IILJ International Legal Theory Colloquium Spring 2011
Convened by Professor Joseph Weiler

Wednesdays 2pm-3:50pm on dates shown

NYU Law School
Vanderbilt Hall 208, 40 Washington Square South
(unless otherwise noted)

Institute for International Law and Justice

SCHEDULE OF SESSIONS:

February 9   Yitzhak Benbaji, *Bar-Ilan University*
"The Moral Power of Soldiers to Undertake the Duty of Obedience"

February 16   Michael Walzer, *Institute for Advanced Study in Princeton / Tikvah and Straus Fellow at NYU School of Law*
"Can the Good Guys Win"

February 23   No Colloquium

March 2   Doreen Lustig, *NYU School of Law*
"Doing Business, Fighting a War: Non-State Actors and the Non State: the Industrialist Cases at Nuremberg"

March 9   Gabriella Blum, *Harvard Law School / Tikvah Fellow at NYU School of Law*
"States' Crime and Punishment"

March 16   No Colloquium – SPRING BREAK

March 23   Matthew C. Waxman, *Columbia Law School*
"Regulating Resort to Force: Form and Substance of the UN Charter Regime"

March 30   Paul Kahn, *Yale Law School*
"Imagining Warfare, or I know It When I See It"

April 6   David Kretzmer, *Hebrew University of Jerusalem and Academic Center of Law and Business, Ramat Gan*
"The Inherent Right to Self-Defense and Proportionality in Ius ad Bellum"

April 13   Andreas Zimmermann, *University of Potsdam,* and Philip Alston, *NYU School of Law*
"Enforcing International Humanitarian Law in Asymmetric Armed Conflicts - the Case of Gaza"

April 20   No Colloquium

April 27   J.H.H. Weiler, *NYU School of Law*
"Not So Quiet on the Western Front: Reflections on the Bellicose Debate Concerning
the Distinction between Ius ad Bellum and Ius in Bello"

<u>Can the Good Guys Win</u>?

Michael Walzer

I

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 can't win. We want to be the good guys, the just warriors, 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, second, 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, won't the burdened fighters be forced to break the rules (and justified in doing so)?

In what is called "asymmetric warfare," between states and non-states, between high-tech military organizations and low-tech insurgent forces, the insurgents argue that it isn't possible for them to win unless they hide among their own civilians and launch terror attacks against the enemy's civilians. And their enemies claim that it isn't 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 <u>jus in bello</u> and of international law. There isn't any way of going after the insurgents that does not produce "excessive" or "disproportionate" civilian casualties. 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 claim that the insurgent forces 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 isn't so much their "last resort" as it is their only resort. And one hears the second argument repeated by state officials and publicists, 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 doesn't 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, what they are meant to achieve, and how they are interpreted and applied in wartime. And it isn't 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 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. The rest of us are the ones who must do the weighing, and the weighing counts significantly in determining how both sides fight.

II

I will begin with an outline of the moral rules (I leave international law to someone who knows it better than I do) and some examples of their application. The argument I want to make depends on that outline: if we understand the morality of war rightly, and if we persuade enough other people to understand it rightly, the claim that it isn't possible to win within the rules will fail. So this is both a theoretical and a practical project; I want to get things right and I also want to have some effect 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 can't be directly targeted; terrorism is ruled out from the beginning (which 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 Two: here is a factory making tanks for the Nazi war effort. 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 in working class neighborhoods around the factory—and the deaths will be considered, were in fact considered, reasonable and therefore acceptable. If that seems a relatively easy case, 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 asymmetrical wars that don't 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 and the rocket launching team is firing from the front of an apartment building. In these cases, the operation is likely to produce civilian deaths, and these aren't 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 isn't morally possible.

The first of these propositions is incontestable, but that doesn't mean that the insurgents are 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. It wasn't obvious to these militants that there was nothing else to do but launch a terrorist campaign. So terrorism may not, in fact, be the only way to win, and once 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 an independent and democratic state. But it is an old argument—a Marxist argument actually—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 strong empirical evidence for this argument. If winning means what the insurgents commonly say it means, then terrorism isn't the way to win.

