Utilitarianism and the Rules of War

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The topic of the present symposium is roughly the moral proscriptions and prescriptions that should govern the treatment by a belligerent, and in particular by its armed forces, of the nationals of an enemy, both combatants and noncombatants. In addressing myself to it, the central question I shall try to answer is: What, from a moral point of view, ought to be the rules of war? But this question, taken as an indication of what I shall be discussing, is both too broad and too narrow. Too broad because the rules of war include many topics like the rights and duties of neutral countries and the proprieties pertaining to an armistice. And too narrow because a full view of the topic requires me to consider, as I shall, such questions as: Is it ever morally right for a person to infringe "ideal" rules of war?

I shall aim to illuminate our topic by discussing it from the point of view of a rule-utilitarianism of the "contractual" variety (to use a term employed by John Rawls in his book *A Theory of Justice*). What this point of view is has of course to be explained, as do the special problems raised by the fact that the rules are to apply to nations at war. I believe it will become clear that the rule-utilitarian viewpoint is a very helpful one for thinking of rules of warfare, and I believe reflection on its implications will confirm us both in conclusions about certain normative rules and in a conviction that a contractual utilitarian view of such matters is essentially sound. Needless to say, I shall be led to express some disagreement with Professor Nagel.

1. (Cambridge, Mass., 1971.)
I. NAGEL'S ABSOLUTISM

I shall take Nagel to be defending, first, the general view that certain kinds of action are, from a moral point of view, absolutely out of bounds, no matter what the circumstances; and second, a specific prohibition that applies this principle to the area of our interest. (His first thesis makes it proper to call his view "absolutist," in the sense that some general moral prohibitions do not have prima facie force only but are binding without exception, indefeasible.) Now Nagel is tentative in his espousal of these two theses, and sometimes contends only that we have some moral intuitions of this sort and that a study of these will show "the complexity, and perhaps the incoherence" of our moral ideas. Indeed, he says he is offering only a "somewhat qualified defense of absolutism," and concedes that in extreme circumstances there may be exceptions to his absolutist principles after all. Where Nagel is committed definitely is to a criticism of utilitarianism; he speaks scathingly of "the abyss of utilitarian apologetics for large-scale murder." In view of Nagel's tentativeness, I think it fair to disassociate him from the positive view I wish to criticize, although I am calling it Nagel's "absolutism." This positive view is, however, the only definite proposal he puts forward, and if I am to consider critically any positive antiutilitarian view in connection with Nagel's essay, it has to be this one. At any rate, this view is one that somebody might hold, and is well worth discussing.

The first point I wish to make is that a rule-utilitarian may quite well agree with Nagel that certain kinds of action are morally out of bounds absolutely and no matter what the circumstances. Take, for instance, some of the rules of warfare recognized by the United States Army:

It is especially forbidden . . . to declare that no quarter will be given. . . . It is especially forbidden . . . to kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion. . . .

It is especially forbidden . . . to employ arms, projectiles, or material calculated to cause unnecessary suffering. . . .

The pillage of a town or place, even when taken by assault, is prohibited. . . .
A commander may not put his prisoners to death because their presence retards his movements or diminishes his power of resistance by necessitating a large guard, or by reason of their consuming supplies, or because it appears certain that they will regain their liberty through the impending success of their forces. It is likewise unlawful for a commander to kill his prisoners on grounds of self-preservation, even in the case of airborne or commando operations, although the circumstances of the operation may make necessary rigorous supervision of and restraint upon the movement of prisoners of war.\(^2\)

A rule-utilitarian is certainly in a position to say that utilitarian considerations cannot morally justify a departure from these rules; in that sense they are absolute. But he will of course also say that the moral justification of these rules lies in the fact that their acceptance and enforcement will make an important contribution to long-range utility. The rule-utilitarian, then, may take a two-level view: that in justifying the rules, utilitarian considerations are in order and nothing else is; whereas in making decisions about what to do in concrete circumstances, the rules are absolutely binding. In the rule-utilitarian view, immediate expediency is not a moral justification for infringing the rules.\(^3\)

It is not clear that Nagel recognizes this sort of absolutism about "ideal" rules of war as a possible utilitarian view, but he seems to disagree with it when he claims that some moral prohibitions are entirely independent of utilitarian considerations.

2. Department of the Army Field Manual PM 27-10, The Law of Land Warfare (Department of the Army, July 1956), pp. 17, 18, 21, 35. The Manual specifically states that the rules of war may not be disregarded on grounds of "military necessity" (p. 4), since considerations of military necessity were fully taken into account in framing the rules. (All page numbers in the text refer to this publication, hereafter called the Army Manual.)

