

# Michael Walzer, *Just and Unjust Wars*

## Chapter 3

### The Rules of War

#### THE MORAL EQUALITY OF SOLDIERS

Among soldiers who choose to fight, restraints of various sorts arise easily and, one might say, naturally, the product of mutual respect and recognition. The stories of chivalric knights are for the most part stories, but there can be no doubt that a military code was widely shared in the later Middle Ages and sometimes honored. The code was designed for the convenience of the aristocratic warriors, but it also reflected their sense of themselves as persons of a certain sort, engaged in activities that were freely chosen. Chivalry marked off knights from mere ruffians and bandits and also from peasant soldiers who bore arms as a necessity. I suppose that it survives today: some sense of military honor is still the creed of the professional soldier, the sociological if not the lineal descendent of the feudal knight. But notions of honor and chivalry seem to play only a small part in contemporary combat. In the literature of war, the contrast between "then and now" is commonly made--not very accurately, but with a certain truth, as in this poem by Louis Simpson:<sup>1</sup>

At Malplaquet and Waterloo  
They were polite and proud,  
They primed their guns with billets-doux  
And, as they fired, bowed.  
At Appomattox too, it seems  
Some things were understood. . .  
But at Verdun and at Bastogne  
There was a great recoil,  
The blood was bitter to the bone  
The trigger to the soul. . . .

Chivalry, it is often said, was the victim of democratic revolution and of revolutionary war: popular passion overcame aristocratic honor.<sup>2</sup> That draws the line before Waterloo and Appomattox, though still not quite correctly. It is the success of coercion that makes war ugly. Democracy is a factor only insofar as it increases the legitimacy of the state and then the effectiveness of its coercive power, not because the people in arms are a bloodthirsty mob fired by political zeal and committed to total war (in contrast to their officers, who would fight with decorum if they could). It is not what the people do when they enter the arena of battle that turns war into a "circus of slaughter," but, as I have already argued, the mere fact that they are there. Soldiers died by the thousands at Verdun and the Somme simply because they were available, their lives nationalized, as it were, by the modern state. They didn't choose to throw themselves at barbed wire and machine guns in fits of patriotic enthusiasm. The blood is bitter to their bones, too; they, too, would fight with decorum if they could. Their patriotism is, of course, a partial explanation of their availability. The discipline of the state is not merely imposed on them; it is also a discipline they accept, thinking that they have to for the sake of their families and their country. But the common features of contemporary combat: hatred for the enemy, impatience with all restraint, zeal for victory--these are the products of war itself whenever masses of men have to be mobilized for battle. They are as much the contribution of modern warfare to democratic politics as of democracy to war.

In any case, the death of chivalry is not the end of moral judgment. We still hold soldiers to certain standards, even though they fight unwillingly--in fact, precisely because we assume that they all fight unwillingly. The military code is reconstructed under the conditions of modern warfare so that it comes to rest not on aristocratic freedom but on military servitude. Sometimes freedom and servitude co-exist, and then we can study the difference between them in clinical detail. Whenever the game of war is revived, the elaborate courtesies of the chivalric age are revived with it--as among aviators in World War I, for example, who imagined themselves (and who have survived in the popular imagination) as airborne knights. Compared to the serfs on the ground, these were aristocrats indeed: they fought in accordance with a strict code of conduct that they invented themselves.<sup>3</sup> There was thralldom in the trenches, however, and mutual recognition took a very different form. Briefly, on Christmas Day 1914, German and French troops came together, drank and sang together, in the no-man's land between their lines. But such moments are rare in recent history, and they are not occasions for moral invention. The modern rules of war depend upon an abstract rather than a practical fellowship.

