

This is a pre-proof draft of a review forthcoming in *Mind*.

Moral Dilemmas of Modern War: Torture, Assassination, and Blackmail in an Age of Asymmetric Conflict, by Michael Gross. New York: Cambridge University Press, 2010. Pp. Xiii + 321.

Gross's book tackles the increasingly important issue of asymmetric warfare: typically, a war that is fought between a militarily superior state, and a weaker, non-state force such as a terrorist or guerrilla organisation. These conflicts pose particular challenges to the ethics of war. On the one hand, the non-state force is often intermingled with the civilian population and does not provide conventional military targets such as military bases or headquarters. Members of these groups often fight without uniforms, and fight only part-time, returning to their ordinary lives after taking part in a particular offensive. These features make it difficult for the state actors to attack the weaker group without violating the current international laws of armed conflict (LOAC). On the other hand, the non-state force often lacks the firepower and resources to have any chance of defeating the superior power using traditional methods of combat. The stronger side's military bases are well-defended, and their soldiers are vast in number and superior in training.

The book feels quite repetitive, and I found the structure and physical presentation of the text awkward. There are two chapters before we get to Part One, and the subheadings often don't stand out very well (some are in bold, some in italics, but some are just in ordinary typeface). It's often unclear from the text where quotations are from, so one is frequently checking the endnotes to see who said what. There are also a fair number of typos. I think that CUP could have done a better job with these aspects of the book, and that Gross has been let down here.

That said, I agree with much of what Gross says, and found his use of material from a range of disciplines novel and often useful. Gross considers various tactics that have emerged as part of these asymmetric conflicts, including the use of non-lethal weapons to reduce collateral damage when fighting in populated areas, terrorism, the use of targeted killing against members of the armed forces, the use of torture to extract information, the use of extortion to compel enemy forces to surrender, and the ethical questions that arise in asymmetric wars of humanitarian intervention. One of Gross's main conclusions is that we should be open to legalising the use of non-lethal weapons against civilians (such as certain chemical weapons like tear gas and psychotropic drugs, and electromagnetic weapons like the Active Denial System (ADS), which inflicts a very painful burning sensation whilst avoiding tissue damage). Whilst these weapons give rise to distinct moral concerns, and using them against civilians violates the current LOAC, Gross argues that they have the potential to reduce the amount of harm that non-combatants suffer. Once we start to think more in terms of 'the lesser evil test', there are, he says, 'firm moral grounds for targeting civilian non-combatants with [non-lethal weapons]' (p. 99). I return to this claim below. Gross also endorses the targeted killing of combatants, suggesting that in the absence of uniforms, lists of named combatants are perhaps the best way to distinguish between combatants and non-combatants. He also argues, interestingly, that interrogational torture can be a legitimate tool of democracies, and that the main reason for an absolute prohibition on its use is that it undermines the standing of those states when condemning terroristic torture in other, more repressive states. I think, however, we ought to be rather sceptical of (and a little confused by) his claim that only the 'potentially guilty' (p. 130) are tortured in democracies, and that such states manage to constraint torture to only 'unlawful combatants' (and not, note,

suspected unlawful combatants). I'm not sure what it is to be potentially guilty of something, which makes me worry about how I'll avoid falling into that category.

There are detailed and interesting discussions of a range of timely topics. Gross's claims about the permissibility of the targeted killing of combatants are especially plausible. But I do think that sometimes the discussion of empirical data takes the place of critical reflection and careful, consistent argument.

For example, I got to end of the chapter on combatant equality without really knowing where Gross stands on this issue. Gross calls soldiers 'babies' (p. 31) in a way that suggests that he is sympathetic to the claims of ignorance and naivety that are often invoked to support the idea that soldiers are morally innocent. But the discussion here is confused. Gross says that ignorance and coercion do not entail 'that soldiers are not responsible for what they are doing. They intend to harm their enemies and gain from it. They are not, therefore, *materially* innocent. Yet, there is an air of *moral* innocence about them.' (p. 31) But material innocence has nothing to do with intentions: it concerns causal facts about whether one is in fact a threat. A person who is helplessly blown towards you by the wind is a material threat to you, even though she has no intention to harm you and cannot properly said to be acting at all. Intentions speak much more obviously to moral responsibility, which sits uncomfortably with Gross's claim that, despite their intentions to kill enemy soldiers for gain, soldiers have an air of moral innocence about them.