Other valuable discussions of contemporary rules of warfare are to be found in L. Oppenheim, International Law, ed. H. Lauterpacht, 7th edn. (New York, 1952) and in Marjorie M. Whiteman, Digest of International Law, esp. Vol. X (U.S. Department of State, 1963).

3. It is conceivable that ideal rules of war would include one rule to the effect that anything is allowable, if necessary to prevent absolute catastrophe. As Oppenheim remarks, it may be that if the basic values of society are threatened nations are possibly released from all the restrictions in order to do what "they deem to be decisive for the ultimate vindication of the law of nations" (International Law, p. 351).
What absolute rule, then, does Nagel propose? I shall formulate and criticize his proposal in a moment. But first we should note that his rule is intended to be restricted in scope; it applies only to what "we deliberately do to people." This is an important restriction. Suppose bombers are dispatched to destroy a munitions factory—surely a legitimate military target in a night raid; in fact and predictably, and from a military point of view incidentally, the bombs kill five thousand people. Is this a case of "deliberately doing" something to these people? Nagel's view here seems obscure. He rejects the law of double effect and says he prefers to "stay with the original, unanalyzed distinction between what one does to people and what merely happens to them as a result of what one does." He concedes that this distinction "needs clarification." Indeed it does. Without more clarification, Nagel is hardly giving an explicit theory. I note that the U.S. Army Manual appears to reject this distinction, and in a paragraph declaring the limitations on strategic bombing states that "loss of life and damage to property must not be out of proportion to the military advantage to be gained" (p. 19).

The absolutist principle that Nagel espouses as the basic restriction on legitimate targets and weapons is this: "hostility or aggression should be directed at its true object. This means both that it should be directed at the person or persons who provoke it and that it should aim more specifically at what is provocative about them. The second condition will determine what form the hostility may appropriately take." Now, while I find this principle reasonably clear in its application to simple two-person cases discussed by him, I find it difficult to apply in the identification of morally acceptable military operations. With some trepidation I suggest that Nagel intends it to be construed to assert something like the following for the case of military operations: "Persons may be attacked 'deliberately' only if their presence or their position prevents overpowering the military forces of the enemy in some way; and they may be attacked only in a manner that is reasonably related to the objective of disarming or disabling them." If this is what he has in mind it is still rather vague, since it does not make clear whether attacks on munitions factories are legitimate, or whether attacks on persons involved in supporting services, say, the provisioning of the army, are acceptable.
It is worth noting that a principle resembling this one might have a utilitarian justification of the kind alluded to above. But the principle standing by itself does not seem to me self-evident; nor does another principle Nagel asserts, that "the maintenance of a direct interpersonal response to the people one deals with is a requirement which no advantages can justify one in abandoning."

II. Morally Justifiable Rules as Rules Impartially Preferable

I shall now proceed to a positive account of the rules of war and of their justification. We shall have to consider several distinct questions, but the central question will be: Which of the possible rules of war are morally justifiable?

But first, what do I mean by "rules of war" or by talk of the "authoritative status" of rules of war? What I have in mind is, roughly, rules with the status that the articles of the Hague and Geneva Conventions have or have had. That is, certain rules pertaining to war are stated in formal treaties. These rules are seriously taught, as being legally binding, to officers and to some extent to enlisted men; they are recognized as legally binding restrictions on the decisions of the general staff; members of the army know that actions forbidden by these rules are contrary both to international law and to their own army's manual of rules for proper conduct; these rules are enforced seriously by the courts, either military or international; and so on. Proscriptions or prescriptions with this status I call "rules of war"; and in speaking of a rule having "authoritative status" I have this kind of force in mind. The U.S. Army Manual lists such rules; and digests of international law such as those by Whiteman and Oppenheim contain information on what such rules are and have been.

