

---

# Coda: Can the Good Guys Win?

Michael Walzer\*

## Abstract

*Asymmetrical warfare poses many problems for soldiers and insurgents who would like to fight in accordance with current understandings of just war theory and the internationally recognized rules of engagement. Members of both groups complain that they cannot win if they stick to the rules. In fact, the rules, rightly understood, are consistent with military success. But, given the political character of modern warfare, it is important that public opinion is shaped by that right understanding so that just conduct is recognized and reinforced.*

## 1 The Challenge

Here is the most important current challenge to the central principles of just war theory, to the international laws of war, and to the actual rules of engagement of (some) Western armies: if we fight according to these principles/laws/rules, we cannot win. The challenge is practical, not theoretical – you just have to listen to the practitioners talking.<sup>1</sup> We want to be the good guys, the just warriors, they say, but if we fight justly, we will lose the war. I suppose that this sort of thing has been said before. Certainly, winning armies violated the rules often enough, and they always claimed that the violations were militarily necessary. Today, however, breaking the rules is especially necessary – so it is said – for two reasons. First, the rising tide of human rights agitation and the new status and strength of international courts have made the rules far more stringent than they were ‘in the old days’ and, secondly, the increasing importance of non-state actors, insurgent and terrorist organizations, has raised questions about how the burden of the rules is distributed. If the distribution is unfair, will the burdened fighters not be forced to break the rules (and justified in doing so)?

In what is called ‘asymmetric warfare’, between states and non-state actors, between high-tech military organizations and low-tech insurgent forces, the insurgents argue that it is not possible for them to win unless they hide among their own civilians and launch terror attacks against the enemy’s civilians. And their enemies

\* Institute for Advanced Study, Princeton, New Jersey. Email: [Walzer@ias.edu](mailto:Walzer@ias.edu).

<sup>1</sup> See the *New York Times*, 20 June, 7 July, and 23 Aug. 2010 for reports of soldiers complaining about the rules of engagement in Afghanistan. But mostly I have not been reading about but literally listening to these complaints in conversations with soldiers and with instructors in the US military academies.

claim that it is not possible to respond effectively to these attacks without inflicting harm on the civilian population within which the insurgents are hiding – harm that exceeds what is permitted by the standards (as they are understood today) of *jus in bello* and of international law. There is no way of going after the insurgents that does not produce ‘excessive’ or ‘disproportionate’ civilian casualties.<sup>2</sup> One side says that the rules penalize them for their weakness, so they must break the rules. The other side says that their enemies are not only breaking the rules but also exploiting them, and the only possible response is to break them again.

The first of these arguments is often repeated by people eager to explain or defend terrorism, who agree with the claim of the insurgents that they are literally unable to attack military targets as they are enjoined to do by the rules of war. If they are to fight at all, they can only fight against unarmed and vulnerable civilians. Terrorism is not so much their ‘last resort’ as it is their only resort. And one hears the second argument repeated by state officials and politicians, who complain that their army is not ‘allowed’ to defeat the insurgents, as it could, and would, if it were unconstrained by the rules of engagement. So the soldiers watch helplessly as their enemies kill, and disappear, and kill again – while they are unable to use their formidable fire-power effectively. The struggle becomes a military stalemate and then an endless war of attrition, which the insurgents are better able to sustain than the army is.

I mean to engage these arguments, but there is another argument that comes ahead of it, which my own rules of engagement require me to take up first. What happens, or does not happen, on the ground is radically affected by what happens in what we might think of as the moral/political surround. There is an ongoing debate about what the rules are and how they are interpreted and applied in wartime. And it is not only soldiers and insurgents who participate in this debate; all the rest of us are also participants. The soldiers’ complaints about how their enemies kill and hide, illegally and immorally, have to be weighed against the claims of the insurgents that innocent civilians are massacred every time the army attacks. And these claims and complaints have to be weighed in turn against the reports of ‘war crimes’ that come from human rights organizations during and immediately after the fighting.<sup>3</sup> The rest of us are the ones who must do the weighing, and the weighing counts significantly in determining how both sides fight. Both sides have to pay attention to public opinion, our opinion, because we decide, or we have a part in deciding, the benefits and costs of fighting well or fighting badly.

