.

Nor, however, did the court openly adopt the argument from military necessity: that under different circumstances the refusal to help was justified by the risks it entailed. Instead, the judges reaffirmed the binding rule. "If the Commander cannot rescue," they argued, "then . . . he cannot sink a merchant vessel . . ." But they did not enforce the rule and punish Doenitz. Admiral Nimitz of the U.S. Navy, called to testify by Doenitz's attorney, had told them that "U.S. submarines [generally] did not rescue enemy survivors if by so doing the vessels were exposed to unnecessary or additional risk." British policy had been similar. In view of this, the judges declared that "the sentence of Doenitz is not assessed on the ground of his breaches of the international law of submarine warfare."<sup>17</sup> They did not accept the argument of the defense attorneys that the law had effectively been rewritten by informal collusion among the belligerents. But they apparently felt that this collusion did make the law unenforceable (or at least unenforceable against only one of the parties to its violation)—a proper judicial decision, but one that leaves open the moral question.

In fact, Doenitz and his allied counterparts had reasons for the policy they adopted, and these reasons fit roughly into the framework of the war convention. Wounded or helpless combatants are no longer subject to attack; in that sense they have regained their right to life. But they are not entitled to assistance so long as the battle continues and the victory of their enemies is uncertain. What is decisive here is not military necessity but the assimilation of merchant seamen to the class of combatants. Soldiers need not risk their lives for the sake of their enemies, for both they and their enemies have exposed themselves to the coerciveness of war. There are some people, however, who are safe against that coerciveness, or who ought to be safeguarded against it, and these people also have a part in the *Laconia* affair.

The *Laconia* was a liner carrying 268 British servicemen and their families, returning home from pre-war stations in the Middle East, and 1,800 Italian prisoners of war. It was torpedoed and sunk off the west coast of Africa by a U-boat whose commander did not know who its passengers were (liners were used extensively by the Allies as troopships). When Doenitz learned of the sinking, and of the identity of the people in the water, he ordered a massive rescue effort involving, initially, a number of other submarines.<sup>18</sup> Italian warships were also asked to hurry to the scene, and the

U-boat commander responsible for the sinking radioed in English a general call for help. But the submarines were instead attacked by several Allied planes whose pilots presumably did not know what was going on in the seas below or did not believe what they were told. The confusion is typical enough in time of war: ignorance on all sides, compounded by mutual fear and suspicion.

In fact, the planes did little damage, but Doenitz's response was harsh. He directed the German commanders to confine their rescue efforts to the Italian prisoners; the British soldiers and their families were to be set adrift. It was this spectacle of women and children abandoned at sea, and the subsequent order that seemed to require its repetition, that was widely thought to be outrageous—and rightly so, it seems to me, even though "unrestricted" submarine warfare was by then commonly accepted. For we draw a circle of rights around civilians, and soldiers are supposed to accept (some) risks in order to save civilian lives. It is not a question of going out of their way or of being, or not being, good samaritans. They are the ones who endanger civilian lives in the first place, and even if they do this in the course of legitimate military operations, they must still make some positive effort to restrict the range of the damage they do. This indeed was Doenitz's own position before the Allied attack, a position he maintained despite criticism from other members of the German High Command: "I cannot put these people into the water. I shall carry on [the rescue effort]. It is not kindness that is involved here, but duty, and it is in terms of that duty that we judge the '*Laconia* order'. A rescue effort undertaken for the sake of noncombatants can be broken off temporarily because of an attack, but it cannot be called off in advance of any attack merely because an attack may occur (or recur). For one attack at least has already occurred and put innocent people in danger of death. Now they must be helped.

### Double Effect

The second principle of the war convention is that noncombatants cannot be attacked at any time. They can never be the objects or the targets of military activity. But as the *Laconia* affair suggests, noncombatants are often endangered not because anyone

sets out to attack them, but only because of their proximity to a battle that is being fought against someone else. I have tried to argue that what is then required is not that the battle be stopped, but that some degree of care be taken not to harm civilians—which means, very simply, that we recognize their rights as best we can within the context of war. But what degree of care should be taken? And at what cost to the individual soldiers who are involved? The laws of war say nothing about such matters; they leave the cruelest decisions to be made by the men on the spot with reference only to their ordinary moral notions or the military traditions of the army in which they serve. Occasionally one of these soldiers will write about his own decisions, and that can be like a light going on in a dark place. Here is an incident from Frank Richards' memoir of the First World War, one of the few accounts by a man from the ranks.<sup>19</sup>

When bombing dug-outs or cellars, it was always wise to throw the bombs into them first and have a look around them after. But we had to be very careful in this village as there were civilians in some of the cellars. We shouted down to them to make sure. Another man and I shouted down one cellar twice and receiving no reply were just about to pull the pins out of our bombs when we heard a woman's voice and a young lady came up the cellar steps . . . She and the members of her family . . . had not left [the cellar] for some days. They guessed an attack was being made and when we first shouted down had been too frightened to answer. If the young lady had not cried out when she did, we would have innocently murdered them all.