What about the second proposition, that fighting against terrorism isn't morally possible—that the number of civilian deaths will always be "disproportionate"? That is certainly contestable, though I doubt that the contest is, at its center, about proportionality. Years ago, when proportionality arguments usually went the other way and large numbers of civilian deaths were pronounced "not disproportionate," I suggested that we should require positive efforts to avoid civilian deaths—whatever the result of our proportionality calculations (and 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, second, if they passed the proportionality test. Since the second of these criteria didn't seem to me much of a test, we needed to strengthen the first: it wasn't enough <u>not to intend</u> civilian casualties; it was necessary <u>to intend not</u> to inflict such casualties. Two effects required two intentions. We should look for strategies and tactics designed, of course, to achieve their military objectives but also designed to minimize death and injury to the civilian population. And these strategies and tactics might involve asking soldiers to take greater risks so as to reduce the risks to civilians. The responsibility to act in positive ways comes first, before any calculations of proportionality, since we have to know the design of the attack before we can begin to calculate.

There are also negative responsibilities that come ahead of proportionality: states and armies and insurgent organizations must not deliberately put civilians in the way of harm. They must not use civilians as human shields in military operations, pushing them ahead of a scouting party, setting up a day care center in a munitions factory, firing mortars or rockets from churches or schools, storing military supplies in apartment buildings. These are impermissible acts, without regard to proportionality calculations. It isn't possible to argue that the number of children who might be killed if the munitions factory is bombed is "not disproportionate" to the

value of deterring the attack. The children shouldn't be there. And it is the people who put them there, not the people who attack the factory, who are responsible for their deaths. It isn't clear to me how the children should figure in the proportionality calculations of the attacking force. Civilians being used by fighters are no longer "disengaged from the business of war," even though they will still look "innocent" to us, perhaps especially so. The calculations shift, though I don't know how far, in favor of the attackers, who won't be responsible for the deaths they cause. Still, they might well look for a way of attacking, at night, say, when the children aren't there. The issue is much clearer with regard to civilians living around the factory, who are always there. Now the attackers are responsible for the deaths they cause if they don't take care, and if they don't take risks, to minimize the collateral damage they know they will inflict.

This argument was meant for soldiers and insurgents alike, though terrorists who take risks in order to kill civilians, not to save them, presumably won't 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. But the current version of the doctrine permits hardly anything in the way of collateral damage. And if one combines a newly restrictive proportionality doctrine with a

requirement of positive and perhaps risky efforts to protect civilians, and then with a negative responsibility not to endanger them, the resulting moral code, according to many soldiers and insurgents, makes it impossible to fight successfully—so long as one honors the code. And since the people who honor the code are presumably the good guys, there seems to be something wrong here.

Critics of just war theory argue that the wrongness has to do with the conventional claim that <u>jus in bello</u> is entirely independent of <u>jus ad bellum</u>, that fighters on 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 <u>ad bellum</u> just warriors must be given some leeway with regard to <u>in bello</u> justice. John Rawls made an argument something like this in <u>A Theory of Justice</u>: "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 those are necessary, may be flatly excluded in a more doubtful situation." That's not a morally crazy argument; one can see where it is coming from.

It's coming from men and women who are confident that they know which side ought to win. With regard to many actual conflicts, I share that confidence. The problem is that it's very widely shared among people on both sides of pretty much every symmetrical and asymmetrical war. On both sides, the arguments are made with fierceness and conviction: we are fighting for national liberation; we are fighting in self-defense; 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 favor of the conventional independence of <u>in bello</u> from <u>ad bellum</u> justice. There won't be any rules at all unless they apply in the same way to both sides. So if the rules make it impossible for the bad guys to win, they must do the same for the good guys.