## 2 The Rules of War

I will begin with a discussion of the moral rules and some examples of their application (I leave international law to someone who knows it better than I do). My argument is

<sup>2</sup> These are the words used by the Secretary-General of the UN to describe the Israeli response to the Hezbollah raid in 2006. See my discussion of his remarks in ‘Responsibility and Proportionality in State–Non-State Wars’, *Parameters* (Spring 2009) 40, at 44–45.

<sup>3</sup> E.g., the Goldstone Report, whose reading of the rules of war certainly makes it hard to fight in asymmetric conflicts. See the critique of the Report by Halbertal, ‘The Goldstone Illusion’, *The New Republic*, 6 Nov. 2009.

convoluted, since I mean to write about both soldiers and insurgents, and that will involve some movement back and forth and some repetition. But I want to arrive at a single conclusion, applicable to both groups: if we understand the morality of war rightly, and if we persuade enough other people to understand it rightly, the claim that it is not possible to win within the rules will fail. The rules will accommodate what the soldiers or insurgents (really) have to do; the restraints they must accept will not close off all paths to victory; and if they fight well, they will find support and reinforcement in the court of public opinion – which is, these days, an important part of what it means to ‘win’. So this is a practical response to a practical challenge. I want to have some effect, however small, on the moral/political surround.

The crucial principle that underlies *jus in bello* is that civilians must be shielded from the violence of the battle. That means that they cannot be directly targeted; terrorism is ruled out from the beginning (this is what the terrorists complain about). It also means that injuries inflicted on civilians indirectly, incidentally, in the course of the fighting – what is called ‘collateral damage’ – must be limited. The standard understanding of the limits is that the injury to civilians must not be ‘disproportionate’ to the value of the military target. The point is to permit the attack so long as the target is really important and the risk to innocent people falls within a reasonable range. ‘Innocent’ here is a term of art; it means ‘disengaged from the business of war’. It says nothing about the moral standing of disengaged men and women, but it does say something, and it is meant to say something, about the moral standing of anyone who deliberately sets out to kill them.

Unintentional killing of the innocent is harder to judge. ‘Important’ and ‘reasonable’ are vague terms, and so proportionality turns out to be a highly elastic principle. It can be exploited in both directions, to justify large-scale injury to civilians and to criticize any injury at all, and it offers little resistance to either of these uses. Consider an example from World War II. Here is a factory making tanks for the Nazi war effort; it is located in a working class neighbourhood. It was not put there for the sake of the civilian cover; that is where factories were built before workers had cars. Given the importance of destroying the factory, and given the aiming devices available in 1943, an attack from the air will almost certainly kill some number, and possibly a very large number, of civilians living nearby – and the deaths will be considered, were in fact considered, reasonable and therefore acceptable. If that seems a relatively easy case, like most cases involving the Nazis, there are many more that are not quite like that but are close enough or can be made to look close enough and then, again, the deaths will be considered acceptable.

On the other hand, there are many military operations in asymmetric wars that do not have that kind of importance, though they may still be called militarily necessary – like seizing a terrorist cadre or hitting a rocket launching team. But suppose that the cadre is hiding in the middle of a city in Pakistan and the rocket launching team is firing from the front of an apartment building in Gaza. In these cases, the operation is likely to produce civilian deaths, and these are not so easy to defend; for many observers, they are not defensible at all. The tendency of lawyers and human rights advocates in recent years has been to focus on cases like these and to insist that any

civilian deaths are ‘disproportionate’. But the ‘war on terrorism’ consists of small-scale engagements of just this sort. It seems to follow, then, that terrorism is immoral, and fighting against the terrorists is not morally possible.