I have said that I shall offer a utilitarian answer to the question which rules of war (in the above sense) are morally justifiable. But I have also said that I shall be offering what I (following Rawls) call a contractual utilitarian answer. What I mean by that (the term "contractual" may be a bit misleading) is this. I accept the utilitarian answer to the question which rules of war are morally justifiable because utilitarian rules of war are the ones rational, impartial persons would choose (the ones they would be willing to put them-
selves under a contract to obey). The more basic question is, then: Which rules of war would people universally prefer to have accorded authoritative status among nations if the people deciding were rational, believed they might be involved in a war at some time, and were impartial in the sense that they were choosing behind a veil of ignorance? (It is understood that their ignorance is to be such as to prevent them from making a choice that would give them or their nation a special advantage; it would, for instance, prevent them from knowing what weaponry their country would possess were it to be at war, and from knowing whether, were war to occur, they would be on the front lines, in a factory, or in the general staff office.) In other words, the more fundamental question is: What rules would rational, impartial people, who expected their country at some time to be at war, want to have as the authoritative rules of war—particularly with respect to the permitted targets and method of attack? I suggest that the rules of war which rational, impartial persons would choose are the rules that would maximize long-range expectable utility for nations at war. In saying this I am offering a contractual utilitarian answer to the question what rules of war are morally justifiable. I am saying, then: (1) that rational, impartial persons would choose certain rules of war; (2) that I take as a basic premise ("analytic" in some sense, if you like) that a rule of war is morally justified if and only if it would be chosen by rational, impartial persons; and (3) that the rules rational, impartial persons would choose are ones which will maximize expectable long-range utility for nations at war.4

Nagel objects to utilitarianism and hence presumably would object to (3), but he might be agreeable to both (1) and (2). At least he seems close to these principles, since he seems to hold that an action is justified if one can justify to its victim what is being done to him. For instance, he implies that if you were to say to a prisoner, "You understand, I have to pull out your fingernails because it is absolutely essential that we have the name of your confederates" and the

4. This summary statement needs much explanation, e.g., regarding the meaning of "rational." It is only a close approximation to the view I would defend, since I think it is better to substitute a more complex notion for that of impartiality or a veil of ignorance.
prisoner agreed to this as following from principles he accepts, then the torture would be justified. Nagel rather assumes that the prisoner would not agree, in an appropriate sense. In this connection we must be clearly aware of an important distinction. A judge who sentences a criminal might also be unable to persuade the criminal to want the sentence to be carried out; and if persuading him to want this were necessary for a moral justification of the criminal law, then the system of criminal justice would also be morally objectionable. We must distinguish between persuading a person to whom something horrible is about to be done to want that thing to happen or to consent to its happening at that very time and something quite different—getting him to accept, when he is rational and choosing in ignorance of his own future prospects, some general principles from which it would follow that this horrible thing should or might be done to a person in his present circumstances. I think Nagel must mean, or ought to mean, that a set of rules of war must be such as to command the assent of rational people choosing behind a veil of ignorance, not that a person must be got to assent at the time to his fingernails being pulled out in order to get information, if that act is to be justified. It may be, however, that Nagel does not agree with this distinction, since he hints at the end of his discussion that something more may be required for moral justification than I have suggested, without indicating what the addition might be.

We should notice that the question which rules of war would be preferred by rational persons choosing behind a veil of ignorance is roughly the question that bodies like the Hague Conventions tried to answer. For there were the representatives of various nations, gathered together, say, in 1907, many or all of them making the assumption that their nations would at some time be at war. And, presumably in the light of calculated national self-interest and the principles of common humanity, they decided which rules they were prepared to commit themselves to follow, in advance of knowing how the fortunes of war might strike them in particular. The questions the signatories to the Hague Conventions actually did ask themselves are at least very close to the questions I think we must answer in order to know which rules of war are morally justified.
III. THE RATIONAL, IMPARTIAL CHOICE: UTILITARIAN RULES

I wish now to explain in a few words why I think rational, impartial persons would choose rules of war that would maximize expectable utility. Then—and this will occupy almost all of the present section—I shall classify the rules of war into several types, and try to show that representative rules of each type would be utility-maximizing and therefore chosen. I shall hope (although I shall not say anything explicitly about this) that the ideal rules of war, identified in this way, will coincide with the reflective intuitions of the reader. If so, I assume that this fact will commend to him the whole of what I am arguing.

I have suggested that rational persons, choosing behind a veil of ignorance but believing that their country may well be involved in a war at some time, would prefer rules of war that would maximize expectable utility, in the circumstance that two nations are at war. Why would they prefer such rules? About this I shall say only that if they are self-interested they will choose rules which will maximize expectable utility generally, for then their chance of coming out best will be greatest (and they do not know how especially to favor themselves); and that if they are altruistic they will again choose that set of rules, for they will want to choose rules which will maximize expectable utility generally. The rules of war, then, subject to the restriction that the rules of war may not prevent a belligerent from using all the power necessary to overcome the enemy, will be ones whose authorization will serve to maximize welfare.

