

## Review - Moral Dilemmas of Modern War

Written by Ralph Parlour

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RALPH PARLOUR, JUL 5 2011

**Moral Dilemmas of Modern War** is a discussion on the ethics of modern asymmetrical wars such as the U.S. war in Iraq or the Israel-Arab conflict. In these conflicts methods that have long been taboo, such as assassination and torture, have become commonplace. The central dilemma of Michael L. Gross' book is the clash between two moral imperatives 'the right to wage war for legitimate purposes... and the duty to protect combatants from unnecessary injury and noncombatants from direct harm' (Gross 2010, 239). In this book Gross is attempting to answer the question of 'who do you bomb when you cannot reach military targets' (Gross, 2010 ix). In the process of making his answer he updates the ethics of just war for an age where asymmetric conflict is prevalent. Gross makes a spirited attempt to resolve this dilemma yet he is only partially successful, he does however improve upon traditional accounts of just war theory.

In general the book is well written and understandable, while not suitable for complete novices to the topic of war ethics, one would not need to be an expert to read this book. It is accessible and entertaining, there are several firsthand accounts and personal stories of people involved in wars that make the book more engaging and aware of the human than abstract tracts on ethics can be sometimes. The method used is unsurprisingly a normative method, he see his book as a 'practical guide' to aim to answer moral puzzles of policy makers, philosophers, journalists and citizens. Much of the book is a normative discussion of what Gross thinks should be done. However there are other sections, for example there is a chapter on non-lethal weapons where Gross goes into some detail into describing the technology and possible uses of these weapons. With the exception of the chapter on modern weaponry the book is a discussion on the legal and ethical problems of methods of war including torture, terrorism and assassination.

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The traditional war convention is succinctly summed up by Walzer (2006, 137) as resting 'first on a certain view of combatants, which stipulates their battlefield equality. But it rests more deeply on a certain view of noncombatants, which holds that they are men and women with rights and that they cannot be used for some military purpose, even if it is a legitimate purpose'. Gross does not reject this entirely, he asserts that 'there are limits to permissible direct harm' but these limits are not because of a simple 'dichotomy between combatants and non-combatants, the former vulnerable and the latter immune. Instead, the emerging norm discards "combatants and non-combatants" for "participants".... Participants are vulnerable to varying degrees of direct harm, sometimes lethal sometimes nonlethal' (Gross 2010, 203). This is the greatest contribution to the field and this issue and its ramifications take up the bulk of the book, therefore the analysis of this idea will be the focus of this article.

One of the successes of Gross' argument is the account of the civilian combatant<sup>1</sup>, this would include many of the inmates of Guantanamo bay who are 'in a legal black hole. In dubbing them 'unlawful combatants', the US implies the Geneva Conventions do not apply: there is no need to charge the men, no need for a trial, they have no right to a lawyer.' (Harris and Wazir, 2002). Yael Stein (2003) claims that civilian combatants 'are civilians... and [they] can only be attacked for as long as they actively participate in hostilities'. Gross rightly points out that militants are not 'civilians who lend an occasional hand... but fighters who maintain their hostile status off the battle field as they prepare for battle' (Gross 2010, 105). So these people inhabit a position in Gross' spectrum that is not quite that of a soldier but very close and would thus entitle them to treatment analogous to that of soldiers. Gross' states that the category of unlawful combatant used by the U.S. 'undermines the spirit of the law and denies combatant status to the many guerilla fighters who deserve it' (Gross 2010, 157). While combatants are subject to lethal attack they also have certain rights if captured. If one takes Stein's view of Palestinian fighters they are simply criminals, irrespective of how they fight and therefore would be protected under international human rights law. In Gross' analysis they are combatants and are only criminals if they commit war crimes, if this view became accepted it could ameliorate some of the conditions of asymmetric conflicts such as that between Israel and it's Arab neighbors. It could lessen the extent to which each side attribute criminal responsibility to the other. This tendency to criminalize is dangerous, as Gross notes and can legitimate terrorism against civilians or excessive use of force to punish by means of collateral damage.

Another benefit of Gross' new spectrum of involvement is that it might reduce harm to those who are less involved in a conflict. The higher the 'participation score' the higher their vulnerability, therefore if participation falls below a certain level 'this might require conventional forces to use less than lethal force to disable and/or arrest these participants' (Gross 2010, 43). There is a problem in war of what level of violence is permissible against non-combatants that support the war fighting capacity of their state. Michael Walzer (2006 p145-6) says that harming civilians involved in the war process (such as munitions workers) is acceptable if forced to by necessity and if the attacker tries to reduce harm. On Gross' spectrum of participation munitions workers would have a relatively low score, therefore instead of inflicting lethal harm on them Gross advocates using less than lethal means. These include methods such as hacking computers and cutting power and use of nonlethal weapons including caltivate gases that render people unconscious and blinding lasers. Some of these weapons are banned, for example caltivate gasses fall under the prohibition against all kinds of chemical weapons in the Chemical Weapons Convention. This is despite the possibility that if used properly they could reduce harm. There is one problem with the concept of a participation score however and that is that it is impossible to measure in an independent or neutral manner. While it is obvious someone who plants car bombs has a higher participation score than someone who collects funds, it can be difficult to decide where those who don't carry out attacks, but play an important role (fund collectors, publicists etc) would fall.