The first of these propositions is incontestable, but that does not mean that the insurgents are unfairly burdened and prevented from winning by the rules of war. There are other strategies available to them – ranging from attacks on military targets and police forces (which are never literally impossible) to general strikes and massive civil disobedience. Indeed, in every insurgent organization fighting or claiming to fight for national liberation, militants have argued among themselves about what ought to be done, and many of them have defended one or another of the alternative strategies.<sup>4</sup> It was not obvious to these militants that there was nothing else to do but launch a terrorist campaign. One of the most common arguments against terrorism in these internal debates is that the resort to terror will discredit the movement in the eyes of people around the world and make opposition to policies of colonialism or occupation more difficult. Whether that argument turns out to be right or not obviously does not depend on the insurgents or on their enemies, but on the rest of us. The stronger the argument is, the weaker the claims of the advocates of terrorism will be.

So terrorism may not, in fact, be the only way to fight with a chance of winning, and if we consider what ‘winning’ means, it may not be a way to win at all. In the Algerian war, an early example of asymmetry, the FLN insisted in all its manifestos that it was fighting to create not only an independent but also a democratic state.<sup>5</sup> The commitment to democracy was a central feature of FLN doctrine, as it is of the doctrines of most 20th and 21st century national liberation movements. But it is an old argument – a Marxist argument actually<sup>6</sup> – that terrorism will not lead to democracy: the band of terrorists is an elite group that pre-empts any popular mobilization and regularly produces authoritarian rule, first in the movement and then in the state. The Algerian case now provides empirical evidence for this argument – as do cases like India and Israel, where the terrorists did not succeed in dominating the national liberation movement, and democratic states were eventually established. If winning means what the insurgents commonly say it means, then terrorism is not the way to win.

I have to tell a more complicated story about insurgents who hide among the civilian population – and fire, let us say, only at military targets. Their case may be similar to my description of the German factory: they may simply be fighting from where they are, from where they live. Or they may come from outside the neighbourhood, seeking the cover of the civilian population. It is hard to see what difference this makes with regard to the standing of the civilians; they are the same people in the two cases. But

<sup>4</sup> See, e.g., the account of arguments within the Irish Republican Army in J. Bowyer Bell, *The Secret Army: A History of the IRA* (1970), ch. XII. See also M. McGuire, *To Take Arms: My Year with the IRA Provisionals* (1973), esp. ch. 15.

<sup>5</sup> For a useful history of the Algerian conflict see A. Horne, *A Savage War of Peace: Algeria 1951–1962* (2006).

<sup>6</sup> See the line from Trotsky (famous in some circles): ‘[t]errorists want to make the masses happy without asking their participation’: I. Howe (ed.), *The Basic Writings of Trotsky* (1963), at 296.

we would think differently of the insurgents, assuming that we knew which description applied to them. Perhaps, when they use civilians as cover, their claim of necessity is right; I do not believe that, but the rest of the argument follows in any case. When civilians are used – not incidentally endangered but deliberately used – the people who are using them must accept responsibility for their deaths, whether or not the number of likely deaths is proportionate to the expected military advantage. They do not have sole responsibility, for the army responding to the insurgent attacks also has moral obligations with regard to civilians – else there would be no military advantage in hiding among them. But the insurgents are responsible, as I will argue, in ways that enable the army's (constrained) response.

This argument about responsibility has its origins in dissatisfaction with the permissive version of proportionality. Years ago, when large numbers of civilian deaths were routinely pronounced 'not disproportionate', I argued that we should require positive efforts to avoid civilian deaths – even if the number of expected deaths fell within the acceptable range. I argued for a revision of the classical doctrine of double effect, which held that civilian casualties were acceptable, first, if they were an unintended side effect of a legitimate military operation and, secondly, if they passed the proportionality test.<sup>7</sup> Since the second of these criteria did not seem much of a test, we needed to strengthen the first: it was not enough *not to intend* civilian casualties; it was necessary *to intend not* to inflict such casualties. Two effects required two intentions. We should, of course, design strategies and tactics to achieve our military objectives, but we should also design them to minimize death and injury to the civilian population. And this second design might involve asking soldiers to take greater risks so as to reduce the risks they impose on civilians.<sup>8</sup> The responsibility to act in positive ways comes first, without regard to proportionality calculations.