It is worth noting that a preamble to the U.S. Army Manual offers an at least partially utilitarian theory of the rules of war (I say "at least partially" because of doubts about the interpretation of clause b). This preamble states that the law of land warfare "is inspired by the desire to diminish the evils of war by: a. Protecting both combatants and noncombatants from unnecessary suffering; b. Safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and c. Facilitating the restoration of peace" (p. 3).

Which rules, then, would maximize expectable utility for nations
at war? (I shall later discuss briefly whether the ideal rules would altogether forbid war as an instrument of national policy.)

First, however, we must understand why the above-mentioned restriction, guaranteeing that the rules of war will not prevent a belligerent from using all the force necessary to overcome the enemy, must be placed on the utility-maximizing rules of war. The reason for this restriction is to be found in the nature of a serious war. There are, of course, many different kinds of war. Wars differ in magnitude, in the technologies they employ, in the degree to which they mobilize resources, in the type of issue the belligerents believe to be at stake, and in many other ways as well. The difference between the Trojan War and World War II is obviously enormous. The former was a simple, small-scale affair, and the issues at stake might well have been settled by a duel between Paris and Menelaus, or Hector and Achilles, and the belligerents might not have been seriously dissatisfied with the outcome. In the case of World War II, the British thought that Hitler’s Germany and its policies threatened the very basis of civilized society. The destruction of Hitler’s power seemed so important to the British that they were willing to stake their existence as a nation on bringing it about. Wars have been fought for many lesser reasons: to spread a political or religious creed, to acquire territory or wealth, to obtain an outlet to the sea, or to become established as a world power. Wars may be fought with mercenaries, or primarily by the contribution of equipment and munitions; such wars make relatively little difference to the domestic life of a belligerent.

It is possible that the rules which would maximize expectable utility might vary from one type of war to another. I shall ignore this possibility for the most part, and merely note that practical difficulties are involved in equipping military handbooks with different sets of rules and establishing judicial bodies to identify the proper classification of a given war. I shall take the position of Britain in World War II as typical of that of a belligerent in a serious war.

The position of a nation in a serious war is such, then, that it considers overpowering the enemy to be absolutely vital to its interests (and possibly to those of civilized society generally)—so vital,
indeed, that it is willing to risk its very existence to that end. It is
doubtful that both sides can be well justified in such an appraisal
of the state of affairs. But we may assume that in fact they do make
this appraisal. In this situation, we must simply take as a fact that
neither side will consent to or follow rules of war which seriously
impair the possibility of bringing the war to a victorious conclusion.
This fact accounts for the restriction within which I suggested a
choice of the rules of war must take place. We may notice that the
recognized rules of war do observe this limitation: they are framed
in such a way as not to place any serious obstacle in the way of a
nation's using any available force, if necessary, to destroy the ability
of another to resist. As Oppenheim has observed, one of the assump-
tions underlying the recognized rules of war is that "a belligerent is
justified in applying any amount and any kind of force which is
necessary for . . . the overpowering of the opponent." This limita-
tion, however, leaves a good deal of room for rules of war which will
maximize expectable long-range utility for all parties.

This restriction, incidentally, itself manifests utilitarian considera-
tions, for a nation is limited to the use of means necessary to over-
come an opponent. Clearly it is contrary to the general utility that
any amount or manner of force be employed when it is not necessary
for victory.

It will be convenient to divide the rules restricting military opera-
tion, especially the targets and weapons of attack, into three types.
(I do not claim that these are exhaustive.)

1. Humanitarian restrictions of no cost to military operation.
There are some things that troops may be tempted to do which are
at best of negligible utility to their nation but which cause serious
loss to enemy civilians, although not affecting the enemy's power
to win the war. Such behavior will naturally be forbidden by rules
designed to maximize expectable utility within the understood re-
striction. Consider, for example, rules against the murder or ill-treat-
ment of prisoners of war. A rule forbidding wanton murder of
prisoners hardly needs discussion. Such murder does not advance
the war effort of the captors; indeed, news of its occurrence only

stiffens resistance and invites retaliation. Moreover, there is an advantage in returning troops having been encouraged to respect the lives of others. A strict prohibition of wanton murder of prisoners therefore has the clear support of utilitarian considerations. Much the same may be said for a rule forbidding ill-treatment of prisoners. There can, of course, be disagreement about what constitutes ill-treatment—for instance, whether a prisoner is entitled to a diet of the quality to which he is accustomed if it is more expensive than that available to troops of the captor army. It is clear, however, that in a war between affluent nations prisoners can generally be well-housed and well-fed and receive adequate medical care without cost to the war effort of the captors. And if they receive such treatment, of course the captives gain. Thus a policy of good treatment of prisoners may be expected to make many nationals of both sides better off, and at a cost which in no way impairs the ability of either to wage the war.

