

JUST AND UNJUST WARS

A MORAL
ARGUMENT WITH
HISTORICAL
ILLUSTRATIONS

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The Nature of Necessity (1)

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

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

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

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

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

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

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

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

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"Asinine Ethics"

Chairman Mao and the Battle of the River Hung

In the year 638 B.C., during the period of China's history known as the Spring and Autumn Era, the two feudal states of Sung and Ch'u fought a battle at the Hung River in central China.¹ The army of Sung, led by its ruler Duke Hsiang, was drawn up in battle formation on the river's northern bank; the Ch'u army had to ford the stream. When its soldiers were halfway across, one of Hsiang's ministers came to him and said, "They are many, and we are few. Pray let us attack them before they are all crossed over." The Duke refused. When the enemy army had reached the northern bank but had not yet re-formed its lines, the minister again asked leave to begin the fight; again the Duke refused. Only after the Ch'u soldiers were properly marshaled did he signal the attack. And then, in the ensuing battle, the Duke himself was wounded and his army put to flight. According to the chronicles, the people of Sung blamed their ruler for the defeat, but he said, "The superior man does not inflict a second wound, and does not take prisoner anyone of grey hairs. When the ancients had their armies in the field, they would not attack an enemy when he was in a defile; and though I am but the poor representative of a fallen dynasty, I will not sound my drums to attack an unformed host."

This is the code of a feudal warrior, an obscure warrior in this case until Mao Tse-tung drew his story out of the chronicles in order to make a modern point. "We are not the Duke of Sung," he declared in one of his lectures *On Protracted War* (1938), "and we have no use for his asinine ethics."² Mao's lecture was an innovative discussion of guerrilla tactics. His argument against the Duke of Sung, however, was familiar enough, and to Chinese as well as Western readers. It is an argument common among practical men, like Hsiang's minister, to whom winning is always more important than aristocratic honor. But it enters significantly into the theory of war only when winning is seen to be *morally* important, that is, only when the outcome of the struggle is conceived in terms of justice. Some 200 years after the battle at the River Hung, more than two millennia before the communist revolution, the philosopher Mo Tzu perfectly described Mao's case, as he himself must understand it.³

Suppose there is a country which is being persecuted and oppressed by its rulers, and a Sage . . . in order to rid the world of this pest raises an army and sets out to punish the evil-doers. If, when he has won a victory, he conforms to the doctrine of the Confucians, he will issue an order to his troops saying, "Fugitives are not to be pursued, an enemy who has lost his helmet is not to be shot at; if a chariot overturns, you are to help the occupants to right it"—if this is done, the violent and the disorderly will escape with their lives and the world will not be rid of its pest.

Mo Tzu believed in the doctrine of Righteous War. Mao Tse-tung has introduced into China the western theory of the just war. No doubt, there are fine points of difference between these two ideas, which I cannot pursue here. But they are not different in any major way. They set up the tension between winning and fighting well in similar fashion, and for Mo Tzu and Chairman Mao they point to the same resolution: the feudal rules for fighting well are simply cast aside. The tension is overcome as soon as it is recognized. That doesn't mean that there are no rules of engagement at all; I have already cited Mao's "Eight Points for Attention," which recapitulate in democratic style the old chivalric code. But for Mao himself the "Eight Points" apparently reflect only the utilitarian requirements of guerrilla war, and they cannot stand against the higher utility of winning—which he is likely to describe in extravagant terms, a combination of Wilsonian idealism and Marxist apocalypse: "The aim of war is to eliminate war . . . Mankind's era of wars will be brought to an end by our own

efforts, and beyond doubt the war we wage is part of the final battle."⁴ And in the final battle, no one will insist upon the "Eight Points." Exceptions will readily be made whenever the conflict seems critical. Consider, for example, the last of the Eight: "Do not ill-treat captives." Mao has also argued that guerrilla bands on the move cannot take prisoners. "It is best first to require the prisoners to hand over their weapons and then to disperse them or execute them."⁵ Since prisoners are not conceived as men-with-rights, the choice between dispersal and execution is purely tactical, and to insist in all cases upon the rule against ill treatment would presumably be an example of "asinine ethics."

Nor were rights thought to be at stake in the old warrior codes. Duke Hsiang believed it unworthy and demeaning to strike a wounded soldier or attack an unformed host. Combat was only possible between peers; otherwise war would not be an occasion for the display of aristocratic virtue. It is not hard to understand why anyone convinced of the moral urgency of victory would be impatient with such notions. Of what use is the (undoubted) virtue of the Duke of Sung if the world is ruled by violence and aggression? Indeed, a war in which the Duke's virtue was more important than a military triumph would seem to be a very unimportant war. Thus the argument of Hsiang's minister after the defeat of the Sung army: "If we grudge a second wound, it would be better not to wound at all. If we would spare the grey-haired, we had better submit to the enemy."⁶ Either fight all-out or not at all. This argument is often said to be typical of American thought, but in fact it is universal in the history of war. Once soldiers are actually engaged, and especially if they are engaged in a Righteous War or a just war, a steady pressure builds up against the war convention and in favor of particular violations of its rules. And then, more often than the belligerent powers are prepared to admit—itsself a matter of interest—the rules are broken. They are not broken for the sake of military necessity alone. That argument justifies too much, and it does so without reference to the cause for which the war is being fought. The rules are broken for the sake of the cause. It is with some version of the argument for justice that the violations are defended.