There are also negative responsibilities that come ahead of proportionality: states and armies, just like insurgent organizations, must not deliberately put civilians in harm's way for military advantage. Insurgents must not fire rockets or mortars from churches or schools or store their military supplies in apartment buildings, and soldiers must not use civilians as human shields in military operations, pushing them ahead of a scouting party, for example, or marching them through a minefield. Nor can the state deliberately place military installations in civilian areas or move a day care centre, say, into a critically important factory. These are, I believe, impermissible acts. It is not possible to argue that the number of children who may be killed if the factory is bombed is 'not disproportionate' to the value of deterring the attack. The children should not be there. And it is the people who put them there, not the people who attack the factory, who bear primary responsibility for their deaths. Similarly, insurgents should not fire their rockets from the front of a school building, even if the number of children at risk in the school is 'not disproportionate' to the damage they hope to inflict on the enemy. The insurgents should not be near the school.

<sup>7</sup> P.A. Woodward, *The Doctrine of Double Effect* (2001). For my revisionist argument see M. Walzer, *Just and Unjust Wars* (1977), at 152–159.

<sup>8</sup> For the argument about risk-taking see Margalit and Walzer, 'Israel: Civilians and Combatants', *The New York Review of Books*, 14 May 2009.

It is not clear to me how the children in either of these examples should figure in the proportionality calculations of the forces attacking the factory or responding to the rockets. Civilians being used by fighters are no longer ‘disengaged from the business of war’, but they will still look ‘innocent’ to us, perhaps especially so – the term of art replaced now by the term itself. We should resist any temptation to discount their lives. It is probably only for the sake of deterrence that the proportionality calculations shift (I do not know how far) in favour of the attackers, so long as they attack with care. If we include deterrence among the military gains sought in the attack, then the target will have greater value and the permitted collateral damage will also be greater.<sup>9</sup> And any added civilian death or injury is the responsibility of those who, before the attack, put the civilians at risk.

There are hard questions here, which I can only address in a tentative way. Above all, it is difficult to judge whether civilians have been deliberately used and endangered or whether they are simply *there*, in a dangerous place. Which is it? The answer may (or may not) determine the choice of battlefield strategies and tactics, but it certainly should determine the assignment of responsibility in the court of public opinion. And getting the assignment right is very important; it can help significantly, as I have argued, to make fighting justly possible. This is especially true when civilians are not endangered for the sake of the cover they provide but precisely in order to expose them to attack – so that they will be killed and their killers condemned for their deaths. In such a case, it is morally necessary to insist that their killers are not the ones (at least, not the only ones) who should be condemned.<sup>10</sup>

### 3 Should the Rules be Revised?

The argument about responsibility was meant for soldiers and insurgents alike, though terrorists who take risks in order to kill civilians, not to avoid killing them, presumably will not be interested in it. Its primary purpose (in 1977) was to deal with the permissiveness of the old proportionality doctrine as it was usually invoked by the leaders of states and armies. Now, however, a new understanding of proportionality dominates the international discussion of asymmetric warfare; it permits hardly anything at all in the way of collateral damage and seems almost designed to make it difficult for states and armies to fight. And if we add to restrictive proportionality the positive obligation to take care and to take risks in order to minimize harm to civilians and the negative responsibility not to use civilians for military advantage, it begins to look very hard to fight justly, let alone to win. Anyone who respects the rules will put himself and his cause at risk. But surely that means there is something wrong with the rules.

Some critics of just war theory argue that the wrongness has to do with the conventional claim that *jus in bello* is entirely independent of *jus ad bellum*, that fighters on

<sup>9</sup> Jeff McMahon suggested the importance of adding deterrence into the proportionality calculations to me at a conference at the US Naval Academy in April 2011 entitled ‘Ten Years Later: Warfare Ethics since 9/11’.