Soldiers cannot endure modern warfare for long without blaming someone for their pain and suffering. While it may be an example of what Marxists call "false consciousness" that they do not blame the ruling class of their own or of the enemy country, the fact is that their condemnation focuses most immediately on the men with whom they are engaged. The level of hatred is high in the trenches. That is why enemy wounded are often left to die and prisoners are killed--like murderers lynched by vigilantes--as if the soldiers on the other side were personally responsible for the war. At the same time, however, we know that they are not responsible. Hatred is interrupted or overridden by a more reflective understanding, which one finds expressed again and again in letters and war memoirs. It is the sense that the enemy soldier, though his war may well be criminal, is nevertheless as blameless as oneself. Armed, he is an enemy; but he isn't my enemy in any specific sense; the war itself isn't a relation between persons but between political entities and their human instruments. These human instruments are not comrades-in-arms in the old style, members of the fellowship of warriors; they are "poor sods, just like me," trapped in a war they didn't make. I find in them my moral equals. That is not to say simply that I acknowledge their humanity, for it is not the recognition of fellow men that explains the rules of war; criminals are men too. It is precisely the recognition of men who are not criminals.

They can try to kill me, and I can try to kill them. But it is wrong to cut the throats of their wounded or to shoot them down when they are trying to surrender. These judgments are clear enough, I think, and they suggest that war is still, somehow, a rule-governed activity, a world of permissions and prohibitions--a moral world, therefore, in the midst of hell. Though there is no license for war-makers, there is a license for soldiers, and they hold it without regard to which side they are on; it is the first and most important of their war rights. They are entitled to kill, not anyone, but men whom we know to be victims. We could hardly understand such a title if we did not recognize that they are victims too.

Hence the moral reality of war can be summed up in this way: when soldiers fight freely, choosing one another as enemies and designing their own battles, their war is not a crime; when they fight without freedom, their war is not their crime. - In both cases, military conduct is governed by rules; but in the first the rules rest on mutuality and consent, in the second on a shared servitude. The first case raises no difficulties; the second is more problematic. We can best explore its problems, I think, if we turn from the trenches and the front lines to the general staff at the rear, and from the war against the Kaiser to the war against Hitler--for at that level and in that struggle, the recognition of "men who are not criminals" is hard indeed.

### ***The Case of Hitler's Generals***

In 1942, General van Arnim was captured in North Africa, and it was proposed by members of Dwight Eisenhower's staff that the American commander "should observe the custom of by-gone days" and permit von Arnim to visit him before he was sent into captivity. Historically, such visits were not merely

matters of courtesy; they were occasions for the reaffirmation of the military code. Thus General van Ravenstein, captured by the British that same year, reports: "I was taken to see. . . Auchinleck himself in his office. He shook hands with me and said: 'I know you well by name. You and your division have fought with chivalry.'"<sup>4</sup> Eisenhower, however, refused to allow the visit. In his memoirs, he explained his reasons:<sup>5</sup>

The custom had its origin in the fact that the mercenary soldiers of old had no real enmity toward their opponents. Both sides fought for love of a fight, out of a sense of duty or, more probably, for money . . . The tradition that all professional soldiers are comrades in arms has . . . persisted to this day. For me, World War II was far too personal a thing to entertain such feelings. Daily as it progressed there grew within me the conviction that, as never before. . . the forces that stood for human good and men's rights were. . . confronted by a completely evil conspiracy with which no compromise could be tolerated.

On this view, it doesn't matter whether or not von Arnim had fought well; his crime was to have fought at all. And similarly, it may not matter how General Eisenhower fights. Against an evil conspiracy, what is crucial is to win. Chivalry loses its rationale, and there are no limits left except "the limitations of force itself."

That was Sherman's view too, but it does not account for the judgments that we make of his conduct, or of Eisenhower's, or even of von Arnim's and von Ravenstein's. Consider now the better-known case of Erwin Rommel: he, too, was one of Hitler's generals, and it is hard to imagine that he could have escaped the moral infamy of the war he fought. Yet he was, so we are told by one biographer after another, an honorable man. "While many of his colleagues and peers in the German army surrendered their honor by collusion with the iniquities of Nazism, Rommel was never defiled." He concentrated, like the professional he was, on "the soldier's task of fighting." And when he fought, he maintained the rules of war. He fought a bad war well, not only militarily but also morally. "It was Rommel who burned the Commando Order issued by Hitler on 28 October 1942, which laid down that all enemy soldiers encountered behind the German line were to be killed at once. . ."<sup>6</sup> He was one of Hitler's generals, but he did not shoot prisoners. Is such a man a comrade? Can one treat him with courtesy, can one shake his hand? These are the fine points of moral conduct; I do not know how they might be resolved, though I am sympathetic with Eisenhower's resolution. But I am sure, nevertheless, that Rommel should be praised for burning the Commando Order, and everyone who writes about these matters seems equally sure, and that implies something very important about the nature of war.