On this view, the rules have no standing in any war that is worth fighting. They are at most "rules of thumb," general precepts of honor (or utility) to be observed only until observing them comes into conflict with the requirements of victory. But this is to misunderstand the status of the war convention. If we consider non-

combatant immunity rather than warrior honor, and the protection of human rights rather than the expediencies of guerrilla war—that is, if we attend to what is really fundamental in the rules of war—the conflict between winning and fighting well is not so easily resolved. If we recognize, for example, that the protection afforded by the “Eight Points” is morally required, and that men and women are rightly indignant if they are robbed and ravaged by guerrilla bands, then Mao’s rules take on a greater significance than their author attributes to them. They cannot simply be set aside; nor can they be balanced, in utilitarian fashion, against this or that desirable outcome. For the rights of innocent people have the same moral effectiveness in the face of just as in the face of unjust soldiers.

And yet the case for breaking the rules and violating those rights is made sufficiently often, and by soldiers and statesmen who cannot always be called wicked, so that we have to assume that it isn’t pointless. Anyway, we know its point all too well. We know how high the stakes sometimes are in war and how urgent victory can be. “For there are peoples,” as Simone Weil has written, “[who] have never recovered after having once been conquered.”⁷ The very existence of a community may be at stake, and then how can we fail to consider possible outcomes in judging the course of the fighting? At this point if at no other, the restraint on utilitarian calculation must be lifted. Even if we are inclined to lift it, however, we cannot forget that the rights violated for the sake of victory are genuine rights, deeply founded and in principle inviolable. And there is nothing asinine about this principle: the very lives of men and women are at stake. So the theory of war, when it is fully understood, poses a dilemma, which every theorist (though not, fortunately, every soldier) must resolve as best he can. And no resolution is serious unless it recognizes the force of both *jus ad bellum* and *jus in bello*.

The Sliding Scale and the Argument from Extremity

The immediate issue is whether we should discriminate between soldiers fighting a just war and soldiers fighting an unjust war. It is, of course, those who claim membership in the first group who

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raise the issue, making what might be called an appeal against combatant equality. Though such appeals are particular in character, they have a general form. They all involve the claim that the equality I have been defending is merely conventional and that the truth about war rights is best expressed in terms of a sliding scale: *the more justice, the more right*. Something like this appears to be what the philosopher John Rawls has in mind when he says, “Even in a just war, certain forms of violence are strictly inadmissible; and when a country’s right to war is questionable and uncertain, the constraints on the means it can use are all the more severe. Acts permissible in a war of legitimate self-defense, when these are necessary, may be flatly excluded in a more doubtful situation.”⁸ The greater the justice of my cause, the more rules I can violate for the sake of the cause—though some rules are always inviolable. The same argument can be put in terms of outcomes: the greater the injustice likely to result from my defeat, the more rules I can violate in order to avoid defeat—though some rules, and so on. The value of this position is that it grants the existence of rights (of some sort) while still opening the way for soldiers resisting aggression to do (some of) the things they believe necessary for victory. It allows the justice of one’s cause to make a difference in the way one fights. Exactly how much of a difference is allowed, however, is radically unclear, and so is the status of the men and women who are now drawn into the hell of war so that justice can triumph. The practical effects of the argument are probably more far-reaching than its proponents would like, but I will say nothing about these effects until I can look at a number of historical cases. First, however, something more must be said about the structure of the argument.

According to the war convention as I have described it, there is no range of actions, over which the sliding scale might move, between legitimate combat and inadmissible violence. There is only a line, not entirely distinct but meant simply to mark off the one from the other. Given this view, the argument quoted from Rawls might be taken to mean that borderline cases should be decided systematically against that country whose “right to war is questionable” or even that the military and political leaders of that country should keep some distance away from the border, never doubling the doubtfulness of their cause with the doubtfulness of their methods. This last would simply be a plea for scrupulousness, which is always a good thing. But there is another meaning that can be drawn out of Rawls’ argument (though I don’t

think it is his own meaning): that the class of "strictly inadmissible" acts should be kept very small, and space should be opened up within the rules of war where the sliding scale might be applied. The effect of sliding the scale to point *x* within this space, it should be said, is not to remove all restraints on military action up to that point, but rather to leave only the restraints of usefulness and proportionality. The sliding scale makes way for those utilitarian calculations that rules and rights are intended to bar. It creates a new class of generally inadmissible acts and of quasi-rights, subject to piecemeal erosion by soldiers whose cause is just—or by soldiers who believe that their cause is just. And so it enables those soldiers to do terrible things and to defend in their own consciences and among their associates and followers the terrible things they do.