<sup>10</sup> I have been helped in thinking through the argument of this and the preceding paragraphs by conversations with Seth Lazar, who strongly disagrees with it.

both sides, whether their cause is just or unjust, have an equal right to fight and are equally bound to fight justly, that is, in accordance with the rules of engagement. But if the rules make it impossible for either side to win, these critics argue, then surely they must be relaxed for the side that ought to win. The *ad bellum* just warriors must be given some leeway with regard to *in bello* justice. John Rawls, writing when the rules were more permissive than they are today, made the argument in the opposite way: we must impose additional restrictions on the unjust warriors. '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-defence, when those are necessary, may be flatly excluded in a more doubtful situation.'<sup>11</sup> This sounds like an argument from common sense, but it can only be made by men and women who are confident that they know which side's war is 'legitimate'. With regard to many actual conflicts, I share that confidence. The problem is that it is very widely shared among people on both sides of pretty much every symmetric and asymmetric war.

On both sides, the arguments are made with fierceness and conviction: we are fighting for national liberation; we are fighting in self-defence; we are fighting against terrorism; we are fighting for justice and peace. And so both sides are ready, equally ready, to claim the benefits of any relaxation of the rules. That is the old, and it still seems to me unanswerable, argument in favour of the conventional independence of *in bello* from *ad bellum* justice. There will not be any rules at all unless they apply in the same way to both sides.<sup>12</sup> So if the rules, as they are currently understood, make it impossible for the unjust warriors to win, they must do the same for the just warriors.

But these are rules of war, rules for war. They have to accommodate the necessities of warfare; they have to make fighting and winning possible. They are not, or they should not be, pacifist rules – even restrictive proportionality, which sometimes serves as the functional equivalent of pacifism, is not in fact pacifist. The rules do, however, have a built-in limit: if a war cannot be fought within the constraints, rightly understood, that they establish, there is a strong probability that it should not be fought. The inability to fight justly is a sign that the war itself is not just. In the 1960s and 1970s, I made an argument of this sort against the American war in Vietnam. I thought that war unjust from the beginning, but this was not an obvious position; there were arguments in favour of the war (it was, after all, a war against communist tyranny). Its injustice was confirmed, I argued, when it became clear that we were not fighting only against the communist insurgents, the Viet Cong; we were at war with the rural society of Vietnam. The capacity of American soldiers to distinguish the insurgents from ordinary Vietnamese was steadily diminishing, until pretty much every Vietnamese man, woman, and child looked like an enemy. The insurgents had won the 'hearts and minds' battle, and whether or not the American war was initially unjust, it had become unjust – even the old proportionality doctrine condemned it.<sup>13</sup>

<sup>11</sup> J. Rawls, *A Theory of Justice* (1971), at 379.

<sup>12</sup> On 'the moral equality of soldiers' see Walzer, *supra* note 7, at 34–41.

<sup>13</sup> *Ibid.*, at 186–196.

That did not justify Viet Cong violations of the rules of war; the rules applied to them exactly as they applied to the Americans. But the way we were forced to fight and the deaths for which we were responsible demonstrated pretty conclusively that we should stop fighting. So the *ad bellum/in bello* distinction is not absolute. Fighting a just war does not give you privileges *vis-à-vis jus in bello*, but fighting unjustly may in some cases de-privilege you *vis-à-vis jus ad bellum*.

Can this really be a one-way argument – only from *in bello* to *ad bellum*? The hard question is whether the argument can ever go the other way. If we had been fighting in self-defence in Vietnam, against a real threat to the physical security of American citizens, would our inability to fight justly have required us to stop fighting? Possibly not; I will come back to this question. But America-in-Vietnam is not a good case for addressing it, since our inability to fight justly was a function of fighting far from home, in someone else's country, for strategic reasons that had little or nothing to do with the physical security of American citizens. So let us consider the position of the Viet Cong, who were fighting in their own country. I said just now that they had no exemption from the rules of war. Suppose, however, that they could not win their fight for national liberation without large-scale violations of the rules, without killing as many Vietnamese as the Americans were killing. Would we have to say then that the rules of war forbade their victory, made national liberation impossible? I think that we would have to say that, for the Viet Cong's inability to fight justly would have been a sign that they had not won the 'hearts and minds' battle, and it would have called into question their claim to be fighting on behalf of the nation. Now the old Marxist argument against terrorism would apply to them: they would be an elite band of killers without popular support. Indeed, the readiness of communist militants to kill their own people was a pretty sure indication that they were not going to establish a democratic state. They were not the 'good guys' in that war; they were only, given the situation on the ground, 'better guys' than the Americans were.