Use of nonlethal weapons such as caltivate gas could also be used to reduce collateral harm of noncombatants. Gross describes an Israeli attack on a civilian convoy during the second Lebanon war of 2006 (Gross 2010, 85-7). There were Hezbollah fighters in the convoy, so Israel attacked it, killing combatants and noncombatants alike, they defended the action calling the civilian deaths collateral damage. If a nonlethal weapon was used that only temporarily incapacitated all of the convoy, then they could distinguish between the combatants and the noncombatants therefore allowing the first to be held and the second to be released. This would have reduced the death toll of combatants and civilians but would have to involve a serious rethink of just war theory and a new norm that would allow for intentional and direct nonlethal attacks on civilians (Gross, 2010 237). I agree with Gross that

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this would be beneficial, however there are problems with this new norm as Gross points out, first to alter the Chemical weapons convention could be the top of a slippery slope that might in time legitimate lethal and very painful chemical weapons. Secondly there is little historical use of nonlethal weapons so the effectiveness of such weapons cannot at this point be assessed. Finally nonlethal weapons can be very harmful if used incorrectly, as happened in the Moscow siege where Chechen rebels held hundreds of hostages, the Russians used caltivate gas in storming the theatre where 129 hostages died.

Gross is somewhat successful in addressing the dilemmas of modern warfare, however there are several problems with his argument. The first is a problem with the book as an overall piece of research in that the focus is almost entirely on the U.S. and the Israeli Arab conflict. There are other asymmetrical conflicts that receive passing mention, such as the Russian conflict in Chechnya but many other large scale and long term conflicts are barely mentioned at all such as the civil war in Sri Lanka, the conflict between the FARC and the Colombian government. The analysis therefore feels rather narrow and one dimensional in its focus.

Another problem with Gross' analysis is that there is a tension, which at time comes close to contradiction. Gross at various points in his book states unambiguously that it is impermissible to intentionally harm civilians, (Gross 2010, 176, 203) while it is permissible that civilians are harmed by collateral damage (Gross 2010, 156). He goes even further stating that 'incidental harm [against civilians] that brings military benefit is on a par with direct harm... and should remain prohibited in the strongest terms' (Gross 2010, 175). He also states that 'Once military planners recognize that collateral harm is useful, it is no longer unintended the next time round' (Gross 2010, 190). These two statements taken together seem to be suggesting that an attack, even one that is legitimate is impermissible if benefit is gained from harming civilians. This seems rather strange and might make it very difficult to engage in conventional military operations. Gross seems to be suggesting that it is permissible for civilians to be harmed incidentally by a legitimate attack, as long as the attacker derives no benefit from the harm done to the noncombatant. But if the target is legitimate and the use of force is proportionate, and the harm done to civilians is not excessive, the attack should not become illegitimate simply because the attacker derives a benefit from the harm done to civilians. Gross is trying to get around problems with the doctrine of double effect<sup>2</sup> while there are problems with the doctrine, Gross' attempted solution is flawed, and close to contradiction.

There is however an even more flagrant contradiction later when after Gross' seemingly highly restrictive limits on collateral harm he claims that '*With the exception of reprisals*, civilian noncombatants are not legitimate targets' (emphasis added, Gross 2010, 191). This is a direct contradiction to earlier statements on the impermissibility of targeting civilians. Gross does go on to say how problematic and harmful the use of reprisals can be, by for example creating a vicious cycle of reprisal and counter reprisal but he does not rule them out against noncombatants but merely says they 'should not be the moral and legal framework of choice to justify attacks on civilians in asymmetric warfare' (Gross, 2010, 195).

There is also a general theoretical problem with this book in that Gross does not address what his theoretical perspective is. At some points such as the discussion on the use of banned weapons he seems to be using a utilitarian argument as he argues that no-lethal weaponry should be used more often because this results in less harm. While in other parts of the book he seems to be using a Kantian framework, this is most evident where he discusses the impermissibility of targeting non-combatants. This is not a massive problem however as the book does feel like a coherent whole, which is not irreparably damaged by the occasional tension. It would however be improved if Gross unambiguously pinned his theoretical colors to the mast.

In conclusion Gross' book makes useful improvements on just war theory. The primary contribution is his idea of using a spectrum of vulnerability, with full combatants at one end who are subject to lethal harm and non-combatants at the other end who should be protected from lethal harm. This is instead of the dichotomy between combatant and civilian in traditional concepts of the war convention. Gross' breakdown of the dichotomy makes better sense of modern day asymmetric conflict where the line between combatant and civilian is at best vague. There would be several changes to war fighting if Gross' ideas were put into practice, firstly those who have a high 'participation rating' would be more vulnerable to lethal harm, they would also be entitled to more rights when captured as they would be entitled to POW status. Those who participate less would be entitled to greater protection than they

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currently are under the war convention. In the current conception of the war ethic, associated targets, such as munitions workers can be subjected to lethal harm, even if they are not directly linked to the conflict. There are however problems with his analysis, there is a tension between his assertion that it is impermissible for one side to derive benefit from the harm suffered by noninvolved civilians and his claim that civilians can be harmed by collateral damage. There is also a contradiction between Gross' condoning of reprisal attacks on civilians and his categorical opposition to the intentional harming of non-combatants. A final general problem is the narrow focus on U.S. and Israeli experiences of asymmetric warfare to the neglect of many other examples. This is not however a serious flaw, it just means that this work should not be seen as a definitive article on all asymmetric wars across the globe. However despite these flaws this book is well worth reading by students of ethics, war and international relations

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1. For a legal analysis of the 'unlawful combatant see Dörmann K (2003)
2. An excellent article that analyses the problems of the doctrine of double effect is Kamm (2004)

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