It would be very odd to praise Rommel for not killing prisoners unless we simultaneously refused to blame him for Hitler's aggressive wars. For otherwise he is simply a criminal, and all the fighting he does is murder or attempted murder, whether he aims at soldiers in battle or at prisoners or at civilians. The chief British prosecutor at Nuremberg put this argument into the language of international law when he said, "The killing of combatants is justifiable. . . only where the war itself is legal. But where the war is illegal. . . there is nothing to justify the killing and these murders are not to be distinguished from those of any other lawless robber bands."<sup>7</sup> And then Rommel's case would be exactly like that of a man who invades someone else's home and kills only some of the inhabitants, sparing the children, say, or an aged grandmother: a murderer, no doubt, though not one without a drop of human kindness. But we don't view Rommel that way: why not? The reason has to do with the distinction of *jus ad bellum* and *jus in bello*. We draw a line between the war itself, for which soldiers are not responsible, and the conduct of the war, for which they are responsible, at least within their own sphere of activity. Generals may well straddle the line, but that only suggests that we know pretty well where it should be drawn. We draw it by recognizing the nature of political obedience. Rommel was a servant, not a ruler, of the German state; he did not choose the wars he fought but, like Prince Andrey, served his "Tsar and country." We still have misgivings in his case, and will continue to have them, for he was more than just unlucky in his "Tsar and country." But by and large we don't blame a soldier, even a general, who fights for his own government.

He is not the member of a robber band, a willful wrongdoer, but a loyal and obedient subject and citizen, acting sometimes at great personal risk in a way he thinks is right. We allow him to say what an English soldier says in Shakespeare's *Henry V*: "We know enough if we know we are the king's men. Our obedience to the king wipes the crime of it out of us."<sup>8</sup> Not that his obedience can never be criminal; for when he violates the rules of war, superior orders are no defence. The atrocities that he commits are his own; the war is not. It is conceived, both in international law and in ordinary moral judgment, as the king's business--a matter of state policy, not of individual volition, except when the individual is the king.

It might, however, be thought a matter of individual volition whether particular men join the army and participate in the war. Catholic writers have long argued that they ought not to volunteer, ought not to serve at all, if they know the war to be unjust. But the knowledge required by Catholic doctrine is hard to come by; and in case of doubt, argues the best of the Schoolmen, Francisco de Vitoria, subjects must fight--the guilt falling, as in *Henry V*, on their leaders. Vitoria's argument suggests how firmly political life is set, even in the pre-modern state, against the very idea of volition in time of war. "A prince is not able," he writes, "and ought not always to render reasons for the war to his subjects, and if the subjects cannot serve in the war except they are first satisfied of its justice, the state would fall into grave peril. . ."<sup>9</sup> Today, of course, most princes work hard to satisfy their subjects of the justice of their wars; they "render reasons," though not always honest ones. It takes courage to doubt these reasons, or to doubt them in public; and so long as they are only doubted, most men will be persuaded (by arguments something like Vitoria's) to fight. Their routine habits of law-abidingness, their fear, their patriotism, their moral investment in the state, all favor that course. Or, alternatively, they are so terribly young when the disciplinary system of the state catches them up and sends them into war that they can hardly be said to make a moral decision at all:<sup>10</sup>

From my mother's sleep I fell into the State.