Nonetheless, Gross concludes that moral arguments for the equality of soldiers are in fact weak. We expect soldiers to know that specific orders within war are manifestly immoral, and thus we can reasonably expect them to judge whether the war as a whole is immoral. Yet in the following chapter, he argues that '[c]ombatant equality and moral innocence make us wary about intentionally harming a combatant in ways that lead to permanent disability. Long-term disability is unnecessary to disable a combatant during conflict and violates his right to return home as whole as possible once the conflict has ended. Soldiers... have a special status as killers.' (p. 67). Moral innocence resurfaces here as a constraint on how we ought to treat soldiers even though Gross seems to be of the view that soldiers act wrongly if they fight in an unjust war. Of course, he might be talking about the moral innocence of *just* combatants. But the prima facie upshot of endorsing the moral inequality of combatants is, as Jeff McMahan has pointed out (*Killing in War*, Oxford: OUP 2009), that unjust combatants ought not to be inflicting any harm at all, not that they should moderate their attacks in light of their enemy's innocence. Gross might want to deny this implication, but there needs to be some discussion of how his stance on the relative moral status of combatants is to be reconciled with his later remarks.

I also thought that the discussion of non-lethal weapons was somewhat incomplete. The primary justification that Gross offers for the use of non-lethal weapons against civilians is that they reduce harm to civilians: 'Civilians suffer incapacitating harm to save them from lethal harm.' (p. 150). This may be true under some circumstances. But Gross does not consider another implication of non-lethal weapons, namely that they could render proportionate attacks that would be disproportionate if they involved lethal weapons. Imagine that an army wants to attack a large group of soldiers, and that it would be proportionate to kill ten civilians as a side effect of carrying out this attack. But, unfortunately, there are thirty civilians who will be killed if the soldiers are attacked. Under the current LOAC, the attack would be illegal, and thus the civilians would suffer no harm at all. But if the LOAC were to allow the use of ADS, it might be thought proportionate to inflict *this* amount of harm upon the civilians in the course of attacking the soldiers. In scenarios like this, the use of non-lethal weapons does not lessen the harm to civilians: it permits the harming of civilians who would not otherwise have suffered any harm at all.

I also found Gross's general interpretation of proportionality idiosyncratic. Gross ties proportionality to necessity, arguing that what it is necessary to do can influence what it is proportionate to do. With this in mind, he offers a defence of Hezbollah's tactic of 'enlisting the aid of civilians who live and work in populated villages [e.g. by placing and storing weapons in their midst]. If Hezbollah had no choice but to expand their capabilities in this way, then it would not be feasible to protect innocent noncombatants short of wholesale evacuation prior to the commencement of hostilities.[...] The inability to take feasible precautions actually *expands* the range of permissible, proportionate harm'. (pp. 167 – 168) Gross argues that when the weaker side of a conflict has comparatively crude weaponry, it may 'justifiably claim' that this must 'broaden the scope of proportionality and allow it more collateral harm than the principle traditionally permits.' (p. 169). This seems to me an implausible account of proportionality, which is usually taken to be independent of the necessity condition. Take a simple case in which I can stop you from pinching me by either slapping you, breaking your arm, or breaking your neck. Let's plausibly assume that it's proportionate to slap you, but clearly disproportionate to break your arm or your neck. Now imagine that slapping you turns out not to be possible. Now I can prevent your pinching me only by breaking your arm or your neck. Does this change in what it is *necessary* for me to do shift the parameters of what it is *proportionate* for me to do? I do not think that it does. I will, sadly, have to suffer your vicious pinching of me, since I have only disproportionate (albeit necessary) responses available to me.

Gross suggests that proportionality is to be judged by looking at what has historically been necessary to win wars (and that this then must be attuned to the features of asymmetric war). But whilst this might be how international law seeks to judge proportionality – effectively by looking at precedent cases to see what has been the norm – this doesn't seem a theoretically satisfying way of determining proportionality. Moreover, Gross's discussion throughout simply assumes the overriding importance of a group's being able to fight: that 'the conditions of permissible and proportionate harm cannot be so strict that it would never be possible to lawfully and humanely to wage war' (p. 177), as if by merely changing what we call "proportionate harm", we can render humane what was previously inhumane. The *ad bellum* conditions of war specify that war can be just only if there is a reasonable prospect of success. Presumably, this means that there must be a reasonable prospect of success *via legitimate means*. The *ad bellum* conditions also stipulate that war must be a proportionate response to a (sufficiently serious) wrong. If the war can be fought only by disproportionate means, then it will not be a proportionate response. These arguments may be surmountable, but we shouldn't bypass them altogether.

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