We need a different and a harder case to test the 'good guys can't win' argument. So let us turn to the Israeli war in Gaza in 2008–2009, which is probably the sort of case most people have in mind when they challenge the current rules of war. Here is the case, in simplified outline, without reference to Israel's occupation of Gaza in 1967, its settlement policy there, or its withdrawal in 2004. Hamas militants had for some years fired rockets indiscriminately into Israel, hoping to kill large numbers of civilians – but with virtually no success. Since they fired at least some of the time from civilian cover, and since Gaza was in any case densely populated, any Israeli response was bound to be problematic, given the proportionality rule. Whether the attack was from the air or on the ground, it would kill many more civilians than the rockets were killing – and that would be called, was in fact called, a 'disproportionate' response.<sup>14</sup> But what was being measured when this term was used – disproportionate to what? Many people measured the deaths on one side against the deaths on the other, as if this was a family feud in Kentucky. The number of Israeli deaths was very low, though

<sup>14</sup> Almost everybody called it disproportionate: see the coverage of the war in the *New York Times* for any day from the end of Dec. 2008 to Jan. 2009.

there was always the possibility that one of the Hamas rockets would hit a school or a hospital. Do potential deaths count? Or should the deaths on the Palestinian side be measured, as in standard proportionality arguments, against the value of the military target – let us say, one of the rocket launching teams? But hitting a single team would not have much value to balance against whatever civilian deaths the attack produced. Should we consider the targets and the deaths cumulatively? What is the military value of hitting many teams, stopping (most of) the rockets from coming, and greatly reducing the chances that a school or hospital would be blown up? The single team measure justifies very little in the way of civilian casualties, and indeed makes it difficult or impossible to fight. The cumulative, multiple team measure can easily be made to justify too much. During and after the Gaza war, most international commentators wrote as if potential deaths did not count and the single team measure was the right one. They applied the restrictive proportionality doctrine, and so, in effect, denied the Israelis any rightful response to the rockets.

That cannot be right, but the old proportionality doctrine also cannot be right; it would have justified more casualties than the IDF actually inflicted in the 36 days of the war. It is at this point that we need to insist upon the argument about responsibility that I sketched in the second part of this article. When Hamas fires rockets into Israel, making no effort to avoid civilian deaths and, indeed, hoping to kill civilians, they are responsible for any civilians they kill. And when they deliberately set up the rocket launchers in front of apartment buildings or schools, they are imposing risks on their own civilians, and they are responsible for deaths caused by legitimate, that is, carefully aimed counter-fire. This is a critical point, and it is often missed: the Israeli army (and any similar army – NATO in Afghanistan, for example) causes the deaths, but Hamas (or any similar insurgent force – the Taliban, for example) bears responsibility for them. Calculations of proportionality have to be adjusted to reflect this distinction between causation and responsibility – even though I cannot say exactly how to do that. At the same time, however, Israeli soldiers (and NATO soldiers) must take positive measures to minimize risks to civilians, and if they do not do that, they will rightly be criticized for the deaths they could have avoided – and this is true without regard to how the proportionality calculations turn out. It is still necessary to make the calculations, to try to find an honest balance between those that permit nothing and those that permit everything, and to call off attacks likely to produce, all things considered, disproportionate damage to civilians. But responsibility is the critical consideration. So long as it is rightly assigned, and so long as the assignments are widely acknowledged, it is possible for the good guys, who live by the rules, to fight and win. (Their victory is not guaranteed; there are no guarantees in war. Even soldiers who break the rules in order to win will not necessarily win in the end. I am arguing only against the claim that fighting justly puts victory out of reach.)