And then how can we blame them for (what we perceive to be) the wrongful character of their war?\*\*\*

Soldiers are not, however, entirely without volition. Their will is independent and effective only within a limited sphere, and for most of them that sphere is narrow. But except in extreme cases, it never completely disappears. And at those moments in the course of the fighting when they must choose, like Rommel, to kill prisoners or let them live, they are not mere victims or servants bound to obedience; they are responsible for what they do. We shall have to qualify that responsibility when we come to consider it in detail for war is still hell, and hell is a tyranny where soldiers are subject to all sorts of duress. But the judgments we actually make of their conduct demonstrate, I think, that within that tyranny we have carved out a constitutional regime: even the pawns of war have rights and obligations.

\* . But these young men, Robert Nozick argues, "are certainly not encouraged to think for themselves by the practice of absolving them of all responsibility for their actions within the rules of war." That is right; they are not. But we cannot blame them in order to encourage the others unless they are actually blameworthy. Nozick insists that they are: "It is a soldier's responsibility to determine if his side's cause is just . . ." The conventional refusal to impose that responsibility the board is "morally elitist." (*Anarchy, State, and Utopia*, New York, 1974, p. 100.) But it isn't elitist merely to recognize the existence of authority structures and socialization processes in the political community, and it may be morally insensitive not to. I do agree with Nozick that "some bucks stop with each of us." A great deal of this book is concerned with trying to say which ones those are.

During the past hundred years, these rights and obligations have been specified in treaties and agreements, written into international law. The very states that enlist the pawns of war have stipulated the moral character of their mutual slaughter. Initially, this stipulation was not based upon any notion of the equality of soldiers but upon the equality of sovereign states, which claimed for themselves the same right to fight (right to make war) that individual soldiers more obviously possess. The argument that I have made on behalf of soldiers was first made on behalf of states--or rather, on behalf of their leaders, who, we were told, are never willful criminals, whatever the character of the wars they begin, but statesmen serving the national interest as best they can. When I discuss the theory of aggression and of responsibility for aggression, I will have to explain why that is an inadequate description of what statesmen do.<sup>11</sup> For now, it is enough to say that this view of sovereignty and political leadership, which was never in accord with ordinary moral judgment, has also lost its legal standing, replaced in the years since World War I by the formal designation of war-making as a criminal activity. However, the rules of engagement have not been replaced but expanded and elaborated, so that we now have both a ban on war and a code of military conduct. The dualism of our moral perceptions is established in the law.

War is a "legal condition which equally permits two or more groups to carry on a conflict by armed force."<sup>12</sup> It is also, and for our purposes more importantly, a moral condition, involving the same permissiveness, not in fact at the level of sovereign states, but at the level of armies and individual soldiers. Without the equal right to kill, war as a rule-governed activity would disappear and be replaced by crime and punishment, by evil conspiracies and military law enforcement. That disappearance seems to be heralded by the United Nations Charter, where the word "war" does not appear but only "aggression," "self-defense," "international enforcement," and so on. But even the UN's "police action" in Korea was still a war, since the soldiers who fought in it were moral equals even if the states were not. The rules of war were as relevant there as in any other "conflict by armed force," and they were equally relevant to the aggressor, the victim, and the police.