III

But the rules are both intended and designed to make fighting and winning possible; they aren't pacifist rules; they are rules of war, rules for war. The design does, however, have a built-in limit: if a war can't be won according to the rules, there is a strong probability that it shouldn't be won. The inability to fight justly is a sign that the war itself isn't just. In the 1960s

and '70s, 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 favor 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. That didn't 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 demonstrated

pretty conclusively that we should stop fighting. So the ad bellum/in bello

distinction isn't absolute. Fighting a just war doesn't 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-defense 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 isn't 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 to do with the physical security of American citizens. So let's consider the position of the Viet Cong, whose fighters were fighting in their own country. I said just now that they had no exemption from the rules of war. Suppose, however, that they couldn't win their fight for national liberation without large-scale violations of the rules, without killing as many Vietnamese as the American were killing. Would we have to say then that the rules of war forbad their victory, made national liberation impossible? Maybe so, for their inability to fight justly would have been a sign that they hadn't 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 were 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 weren't going to liberate their people and establish a democratic state. They weren't 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's turn to the Israeli war in Gaza in 2008, 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 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, 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. 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. The number of Israeli deaths was very low, though 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's say,

one of the rocket launching teams? But hitting a single team wouldn't 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 making sure that no 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 didn't count and the single team measure was the right one. And so, in effect, they denied the Israelis any rightful response to the rockets.

That can't be right, but the alternative proportionality argument also can't be right; it would have justified more casualties than the IDF actually inflicted in the 36 days of the war. Hence the need to apply the responsibility doctrine that I sketched above. 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 fire from civilian cover, 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 can't 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 don't 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.

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 can't win without acting like the bad guys. But I 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 can't be denied; they have to be engaged. One way to engage these kinds of questions—my own way in <u>Just and Unjust Wars</u>--is to invoke the controversial doctrine of "supreme emergency." If a country is fighting in self-defense 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 <u>ad bellum</u> justice overrides <u>in bello</u> justice. The distinction between the two collapses in a supreme emergency—and this argument applies not only to states but also to insurgents fighting against an enemy engaged in mass murder or enslavement. I don't think that there is any collapse short of that. 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 good guys face, the greater their entitlements in battle? This is the argument that I have already discussed, to which I responded in the same way as 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. <u>Jus in bello</u> is already an adaptation of everyday morality to the necessities of combat, and absent extremity, no further adaptations are required.

IV

On this side of supreme emergency, it is morally obligatory to fight with constraint, and I haven't yet seen any plausible argument that this isn't possible--when the constraints are rightly understood and the soldiers (or the insurgents) are genuinely committed to them. Their 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 don't 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. They will look for alternative strategies and tactics, and they will shield civilians as best they

can. Their aim is to win, of course, and they take risks first of all for the sake of their 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 the soldiers responsible for what they try to do; we credit them for their efforts to avoid civilian deaths, even when those efforts don't entirely succeed. What we must insist on is the effort, the morally necessary care-taking and risk-taking.

This position isn't merely academic, the product of professors, far from the battlefield, imagining ideal but unlikely battles. It is very close to the honor code of professional soldiers, though expressed in a different language. And it underpins the rules of engagement of (some) Western armies fighting in asymmetric wars, like the NATO forces in Afghanistan. The rules promulgated by General McCrystal, and then endorsed 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." I have heard it said 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's possible to win within the constraints of <u>jus in bello</u>—and even that it's 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? If the old colonial wars required extreme brutality, we might well think (if we didn't already think) that these were unjust wars. They shouldn't be fought, and they shouldn't be won. But let's 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 won't 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 legal and moral constraints is plausibly connected to these achievements, and wherever the "hearts and minds" battle is relevant, the connection is close. It may seem 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.

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 the work of people who are sympathetic to the insurgents and terrorists (one sees this most clearly in debates at the UN). And the argument that soldiers don't have to take risks to minimize civilian deaths come 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 <u>ad</u> <u>bellum</u> judgments to affect <u>in bello</u> judgments. 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 won't deny victory to the men and women who adopt them as their military code.