*Innocently murdered*, because they had shouted first; but if they had not shouted, and then killed the French family, it would have been, Richards believed, murder simply. And yet he was accepting a certain risk in shouting, for had there been German soldiers in the cellar, they might have scrambled out, firing as they came. It would have been more prudent to throw the bombs without warning, which means that military necessity would have justified him in doing so. Indeed, he would have been justified on other grounds, too, as we shall see. And yet he shouted.

The moral doctrine most often invoked in such cases is the principle of double effect. First worked out by Catholic casuists in the Middle Ages, double effect is a complex notion, but it is at the same time closely related to our ordinary ways of thinking about moral life. I have often found it being used in military and political debates. Officers will tend to speak in its terms, knowingly or unknowingly, whenever the activity they are planning is likely

to injure noncombatants. Catholic writers themselves frequently use military examples; it is one of their purposes to suggest what we ought to think when "a soldier in firing at the enemy foresees that he will shoot some civilians who are nearby."<sup>20</sup> Such foresight is common enough in war; soldiers could probably not fight at all, except in the desert and at sea, without endangering nearby civilians. And yet it is not proximity but only some contribution to the fighting that makes a civilian liable to attack. Double effect is a way of reconciling the absolute prohibition against attacking non-combatants with the legitimate conduct of military activity. I shall want to argue, following the example of Frank Richards, that the reconciliation comes too easily, but first we must see exactly how it is worked out.

The argument goes this way: it is permitted to perform an act likely to have evil consequences (the killing of noncombatants) provided the following four conditions hold.<sup>21</sup>

- 1) The act is good in itself or at least indifferent, which means, for our purposes, that it is a legitimate act of war.
- 2) The direct effect is morally acceptable—the destruction of military supplies, for example, or the killing of enemy soldiers.
- 3) The intention of the actor is good, that is, he aims only at the acceptable effect; the evil effect is not one of his ends, nor is it a means to his ends.
- 4) The good effect is sufficiently good to compensate for allowing the evil effect; it must be justifiable under Sidgwick's proportionality rule.

The burden of the argument is carried by the third clause. The "good" and evil effects that come together, the killing of soldiers and nearby civilians, are to be defended only insofar as they are the product of a single intention, directed at the first and not the second. The argument suggests the great importance of taking aim in wartime, and it correctly restricts the targets at which one can aim. But we have to worry, I think, about all those unintended but foreseeable deaths, for their number can be large, and subject only to the proportionality rule—a weak constraint—double effect provides a blanket justification. The principle for that reason invites an angry or a cynical response: what difference does it make whether civilian deaths are a direct or an indirect effect of my actions? It can hardly matter to the dead civilians, and if I know in advance that I am likely to kill so many innocent people and go ahead anyway, how can I be blameless?<sup>22</sup>

We can ask the question in a more concrete way. Would Frank



Richards have been blameless if he had thrown his bombs without warning? The principle of double effect would have permitted him to do so. He was engaged in a legitimate military activity, for many cellars were in fact being used by enemy soldiers. The effects of making "bomb without warning" his general policy would have been to reduce the risks of his being killed or disabled and to speed up the capture of the village, and these are "good" effects. Moreover, they were clearly the only ones he intended; civilian deaths would have served no purpose of his own. And finally, over an extended period of time, the proportions would probably have worked out favorably or at least not unfavorably; the mischief done would, let us assume, be balanced by the contribution to victory. And yet Richards was surely doing the right thing when he shouted his warning. He was acting as a moral man ought to act; his is not an example of fighting heroically, above and beyond the call of duty, but simply of fighting well. It is what we expect of soldiers. Before trying to state that expectation more precisely, however, I want to see how it works in more complex combat situations.