## **TWO SORTS OF RULES**

The rules of war consist of two clusters of prohibitions attached to the central principle that soldiers have an equal right to kill. The first cluster specifies when and how they can kill, the second whom they can kill. My chief concern is with the second, for there the formulation and reformulation of the rules reach to one of the hardest questions in the theory of war--that is, how those victims of war who can be attacked and killed are to be distinguished from those who cannot. I don't believe that this question must be answered in this or that specific way if war is to be a moral condition. It is necessary, however, that at any particular moment there be an answer. War is distinguishable from murder and massacre only when restrictions are established on the reach of battle. The first set of rules does not involve any such fundamental issue. Rules specifying how and when soldiers can be killed are by no means unimportant, and yet the morality of war would not be radically transformed were they to be abolished altogether. Consider, for example, those battles described by anthropologists in which warriors fight with bows and unfeathered arrows. The arrows fly less accurately than they would if they were feathered; they can be dodged; few men are killed.<sup>13</sup> It is clearly a good rule, then, that arrows not be feathered, and we may fairly condemn the warrior who first arms himself with the superior and forbidden weapon and hits his enemy: Yet the man he kills was liable to be killed in any case, and a collective (intertribal) decision to fight with feathered arrows would not violate any basic moral principle. The case is the same with all other rules of this kind: that soldiers be preceded into battle by a herald carrying a red flag, that fighting always be broken off at sunset, that ambushes and surprise attacks be prohibited, and so on. Any rule that limits the intensity and duration of combat or the suffering of soldiers is to be welcomed, but none of these restraints seem crucial to the idea of war as a moral condition. They are circumstantial in the literal sense of that word, highly particularized and local to a specific time and place. Even if in practice they endure for many years, they are always susceptible to the transformations brought about by social change, technological innovation, and foreign conquest. \*

The second set of rules does not seem similarly susceptible. At least, the general structure of its provisions seems to persist without reference to social systems and technologies--as if the rules involved were (as I think they are) more closely connected to universal notions of right and wrong. Their tendency is to set certain classes of people outside the permissible range of warfare, so that killing any of their members is not a legitimate act of war but a crime. Though their details vary from place to place, these rules point toward the general conception of war as a combat between combatants, a conception that turns up again and again in anthropological and historical accounts. It is most dramatically exemplified when war is actually a combat between military champions, as among many primitive peoples, or in the Greek epics, or in the biblical tale of David and Goliath. "Let no man's heart fail within him," says David, "thy servant will go and fight this Philistine."<sup>14</sup> Once such a contest has been agreed upon, soldiers themselves are protected from the hell of war. In the Middle Ages, single combat was advocated for precisely this reason: "Better for one to fall than the whole army."<sup>15</sup> More often, however, protection has been offered only to those people who are not trained and prepared for war, who do not fight or cannot: women and children, priests, old men, the members of neutral tribes, cities, or states, wounded or captured soldiers.\*\*

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\* They are also susceptible to the kind of reciprocal violation legitimized by the doctrine of reprisal: violated by one side, they can be violated by the other, But this does not seem to be true of the other set of rules, described below. See the discussion of reprisals in chapter 13.

\*\* The lists are often more specific and more picturesque than this, reflecting the character of a particular culture. Here is an example from an ancient Indian text, according to which the following groups of people are not to be subjected to the exigencies of battle: "Those who look on without taking part, those afflicted with grief, . . . those who are asleep, thirsty, or fatigued or are walking along the road, or have a task on hand unfinished, or who are proficient in fine art." (S. V. Viswanatha, *International Law in Ancient India*, Bombay, 1925, p. 156.)

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What all these groups have in common is that they are not currently engaged in the business of war. Depending on one's social or cultural perspective, killing them may appear wanton, unchivalrous, dishonorable, brutal, or murderous. But it is very likely that some general principle is at work in all these judgments, connecting immunity from attack with military disengagement. Any satisfactory account of the moral reality of war must specify that principle and say something about its force. I shall attempt to do both these things later on.

The historical specifications of the principle are, however, conventional in character, and the war rights and obligations of soldiers follow from the conventions and not (directly) from the principle, whatever its force. Once again, war is a social creation. The rules actually observed or violated in this or that time and place are necessarily a complex product, mediated by cultural and religious norms, social structures, formal and informal bargaining between belligerent powers, and so on. Hence, the details of noncombatant immunity are likely to seem as arbitrary as the rules that determine when battles should start and stop or what weapons may be used. They are more important by far, but similarly subject to social revision. Exactly like law in domestic society, they will often represent an incomplete or distorted embodiment of the relevant moral principle. They are subject, then, to philosophical criticism. Indeed, criticism is a crucial part of the historical process through which the rules are made. We might say that war is a philosophical creation. Long before philosophers are satisfied with it, however, soldiers are bound by its canons. And they are equally bound, because of their own equality, and without reference to the content or the incompleteness of the canons.