Again, much the same may be said of the treatment of civilians and of civilian property in occupied territories. There is no military advantage, at least for an affluent nation, in the plunder of private or public property. And the rape of women or the ill-treatment of populations of occupied countries serves no military purpose. On the contrary, such behavior arouses hatred and resentment and constitutes a military liability. So utility is maximized, within our indicated basic limitations, by a strict rule calling for good treatment of the civilian population of an occupied territory. And the same can be said more generally for the condemnation of the wanton destruction of cities, towns, or villages, or devastation not justified by military necessity, set forth in the Charter of the Nuremberg Tribunal.

Obviously these rules, which the maximization of expectable utility calls for, are rules that command our intuitive assent.

2. Humanitarian restrictions possibly costly to military victory. Let us turn now to rules pertaining to actions in somewhat more complex situations. There are some actions which fall into neither of the classes so far discussed. They are not actions which must be permitted because they are judged necessary or sufficient for victory, and hence actions on which no party to a major war would ac-
cept restrictions. Nor are they actions which morally justified rules of war definitely prohibit, as being actions which cause injury to enemy nationals but serve no military purpose. It is this large class of actions neither clearly permitted nor definitely prohibited, for reasons already discussed, that I wish now to consider. I want to ask which rules of war are morally justified, because utility-maximizing, for actions of this kind. In what follows I shall be distinguishing several kinds of action and suggesting appropriate rules for them. The first type is this: doing something which will result in widespread destruction of civilian life and property and at the same time will add (possibly by that very destruction) to the probability of victory but will not definitely decide the war. Some uses of atomic weapons, and area bombing of the kind practiced at Hamburg, illustrate this sort of case.

A proper (not ideally precise) rule for such operations might be: substantial destruction of lives and property of enemy civilians is permissible only when there is good evidence that it will significantly enhance the prospect of victory. Application of the terms "good evidence" and "significantly enhance" requires judgment, but the rule could be a useful guideline all the same. For instance, we now know that the destruction of Hamburg did not significantly enhance the prospect of victory; in fact, it worked in the wrong direction, since it both outraged the population and freed workers formerly in non-war-supporting industries to be moved into industry directly contributing to the German war effort. The generals surely did not have good evidence that this bombing would significantly enhance the prospect of victory.

This rule is one which parties to a war might be expected to accept in advance, since following it could be expected to minimize the human cost of war on both sides, and since it does not involve a significant compromise of the goal of victory. The proposed rule, incidentally, has some similarities to the accepted rule cited above from the U.S. Army Manual, that "loss of life and damage to property must not be out of proportion to the military advantage to be gained."

This rule, which I am suggesting only for wars like World War II, where the stakes are very high, may become clearer if seen in
the perspective of a more general rule that would also be suitable for wars in which the stakes are much lower. I pointed out above that what is at stake in a war may be no more than a tiny strip of land or national prestige. (The utility of these, may, however, be considered very great by a nation.) Now, it is clear that a risk of defeat which may properly be taken when the stakes are small may not be a proper risk when the stakes are virtually infinite; and a risk that could not properly be run when the stakes are enormous might quite properly be run when the stakes are small. So if the above-suggested rule is plausible for serious wars, in which the stakes are great, a somewhat different rule will be plausible in the case of wars of lesser importance—one that will require more in the way of “good evidence” and will require that the actions more “significantly enhance” the prospect of victory than is necessary when the stakes are much higher. These thoughts suggest the following general principle, applicable to all types of war: a military action (e.g., a bombing raid) is permissible only if the utility (broadly conceived, so that the maintenance of treaty obligations of international law could count as a utility) of victory to all concerned, multiplied by the increase in its probability if the action is executed, on the evidence (when the evidence is reasonably solid, considering the stakes), is greater than the possible disutility of the action to both sides multiplied by its probability. The rule for serious wars suggested above could then be regarded as a special case, one in which the utility of victory is virtually set at infinity—so that the only question is whether there is reasonably solid evidence that the action will increase the probability of victory. The more general rule obviously involves difficult judgments; there is a question, therefore, as to how it could be applied. It is conceivable that tough-minded civilian review boards would be beneficial, but we can hardly expect very reliable judgments even from them.⁴

6. If we assume that both sides in a major struggle somehow manage to be persuaded that their cause is just, we shall have to expect that each will assign a net positive utility to its being the victor. For this reason it makes very little difference whether the more general principle uses the concept of the utility of victory by one side for everyone concerned, or the utility for that side only.