### *Bombardment in Korea*

I am going to follow here a British journalist's account of the way the American army waged war in Korea. Whether it is an entirely just account I do not know, but I am more interested in the moral issues it raises than in its historical accuracy. This, then, was a "typical" encounter on the road to Pyongyang. A battalion of American troops advanced slowly, without opposition, under the shadow of low hills. "We were well into the valley now, halfway down the straight . . . strung out along the open road, when it came, the harsh stutter of automatic fire sputtering the dust around us."<sup>28</sup> The troops stopped and dove for cover. Three tanks moved up, "pounding their shells into the . . . hillside and shattering the air with their machine guns. It was impossible in this remarkable inferno of sound to detect the enemy, or to assess his fire." Within fifteen minutes, several fighter planes arrived, "diving down upon the hillside with their rockets." This is the new technique of warfare, writes the British journalist, "born of immense productive and material might": "the cautious advance, the enemy small arms fire, the halt, the close support air strike, artillery, the cautious advance, and so on." It is designed to save the lives of soldiers, and it may or may not have that effect. "It is certain that it kills civilian men, women, and children, indiscriminately and in great numbers, and destroys all that they have."

Now there is another way to fight, though it is only open to soldiers who have had a "soldierly" training and who are not "roadbound" in their habits. A patrol can be sent forward to outflank the enemy position. In the end, it often comes to that anyway, as it did in this case, for the tanks and planes failed to hit the North Korean machine gunners. "At last, after more than an hour . . . a platoon from Baker Company began working their way through the scrub just under the ridge of the hill." But the first reliance was always on bombardment. "Every enemy shot released a deluge of destruction." And the bombardment had, or sometimes had, its characteristic double effect: enemy soldiers were killed, and so were any civilians who happened to be nearby. It was not the intention of the officers who called in the artillery and planes to kill civilians; they were acting out of a concern for their own men. And that is a legitimate concern. No one would want to be commanded in wartime by an officer who did not value the lives of his soldiers. But he must also value civilian lives, and so must his soldiers. He cannot save them, because they cannot save themselves, by killing innocent people. It is not just that they can't kill a lot of innocent people. Even if the proportions work out favorably, in particular cases or over a period of time, we would still want to say, I think, that the patrol must be sent out, the risk accepted, before the big guns are brought to bear. The soldiers sent on patrol can plausibly argue that they never chose to make war in Korea; they are soldiers nevertheless; there are obligations that go with their war rights, and the first of these is the obligation to attend to the rights of civilians—more precisely, of those civilians whose lives they themselves endanger.

The principle of double effect, then, stands in need of correction. Double effect is defensible, I want to argue, only when the two outcomes are the product of a *double intention*: first, that the "good" be achieved; second, that the foreseeable evil be reduced as far as possible. So the third of the conditions listed above can be restated:

- 3) The intention of the actor is good, that is, he aims narrowly at the acceptable effect; the evil effect is not one of his ends, nor is it a means to his ends, and, aware of the evil involved, he seeks to minimize it, accepting costs to himself.

Simply not to intend the death of civilians is too easy; most often, under battle conditions, the intentions of soldiers are focused narrowly on the enemy. What we look for in such cases is some sign



of a positive commitment to save civilian lives. Not merely to apply the proportionality rule and kill no more civilians than is militarily necessary—that rule applies to soldiers as well; no one can be killed for trivial purposes. Civilians have a right to something more. And if saving civilian lives means risking soldier's lives, the risk must be accepted. But there is a limit to the risks that we require. These are, after all, unintended deaths and legitimate military operations, and the absolute rule against attacking civilians does not apply. War necessarily places civilians in danger; that is another aspect of its hellishness. We can only ask soldiers to minimize the dangers they impose.

Exactly how far they must go in doing that is hard to say, and for that reason it may seem odd to claim that civilians have rights in such matters. What can this mean? Do civilians have a right not only not to be attacked but also not to be put at risk to such and such a degree, so that imposing a one-in-ten chance of death on them is justified, while imposing a three-in-ten chance is unjustified? In fact, the degree of risk that is permissible is going to vary with the nature of the target, the urgency of the moment, the available technology, and so on. It is best, I think, to say simply that civilians have a right that "due care" be taken.<sup>24</sup> \* The case is the same in domestic society: when the gas company works on the lines that run under my street, I have a right that its workmen observe very strict safety standards. But if the work is urgently required by the imminent danger of an explosion on a neighboring street, the standards may be relaxed and my rights not violated. Now, military necessity works exactly like civil emergency, except that in war the standards with which we are familiar in domestic society are always relaxed. That is not to say, however, that there are no standards at all, and no rights involved. Whenever there is likely to be a second effect, a second intention is morally required. We can move some way toward defining the limits of that second intention if we consider two more wartime examples.