## THE WAR CONVENTION

I propose to call the set of articulated norms, customs, professional codes, legal precepts, religious and philosophical principles, and reciprocal arrangements that shape our judgments of military conduct the war convention. It is important to stress that it is our judgments that are at issue here, not conduct itself. We cannot get at the substance of the convention by studying combat behavior, any more than we can understand the norms of friendship by studying the way friends actually treat one another. The norms are apparent, instead, in the expectations friends have, the complaints they make, the hypocrisies they adopt. So it is with war: relations between combatants have a normative structure that is revealed in what they say (and what the rest of us say) rather than in what they do--though no doubt what they do, as with friends, is affected by what they say. Harsh words are the immediate sanctions of the war convention, sometimes accompanied or followed by military attacks, economic blockades, reprisals, war crimes trials, and so on. But neither the words nor the actions have any single authoritative source; and, finally, it is the words that are decisive--the "judgment of history," as it is called, which means the judgment of men and women arguing until some rough consensus is reached.

The terms of our judgments are most explicitly set forth in positive international law: the work of politicians and lawyers acting as representatives of sovereign states, and then of jurists codifying their agreements and searching out the rationale that underlies them. But international law arises out of a radically decentralized legislative system, cumbersome, unresponsive, and without a parallel judicial system to establish the specific details of the legal code. For that reason, the legal handbooks are not the only place to find the war convention, and its actual existence is demonstrated not by the existence of the handbooks but by the moral arguments that everywhere accompany the practice of war. The common law of combat is developed through a kind of practical casuistry. Hence the method of this book: we look to the lawyers for general formulas, but to historical cases and actual debates for those particular judgments that both reflect the war convention and constitute its vital force. I don't mean to suggest that our judgments, even over time, have an unambiguous collective form. Nor, however, are they idiosyncratic and private in character. They are socially patterned, and the patterning is religious, cultural, and political, as well as legal. The task of the moral theorist is to study the pattern as a whole, reaching for its deepest reasons.

Among professional soldiers, the war convention often finds advocates of a special kind. Though chivalry is dead and fighting unfree, professional soldiers remain sensitive (or some of them do) to those limits and restraints that distinguish their life's work from mere butchery. No doubt, they know with General Sherman that war is butchery, but they are likely to believe that it is also, simultaneously, something else. That is why army and navy officers, defending a long tradition, will often protest commands of their civilian superiors that would require them to violate the rules of war and turn them into mere instruments for killing. The protests are mostly unavailing--for instruments, after all, they are--but within their own sphere of decision, they often find ways to defend the rules. And even when they don't do that, their doubts at the time and justifications after the fact are an important guide to the substance of the rules. Sometimes, at least, it matters to soldiers just whom they kill.

The war convention as we know it today has been expounded, debated, criticized, and revised over a period of many centuries. Yet it remains one of the more imperfect of human artifacts: recognizably something that men have made, but not something that they have made freely or well. It is necessarily imperfect, I think, quite aside from the frailties of humankind, because it is adapted to the practice of modern war. It sets the terms of a moral condition that comes into existence only when armies of victims meet (just as the chivalric code sets the terms of a moral condition that comes into existence only when there are armies of free men). The convention accepts that victimization or at least assumes it, and starts from there. That is why it is often described as a program for the toleration of war, when what is needed is a program for its abolition. One does not abolish war by fighting it well; nor does fighting it well make it tolerable. War is hell, as I have already said, even when the rules are strictly observed. Just for that

reason, we are sometimes made angry by the very idea of rules or cynical about their meaning. They only serve, as Prince Andrey says in that impassioned outburst that evidently also expresses Tolstoy's conviction to make us forget that war is "the vilest thing in life. . ."16

And what is war, what is needed for success in war, what are the morals of the military world? The object of warfare is murder; the means employed in warfare--spying, treachery, and the encouragement of it, the ruin of a country, the plunder of its inhabitants . . . trickery and lying, which are called military strategy; the morals of the military class---absence of all independence, that is, discipline, idleness, ignorance, cruelty, debauchery, and drunkenness.