One might propose that the general restriction on rules of war, to the effect that in a serious war the use of any force necessary or sufficient for victory
These rules are at least very different from a blanket permission for anything the military thinks might conceivably improve the chances of victory, irrespective of any human cost to the enemy. In practice, it must be expected that each party to a war is likely to estimate the stakes of victory quite high, so that the rule which has the best chance of being respected is probably the first one mentioned, and not any modification of it that would be suggested to an impartial observer by the second, more general principle.

The reader may have been struck by the fact that these suggested rules are essentially institutionalized applications of a kind of act-utilitarian principle for certain contexts. This may seem inconsistent with the notion of a system of absolute rules themselves justified by long-range utilitarian considerations. But there is nothing inconsistent in the suggestion that some of the "absolute" rules should require that in certain situations an action be undertaken if and only if it will maximize expectable utility.

It may be objected that the rules suggested are far too imprecise to be of practical utility. To this I would reply that there is no reason why judgment may not be required in staff decisions about major operations. Furthermore, the U.S. Army Manual already contains several rules the application of which requires judgment. For example:

Absolute good faith with the enemy must be observed as a rule of conduct. . . . In general, a belligerent may resort to those measures for mystifying or misleading the enemy against which the enemy ought to take measures to protect himself.

The measure of permissible devastation is found in the strict necessities of war. Devastation as an end in itself or as a separate
measure of war is not sanctioned by the law of war. There must be some reasonably close connection between the destruction of property and the overcoming of the enemy's army. . . .

The punishment imposed for a violation of the law of war must be proportionate to the gravity of the offense. The death penalty may be imposed for grave breaches of the law. . . . Punishments should be deterrent . . . (pp. 22, 23-24, 182).

It has sometimes been argued, for instance by Winston Churchill, that obliteration bombing is justified as retaliation. It has been said that since the Germans destroyed Amsterdam and Coventry, the British had a right to destroy Hamburg. And it is true that the Hague Conventions are sometimes regarded as a contract, breach of which by one side releases the other from its obligations. It is also true that a government which has itself ordered obliteration bombing is hardly in a position to complain if the same tactic is employed by the enemy. But maximizing utility permits obliteration bombing only as a measure of deterrence or deterrent reprisal. This rule, incidentally, is recognized by the Army Manual as a principle governing all reprisals: "Reprisals are acts of retaliation . . . for the purpose of enforcing future compliance with the recognized rules of civilized warfare. . . . Other means of securing compliance with the law of war should normally be exhausted before resort is had to reprisals. . . . Even when appeal to the enemy for redress has failed, it may be a matter of policy to consider, before resorting to reprisals, whether the opposing forces are not more likely to be influenced by a steady adherence to the law of war on the part of the adversary" (p. 177). Purposes of retaliation, then, do not permit bombing in contravention of the suggested general principles.

Special notice should be taken that widespread civilian bombing might be defended by arguing that a significant deterioration in civilian morale could bring an end to a war by producing internal revolution. Our principle does not exclude the possibility of such reasoning, in the presence of serious evidence about civilian morale, when the stakes of victory are high. But we know enough about how bombing affects civilian morale to know that such bombing could be justified only rarely, if at all. The U.S. Army seems to go further
than this; its rule asserts that any attack on civilians "for the sole purpose of terrorizing the civilian population is also forbidden." It may be, however, that in actual practice this rule is interpreted in such a way that it is identical with the less stringent rule which is as much as utilitarian considerations can justify; if not, I fear we have to say that at this point the Army's theory has gone somewhat too far.

3. Acceptance of military losses for humanitarian reasons. Let us now turn to some rules which have to do with what we might call the economics of warfare, when the ultimate outcome is not involved, either because the outcome is already clear or because the action is fairly local and its outcome will not have significant repercussions. What damage may one inflict on the enemy in order to cut one's own losses? For instance, may one destroy a city in order to relieve a besieged platoon, or in order to avoid prolonging a war with consequent casualties? (The use of atom bombs in Japan may be an instance of this type of situation.) It is convenient to deal with two types of cases separately.