\* Since judgments of "due care" involve calculations of relative value, urgency, and so on, it has to be said that utilitarian arguments and rights arguments (relative at least to indirect effects) are not wholly distinct. Nevertheless, the calculations required by the proportionality principle and those required by "due care" are not the same. Even after the highest possible standards of care have been accepted, the probable civilian losses may still be disproportionate to the value of the target; then the attack must be called off. Or, more often, military planners may decide that the losses entailed by the attack, even if it is carried out at minimal risk to the attackers, are not disproportionate to the value of the target: then "due care" is an additional requirement.

### *The Bombing of Occupied France and the Vernor Raid*

During World War II, the Free French air force carried out bombing raids against military targets in occupied France. Inevitably, their bombs killed Frenchmen working (under coercion) for the German war effort; inevitably too, they killed Frenchmen who simply happened to live in the vicinity of the factories under attack. This posed a cruel dilemma for the pilots, which they resolved not by giving up the raids or asking someone else to carry them out, but by accepting greater risks for themselves. "It was . . . this persistent question of bombing France itself," says Pierre Mendes-France, who served in the air force after his escape from a German prison, "which led us to specialize more and more in precision bombing—that is, flying at a very low altitude. It was more risky, but it also permitted greater precision . . ." <sup>25</sup> The same factories, of course, could have been (perhaps should have been) attacked by squads of partisans or commandos carrying explosives; and their aim would have been perfect, not merely more precise, and no civilians except those working in the factories would have been endangered. But such raids would have been extremely dangerous and the chances of success, and especially of reiterated success, very slim. Risks of that sort were more than the French expected, even of their own soldiers. The limits of risk are fixed, then, roughly at that point where any further risk-taking would almost certainly doom the military venture or make it so costly that it could not be repeated.

There is obviously leeway for military judgment here: strategists and planners will for reasons of their own weigh the importance of their target against the importance of their soldiers' lives. But even if the target is very important, and the number of innocent people threatened relatively small, they must risk soldiers before they kill civilians. Consider, for example, the one case I have found from the Second World War where a commando raid was tried instead of an air attack. In 1943, the heavy water plant at Vernor in occupied Norway was destroyed by Norwegian commandos operating on behalf of the British S.O.E. (Special Operations Executive). It was vitally important to stop the production of heavy water so as to delay the development of an atomic bomb by German scientists. British and Norwegian officials debated whether to make the attempt from the air or on the ground and chose the latter approach because it was less likely to injure civilians.<sup>26</sup> But it was very dangerous for the commandos. The first

attempt failed, and thirty-four men were killed in its course; the second attempt, by a smaller number of men, succeeded without casualties—to the surprise of everyone involved, including the commandos. It was possible to accept such risks for a single operation that would not, it was thought, have to be repeated. For a “battle” that extended over time, consisting of many separate incidents, it would not have been possible.

Later in the war, after production was resumed at Vemork and security considerably tightened, the plant was bombed from the air by American planes. The bombing was successful, but it resulted in the deaths of twenty-two Norwegian civilians. At this point, double effect seems to work, justifying the air attack. Indeed, in its unrevised form it would have worked sooner. The importance of the military aim and the actual casualty figures (foreseeable in advance, let us assume) would have justified a bombing raid in the first place. But the special value we attach to civilian lives precluded it.

Now, the same value attaches to the lives of German as to those of French or Norwegian civilians. There are, of course, additional moral as well as emotional reasons for paying that respect and accepting its costs in the case of one's own people or one's allies (and it is no accident that my two examples involve attacks on occupied territory): Soldiers have direct obligations to the civilians they leave behind, which have to do with the very purpose of soldiering and with their own political allegiance. But the structure of rights stands independently of political allegiance; it establishes obligations that are owed, so to speak, to humanity itself and to particular human beings and not merely to one's fellow citizens. The rights of German civilians—who did no fighting and were not engaged in supplying the armed forces with the means of fighting—were no different from those of their French counterparts, just as the war rights of German soldiers were no different from those of French soldiers, whatever we think of their war.

The case of occupied France (or Norway) is, however, complex in another way. Even if the French pilots had reduced their risks and flown at high altitudes, we would not hold them solely responsible for the additional civilian deaths they caused. They would have shared that responsibility with the Germans—in part because the Germans had attacked and conquered France, but also (and more importantly for our immediate purposes) because they had mobilized the French economy for their own strategic ends, forcing French workers to serve the German war machine, turning

French factories into legitimate military targets, and putting the adjacent residential areas in danger. The question of direct and indirect effect is complicated by the question of coercion. When we judge the unintended killing of civilians, we need to know how those civilians came to be in a battle zone in the first place. This is, perhaps, only another way of asking who put them at risk and what positive efforts were made to save them. But it raises issues that I have not yet addressed and that are most dramatically visible when we turn to another, and a much older, kind of warfare.