And yet, even people who believe all this are capable of being outraged by particular acts of cruelty and barbarism. . War is so awful that it makes us cynical about the possibility of restraint, and then it is so much worse that it makes us indignant at the absence of restraint. Our cynicism testifies to the defectiveness of the war convention, and our indignation to its reality and strength.

### ***The Example of Surrender***

Anomalous the convention often is, but binding nonetheless. Consider for a moment the common practice of surrendering, the detailed features of which are conventionally (and in our own time, legally) established. A soldier who surrenders enters into an agreement with his captors: he will stop fighting if they will accord him what the legal handbooks call "benevolent quarantine."<sup>17</sup> Since it is usually made under extreme duress, this is an agreement that would have no moral consequences at all in time of peace. In war it does have consequences. The captured soldier acquires rights and obligations specified by the convention, and these are binding without regard to the possible criminality of his captors or to the justice or urgency of the cause for which he has been fighting. Prisoners of war have a right to try to escape--they cannot be punished for the attempt--but if they kill a guard in order to escape, the killing is not an act of war; it is murder. For they committed themselves to stop fighting, gave up their right to kill, when they surrendered.

It is not easy to see all this as the simple assertion of a moral principle. It is the work of men and women (with moral principles in mind) adapting to the realities of war, making arrangements, striking bargains. No doubt, the bargain is generally useful to captives and captors alike, but it is not necessarily useful in every case to either of them or to mankind as a whole. If our purpose in this particular war is to win as soon as possible, the spectacle of a prison camp must seem strange indeed. Here are soldiers making themselves at home, settling in for the duration, dropping out of the war before it is over, and bound not to renew the fighting, even if they can (through sabotage, harassment, or whatever), because they promised at the point of a gun not to do so. Surely these are promises that can sometimes be broken. Yet prisoners are not invited to calculate the relative utilities of keeping or of breaking them. The war convention is written in absolutist terms: one violates its provisions at one's moral, as at one's physical peril. But what is the force of these provisions? They derive ultimately from principles that I will take up later on, which explain the meaning of quarter, disengagement, and immunity. They derive immediately and specifically from the consensual process itself. The rules of war, alien as they often are to our sense of what is best, are made obligatory by the general consent of mankind.

Now that, too, is a consent given under a kind of duress. Only because there is no escape from hell, it might be said, have we labored to create a world of rules within it. But let us imagine an escape attempt, a liberation struggle, a "war to end war." Surely it would be foolish then to fight according to the rules. The all-important task would be to win. But it is always important to win, for victory can always be described as an escape from hell. Even the victory of an aggressor, after all, ends the war. Hence the long history of impatience with the war convention. That history is nicely summed up in a letter written in 1880 by the Prussian chief of staff, General van Moltke, to protest the Declaration of St. Petersburg (an early effort to codify the rules of war): "The greatest kindness in war," wrote von Moltke, "is to bring it to a

speedy conclusion. It should be allowable, with that view, to employ all means save those that are absolutely objectionable."18 Von Moltke stops short of a total denial of the war convention; he recognizes absolute prohibitions of some unspecified sort. Almost everyone does. But why stop short if that means falling short of the "greatest kindness"? This is the form of the most common argument in the theory of war and of the most common moral dilemma in its practice. The war convention is found to stand in the way of victory and, it is usually said, a lasting peace. Must its provisions, must this particular provision be obeyed? When victory means the defeat of aggression, the question is not only important; it is painfully difficult. We want to have it both ways: moral decency in battle and victory in war; constitutionalism in hell and ourselves outside.