But what if Hamas rockets were killing large numbers of Israeli civilians, and the only way of stopping the killing was to respond in kind? If we assume that the anti-terrorists are the good guys here (which is my assumption), then we are finally at the core of the argument: the good guys cannot win without acting like the bad guys. I want to deny the premise of the question: there are other ways of stopping the rocket attacks;

it is still possible to fight within the just war constraints, so long as responsibility is rightly assigned and proportionality honestly balanced. But this answer will be taken as an evasion. The premises of ‘what if?’ questions cannot be denied; they have to be engaged. One way to engage these kinds of questions – my own way in *Just and Unjust Wars* – is to invoke the controversial doctrine of ‘supreme emergency’.<sup>15</sup> If a country is fighting in self-defence and is faced with a looming danger of a catastrophic kind – massacre or radical subjugation – it can indeed violate the rules of war, and the only limit on the violation is necessity. This permission obviously extends only to the side that is fighting a just war, so here is the point where *ad bellum* justice overrides *in bello* justice. The distinction between the two collapses in a supreme emergency – and this argument holds not only for states but also for insurgents fighting against an enemy engaged in mass murder or enslavement. I do not think that there is any collapse short of that, so the argument would not in fact apply to Gaza. The ‘what if?’ question is persuasive only in an extreme form.

But why should we draw such a hard line at such a far point? Why not adopt a sliding scale – the greater the danger the just warriors face, the greater their entitlements in battle? This is the argument that I have already discussed, to which I responded in the same way that just war theorists (and international lawyers) have been responding for a long time now: if a conviction of justice and a sense of danger are sufficient to allow violations of the rules of war, the rules will regularly be violated. But there is a further response, which strengthens the argument against the sliding scale. *The scale has already slid*, though not in a way that discriminates between the two sides. The rules of war have been shaped over many years to fit the dangers of war or, at least, the ordinary dangers of war. *Jus in bello* is already an adaptation of everyday morality to the necessities of combat, and, absent extremity, no further adaptations are required. I do not mean that they will never be required. The process of adaptation is historical and circumstantial, and circumstances may arise sometime in the future that will require changes in the rules of war. But right now there is no such requirement.

## 4 Living by the Rules

On this side of supreme emergency, it is morally obligatory to fight with constraint, and I have not yet seen any plausible argument that this is not possible – when the constraints are rightly understood and (here is the last part of my argument) the soldiers are genuinely committed to them. Commitment is critically important. Soldiers have to be trained to fight justly, and their officers have to be taught the best ways of doing that. It is incompetence, above all, that breeds brutality. There is plenty of spontaneous brutality in war, especially ‘in the heat of the battle’; I do not mean to ignore that. But well-trained and well-disciplined armies are less brutal – and their officers and soldiers are less likely to think that brutality is necessary for victory. The same

<sup>15</sup> Walzer, *supra* note 7, at 251–255. See also Statman, ‘Supreme Emergencies Revisited’, *Ethics* (Oct. 2006) 58 and Benbaji, ‘Dehumanization, Lesser Evil, and the Supreme Emergency Exemption’, *Diametros* (Mar. 2010) 5.

thing is true for insurgents who are morally committed: they will look for alternative strategies and tactics, and they will shield civilians as best they can. Both sides aim to win, of course, and their fighters take risks first of all for the sake of the military mission, and only after that in order to minimize civilian deaths. The second set of risks must not put the mission in jeopardy, else the first set would be pointless. We hold soldiers and insurgents responsible for what they try to do; we credit them for their efforts to avoid killing civilians, even when those efforts do not entirely succeed. What we must insist on is the effort, the morally necessary care-taking and risk-taking.