First, when may one inflict large losses on the enemy in order to avoid smaller losses for oneself, given that the issue of the war is not in doubt? A complicating fact is that when the issue is no longer in doubt it would seem that the enemy ought to concede, thereby avoiding losses to both sides. Why fight on when victory is impossible? (Perhaps to get better terms of peace.) But suppose the prospective loser is recalcitrant. May the prospective victor then unleash any horrors whatever in order to terminate the war quickly or reduce his losses? It is clear that the superior power should show utmost patience and not make the terms of peace so severe as to encourage further resistance. On the other hand, long-range utility is not served if the rules of war are framed in such a way as to provide an umbrella for the indefinite continuation of a struggle by an inferior power. So it must be possible to inflict losses heavy enough to produce capitulation but not so heavy as to be out of proportion to the estimated cost of further struggle to both sides. This condition is especially important in view of the fact that in practice there will almost always be other pressures that can be brought to bear. The

7. Whiteman, Digest of International Law, X, 135.
application of such a rule requires difficult judgments, but some such rule appears called for by long-range utilitarian considerations.

The second question is: Should there be restrictions on the treatment of an enemy in the case of local actions which could hardly affect the outcome of the war, when these may cause significant losses? Rules of this sort are in fact already in force. For instance, as mentioned above, the Army Manual forbids killing of prisoners when their presence retards one's movements, reduces the number of men available for combat, uses up the food supply, and in general is inimical to the integrity of one's troops. Again, the Second Hague Convention forbids forcing civilians in occupied territory to give information about the enemy, and it forbids reprisals against the general civilian population "on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible." The taking of hostages is prohibited (Army Manual, p. 107).

All these rules prescribe that a belligerent be prepared to accept certain military disadvantages for the sake of the lives and welfare of civilians and prisoners. The disadvantages in question are not, however, losses that could be so serious as to affect the outcome of a war. Furthermore, the military gains and losses are ones which are likely to be evenly distributed, so that neither side stands to gain a long-term advantage if the rules are observed by both. So, without affecting the outcome of the war and without giving either side an unfair advantage, a considerable benefit can come to both belligerents in the form of the welfare of their imprisoned and occupied populations. Thus the long-run advantage of both parties is most probably served if they accept forms of self-restraint which can work out to be costly in occasional instances. Such rules will naturally be accepted by rational, impartial people in view of their long-range benefits.

IV. RULES OF WAR AND MORALITY

I have been arguing that there is a set of rules governing the conduct of warfare which rational, impartial persons who believed that their country might from time to time be engaged in a war would prefer to any alternative sets of rules and to the absence of

8. Article L.
rules. I have also suggested, although without argument, that it is proper to say of such a set of rules that it is morally justified (and of course I think that such a set ought to be formally recognized and given authoritative status). There is thus a fairly close parallel with the prohibitions (and justifications and recognized excuses) of the criminal law: certain of these would be preferred to alternative sets and to an absence of legal prohibitions by rational, impartial persons; the prohibitions that would be so preferred may (I think) be said to be morally justified; and such rules ought to be adopted as the law of the land. I do not say the parallel is exact.

It may be suggested that there will be a considerable discrepancy between what is permitted by such “morally justifiable” rules of war and what it is morally permissible for a person to do in time of war. (Nagel mentions dropping the bomb on Hiroshima, attacks on trucks bringing up food, and the use of flamethrowers in any situation whatever as examples of actions not morally permissible; but it is not clear that he would say these would be permitted by morally justifiable rules of war, or even that he recognizes a distinction between what is morally permissible and what is permitted by morally justifiable rules of war.) Moreover, it might be thought that such “morally justifiable” rules of war could not be derived from justified moral principles. It might be asked, too, what the moral standing of these “morally justified” rules of war is, in view of the fact that the rules of war actually accepted and in force may, at least in some particulars, be rather different. These are difficult questions, about which I wish to say something.

It is obvious that there may well be discrepancies between what a person morally may do in wartime and what is permitted by morally justified rules of war, just as there are discrepancies between what is morally permitted and what is permitted by morally justifiable rules of the criminal law. For one thing, the rules of war, like the criminal law, must be formulated in such a way that it is decidable whether a person has violated them; it must be possible to produce evidence that determines the question and removes it from the realm of speculation. More important, just as there are subtle interpersonal relations—such as justice and self-restraint in a family—which it is undesirable for the criminal law to attempt to regulate
but which may be matters of moral obligation, so there may well be moral obligations controlling relations between members of belligerent armies which the rules of war cannot reach. For instance, one might be morally obligated to go to some trouble or even take a certain risk in order to give aid to a wounded enemy, but the rules of war could hardly prescribe doing so. I am unable to think of a case in which moral principles require a person to do what is forbidden by morally justifiable rules of war; I suppose this is possible. But it is easy to think of cases in which moral principles forbid a person to injure an enemy, or require him to aid an enemy, when morally justifiable rules of war do not prescribe accordingly and when the military law even forbids the morally required behavior. (Consider, for instance, the fact that, according to the Manual, the U.S. Army permits severe punishment for anyone who "without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly . . ." [p. 33].)