Now, the extreme form of the sliding-scale argument is the claim that soldiers fighting a just war can do anything at all that is useful in the fighting. This effectively annuls the war convention and denies or suspends the rights that the convention was designed to protect. The war rights of the just are total, and any blame their actions entail falls upon the leaders of the other side. General Sherman took this view of war, as we have seen, and I have called it the "war is hell" doctrine. It is not so much a resolution of the tension between winning and fighting well as a denial of its moral significance. The only kind of justice that matters is *jus ad bellum*. Beyond that there are only such considerations as rational men will always attend to: they will not waste their substance in useless killing of the innocent, though they will kill them readily enough if victory seems to require it. It may be that this is what the sliding scale comes to in any case, but its advocates at least claim to recognize the existence of rules and rights, and so their argument requires a separate analysis.

The only alternative to the sliding scale, it is often said, is a position of moral absolutism. To resist the slide, one must hold that the rules of war are a series of categorical and unqualified prohibitions, and that they can never rightly be violated even in order to defeat aggression.⁹ But that is a hard line to take, and especially so in the modern age, when aggression has assumed such frightening forms. Perhaps the Duke of Sung was right not to break the warrior code for the sake of his dynasty. But if what is being defended is the state itself and the political community it protects and the lives and liberties of the members of that community. . . . *Fiat justicia ruat coelum*, do justice even if the heavens fall, is not for most people a plausible moral doctrine.

There is an alternative doctrine that stops just short of absolutism and that I shall try to defend in the chapters that follow. It might be summed up in the maxim: do justice unless the heavens are (really) about to fall. This is the utilitarianism of extremity, for it concedes that in certain very special cases, though never as a matter of course even in just wars, the only restraints upon military action are those of usefulness and proportionality. Throughout my discussion of the rules of war, I have been resisting this view and denying its force. I have argued, for example, against the notion that civilians can be locked into a besieged city or reprisals taken against innocent people "in extreme cases." For the idea of extremity has no place in the making of the war convention—or if it is said that combat is always extreme, then the idea is naturalized within the convention. The rules are adjusted to the everyday extremities of war; no further adjustment is possible if we are to have any rules at all, and if we are to attend to the rights of the innocent. But now the question is not one of rule-making, but of rule-breaking. We know the form and substance of the moral code; we must decide, at a moment of desperation and looming disaster, whether to live (and perhaps to die) by its rules.

The sliding scale erodes the convention bit by bit, and so it eases the way for the decision-maker who believes himself "forced" to violate human rights. The argument from extremity permits (or requires) a more sudden breach of the convention, but only after holding out for a long time against the process of erosion. The reasons for holding out have to do with the nature of the rights at issue and the status of the men and women who hold them. These rights, I shall argue, cannot be eroded or undercut; nothing diminishes them; they are still standing at the very moment they are overridden: that is why they have to be *overridden*.¹⁰ Hence breaking the rules is always a hard matter, and the soldier or statesman who does so must be prepared to accept the moral consequences and the burden of guilt that his action entails. At the same time, it may well be that he has no choice but to break the rules: he confronts at last what can meaningfully be called necessity.

The tension between the rules of war and the theory of aggression, between *jus in bello* and *jus ad bellum*, can be dealt with in four different ways:

- 1) the war convention is simply set aside (decided as "asinine ethics") under the pressure of utilitarian argument;
- 2) the convention yields slowly to the moral urgency of the

cause: the rights of the righteous are enhanced, and those of their enemies devalued;

3) the convention holds and rights are strictly respected, whatever the consequences; and

4) the convention is overridden, but only in the face of an imminent catastrophe.

The second and fourth of these are the most interesting and the most important. They explain how it is that morally serious men and women, who have some sense of what rights are, come nevertheless to violate the rules of war, escalate its brutality and extend its tyranny. The fourth seems to me the right argument. It provides the best account of the two kinds of justice and most fully recognizes the force of each. I shall focus on it in the chapters that follow, but try at the same time to suggest the inadequacies and dangers of the sliding scale. I will look first at a number of cases involving the practice of neutrality, perhaps the most disputed feature of the war convention. Since neutral rights constitute a kind of noncombatant immunity, they might have been taken up earlier on. The disputes they have generated, however, raise questions less about the content than about the force and endurance of rights in war. How long must one wait before breaking the rules? The answer I want to defend is best expressed by reversing Chairman Mao's dictum: with reference to our own conventions, and until the very last minute, *we are all the Duke of Sung*.