This position is not merely academic, the product of professors, far from the battlefield, imagining ideal but unlikely battles. It is very close to the honour code of professional soldiers, though expressed in a different language. And it underpins the rules of engagement of Western armies fighting in asymmetric wars, like the NATO forces in Afghanistan. Here I can talk only from the side of the army, though the few examples that we have of insurgent codes (like Mao's rules for the Red Army<sup>16</sup>) suggest that the argument holds for the other side too. The rules promulgated by General McCrystal, and then endorsed with only minor qualification by General Petreus, require soldiers to take risks in order to minimize civilian deaths. It is true that these rules are not only morally but also strategically motivated; they are designed to win, or to avoid losing, the battle for 'hearts and minds'. Tough-minded 'realists' claim that this is the wrong battle; the better battle is for bodies, as it always has been, and the way to win is to turn large numbers of bodies, including civilian bodies, into corpses. Only brutality will break the back of asymmetric resistance. That is how colonial armies 'in the old days' established their supremacy. But those were indeed the old days, before the age of popular mobilization and ideological warfare. I suspect that General McCrystal was right to think that morality and strategy fit more closely together in contemporary wars. In any case, it is clear that leading military figures believe that it is possible to win within the constraints of *jus in bello* – and even that it is not possible to win outside those constraints.

What does victory mean in these kinds of wars – and what victories are, so to speak, worth winning?<sup>17</sup> If the old colonial wars required extreme brutality, we might well think (if we did not already think) that these were unjust wars. They should not be fought, and they should not be won. But let us assume that in contemporary asymmetric wars, the high-tech armies are sometimes fighting in a just cause (sometimes not, but the assumption is necessary for my argument here). Winning will not be marked by a surrender ceremony and a victory parade; it will have a less formal, less visible, more modest character; its achievements will mostly be negative – the military and political weakening of the insurgent forces, the radical reduction of terrorist attacks, the creation of a not-indecent government. The commitment to fight within the established moral constraints is plausibly connected to these achievements, and wherever the 'hearts and minds' battle is relevant, the connection is close. It may seem

<sup>16</sup> See Walzer, *supra* note 7, at 181.

<sup>17</sup> For a discussion of what winning means today, which raises many more questions than I can address here, see Gabriela Blum's article, 'The Fog of Victory', in this volume, at 391.

entirely irrelevant in cases like the Gaza war, where the Israelis were clearly not fighting for Gazan hearts and minds. But in a democratic and ideological age, the IDF's ultimate victory (or defeat) depends in significant ways on hearts and minds elsewhere. Fighting with constraint can be, in multiple ways, a good thing to do.

And what would victory for the insurgents look like? Here the achievement might well be positive – the end of colonial rule and the creation of an independent and democratic state. But if the aim of the insurgents extended to the elimination of minority populations, like the  *pied noir*  in Algeria, or Asian immigrants in central Africa, or Anglo-Indians or Muslims in India, their war would be unjust and not worth winning. A just war would end with some kind of accommodation, different in different cases – territorial compromise, the peaceful movement of populations, the granting of citizenship or communal rights. The commitment to fight justly is connected to these kinds of outcomes, while terrorism is designed to make them impossible – and does make them impossible. So we can say again that fighting with constraint can be, in multiple ways, a good thing to do.

But we have to insist that the constraints are rightly understood. As I argued at the beginning, the moral/political surround makes a difference in what happens on the ground. And the surround has been more political than moral in recent years. The restrictive proportionality argument, which makes it so difficult to fight against insurgents and terrorists, is (in part) the work of people who are sympathetic to the insurgents and terrorists – we can see this most clearly in debates at the UN. And the argument that soldiers do not have to take risks to minimize civilian deaths comes from people determined to defeat the insurgents and terrorists at any cost. Of course, these political positions are also moral positions, and it makes sense that they will have an impact on arguments about responsibility and proportionality. And yet I believe that we should resist that impact – for the same reasons that we should not, except in extremity, allow  *ad bellum*  judgements to affect  *in bello*  judgements. If we want to protect innocent lives in war, we have to work through the responsibility arguments and we have to get the proportionality calculations right. And these arguments and calculations require us to bracket – not forever but for a reflective moment – our political sympathies and antipathies and to focus narrowly on what happens on the battlefield or in the course of the asymmetric struggle. How should insurgents and soldiers aim their weapons, with what intentions, in what circumstances, with what degree of care? There are right answers to these questions, and the right answers will not deny victory to the men and women who adopt them as their military code.