The possible contrast between morally justifiable rules of war and what is morally permitted will seem quite clear to persons with firm moral intuitions. It may be helpful, however, to draw the contrast by indicating what it would be, at least for one kind of rule-utilitarian theory of moral principles. A rule-utilitarian theory of morality might say that what is morally permissible is any action that would not be forbidden by the kind of conscience which would maximize long-rang expectable utility were it built into people as an internal regulator of their relations with other sentient beings, as contrasted with other kinds of conscience or not having a conscience at all. Then justifiable rules of war (with the standing described above) would be one thing; what is morally permissible, in view of ideal rules of conscience, might be another. Rational, impartial persons, understanding that their country may be involved in a war, might want one set of rules as rules of war, whereas rational, impartial persons choosing among types of conscience might want a different and discrepant set of rules as rules of conscience. In the same way there may be a discrepancy between a morally justified system of criminal law and morally justified rules of conscience. And just as, consequently, there may occasionally be a situation in
which it is one's moral duty to violate the criminal law, so there may occasionally be a situation in which it is one's moral duty to violate morally justifiable rules of war.

It might be asked whether a person who subscribed to sound moral principles would, if given the choice, opt for a system of rules of war; and if so, whether he would opt for a set that would maximize expectable utility for the situation of nations at war. I suggest that he would do so; that such a person would realize that international law, like the criminal law, has its place in human society, that not all decisions can simply be left to the moral intuitions of the agent, and that the rules of war and military justice are bound to be somewhat crude. He would opt for that type of system which will do the most good, given that nations will sometimes go to war. I am, however, only suggesting that he would; in order to show that he would one would have to identify the sound moral principles which would be relevant to such a decision.

Another question that might be raised is whether a person should follow the actual military rules of his country or the morally justifiable ones (in the sense explained above). This question can obviously be taken in either of two ways. If the question is which rules are legally binding, of course the actual rules of war recognized at present are legally binding on him. But the question might be: Is a person morally bound to follow the "ideal" rules of war, as compared with the actual ones (or the legal orders of his officer), if they come into conflict? Here two possible situations must be distinguished. It is logically possible that a morally justifiable set of rules of war would permit damage to the enemy more severe than would the actual rules of war; in that case, assuming the actual rules of war have the status of an obligation fixed by a treaty, the moral obligation would seem to be to follow the provisions of the treaty (subject to the usual difficulties about older treaties not contemplating contemporary situations). Suppose, however, that a superior officer commands one to do something that is permitted by the actual rules of war (that is, not explicitly forbidden) but which clearly would be forbidden by morally justifiable rules of war. The question is then whether a moral person would refuse to do what is permitted by an unjust institution but would be forbidden by a just one. It would
have to be argued in detail that sound moral principles would not permit a person to do what would be permitted only by an unjust institution. I shall not attempt to argue the matter, but only suggest that sound moral principles would not permit obedience to an order forbidden by morally justifiable rules of war. It is quite possible, incidentally, contrary to what I have just said about the legal issues, that a court-martial would not succeed in convicting a person who refused an order of this sort and defended his action along these lines.

There is space only to advert to the larger issue of the moral justification for nations being belligerents at all. Presumably, just as there are morally justified rules of war, in the sense of rules which rational, impartial persons would choose on the assumption their country might be involved in a war, so there are morally justified rules about engaging in a war at all, in the sense of rules governing the behavior of nations which rational, impartial persons would subscribe to if they believed that they would live in a world in which the chosen rules might obtain. Not only are there such morally justified rules regarding belligerency, but almost every nation is in fact signatory to a treaty abjuring war as an instrument of policy. Moreover, it has been declared criminal by the Treaty of London for a person to plan, prepare, initiate, or wage a war of aggression or a war in violation of international treaties, agreements, or assurances. So there is basis both in morally justified principles of international law and in actual international law for questioning the position of a belligerent. Presumably the relation between these and the moral obligations of citizens and government officials is complex, rather parallel to that just described for the case of rules of war.