## NOTES

### The Rules of War

1. Louis Simpson, "The Ash and the Oak," *Good News of Death and Other Poems*, in *Poets of Today II* (New York, 1955), p. 162.
2. See for example, Fuller, *Conduct of War*, ch. II ("The Rebirth of Total War").
3. Edward Rickenbacker's *Fighting the Flying Circus* (New York, 1919) is a lively (and typical) account of the chivalry of the air. In 1918, Rickenbacker wrote in his flight diary: "Resolved today that. . . I will never shoot at a Hun who is at a disadvantage. . ." (p. 338). For a general account, see Frederick Oughton, *The Aces* (New York, 1960).
4. Quoted in Desmond Young, *Rommel: The Desert Fox* (New York, 1958), p. 137.
5. Eisenhower, *Crusade in Europe* (New York, 1948), pp. 156-57.
6. Ronald Lewin, *Rommel as Military Commander* (New York, 1970), pp. 294, 311. See also Young, pp. 130-32.
7. Quoted in Robert. W. Tucker, *The Law of War and Neutrality at Sea* (Washington, 1957), p. 6 n. Tucker's discussion of the legal issues is very useful; see also H. Lauterpacht, "The Limits of the Operation of the Law of War," in *30 British Yearbook of International Law* (1953).
8. *Henry V*, 4:1, ll. 132-35.
9. Francisco de Vitoria, *De Indis et De Iure Belli Relationes*, ed. Ernest Nys (Washington, D.C., 1917): *On the Law of War*, trans. John Pawley Bate, p. 176.
10. Randall Jarrell, "The Death of the Ball Turret Gunner," in *The Complete Poems* (New York, 1969), p.144.
11. See below, ch. L8. For a historical account of these issues, see C. A. Pompe, *Aggressive War: An International Crime* (The Hague, 1953).
12. Quincy Wright, *A Study of War* (Chicago, 1942), I, 8.
13. Gardner and Heider, *Gardens of War*, p. 139.
14. *First Samuel*, 17: 32.

15. Johan Huizinga, *Homo Ludens* (Boston, 1955), p. 92.

16. *War and Peace*, Part Ten, XXV, p. 725.

17. For a discussion of this agreement, see my essay "Prisoners of War: Does the Fight Continue After the Battle?" in *Obligations: Essays on Disobedience, War and Citizenship* (Cambridge, Mass., 1970).

18. *Moltke in Seinen Briefen* (Berlin, 1902), p. 253. The letter is addressed to J. C. Bluntschli, a noted scholar of international law.

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## Chapter 9 excerpt:

### 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 noncombatants 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 dearly 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>23</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 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 "road bound" 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

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\*\*\* 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

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### **THE BOMBING OF OCCUPIED FRANCE AND THE VERMORK 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. . . ."25 The same factories, of course, could have been (perhaps should have been) attacked by squads of partisans or commandos carrying explosives; 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 Vemork 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.

## CHAPTER 9 EXCERPT--NOTES

19. *Old Soldiers Never Die* (New York, 1966), p. 198.

20. Kenneth Dougherty, *General Ethics: An Introduction to the Basic Principles of the Moral Life According to St. Thomas Aquinas* (Peekskill, N.Y., 1959), p. 64.

21. Dougherty, pp. 65-66; d. John C. Ford, S. J. "The Morality of Obliteration Bombing," in *War and Morality*, ed. Richard Wasserstrom (Belmont, California" 1970). I cannot make any effort here to review

the philosophical controversies over double effect. Dougherty provides a (very simple) text book description, Ford a careful (and courageous) application.

22. For a philosophical version of the argument that it cannot make a difference whether the killing of innocent people is direct or indirect, see Jonathan Bennett, "Whatever the Consequences," *Ethics*, ed. Judith Jarvis Thomson and Gerald Dworkin (New York, 1968).

23. Reginald Thompson, *Cry Korea* (London, 1951), pp. 54, 142-43.

24. I have been helped in thinking about these questions by Charles Fried's discussion of "Imposing Risks on Others," *An Anatomy of Values: Problems of Personal and Social Choice* (Cambridge, Mass., 1970), ch. XI.

25. Quoted from the published text of Marcel Ophuls' documentary film, *The Sorrow and the Pity* (New York, 1972), p. 131.

26. Thomas Gallagher, *Assault in Norway* (New York, 1975), pp. 19-20, 50.