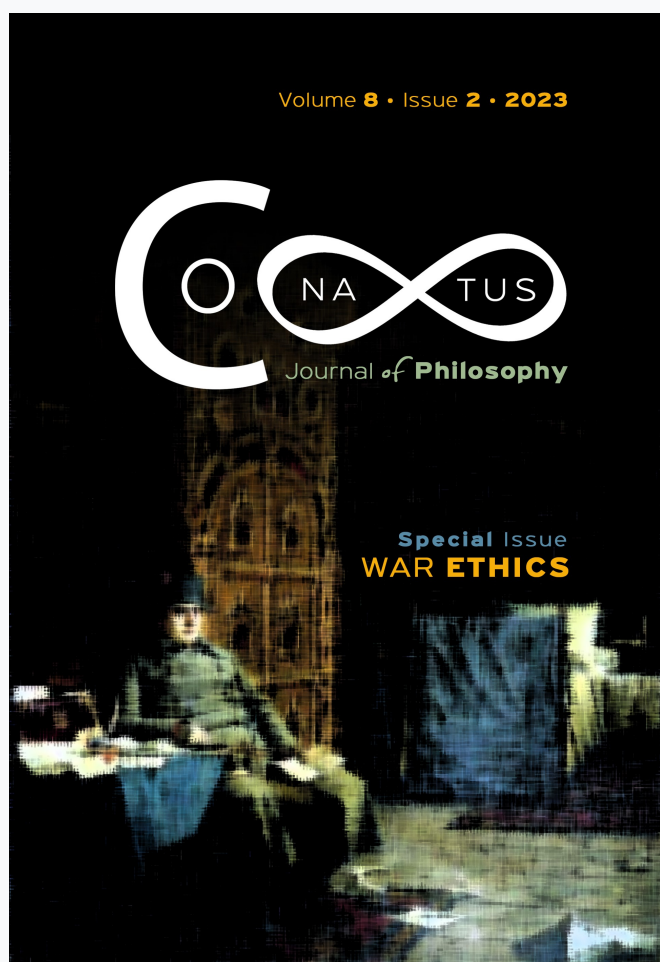


Conatus - Journal of Philosophy

Vol 8, No 2 (2023)

Conatus - Journal of Philosophy SI: War Ethics



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doi: [10.12681/cjp.34495](https://doi.org/10.12681/cjp.34495)

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To cite this article:

Marsili, M. (2023). Morals and Ethics in Counterterrorism. *Conatus - Journal of Philosophy*, 8(2), 373–398.
<https://doi.org/10.12681/cjp.34495>

Morals and Ethics in Counterterrorism

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Abstract

Political leaders, philosophers, sociologists, historians, political scientists, law scholars and economists approach terrorism in diverse ways, especially its definition. Politicians assign the meaning to the term terrorism that best suits them. Political scientists analyze the actions of those in the geopolitical framework. Moral philosophers look at terrorism from the viewpoint of fairness. Historians make a comparative assessment of the phenomenon through its evolution over time, and scholars of law simply dissect counterterrorism measures and assess their consistency with customs and current legislation. Sociologists stress the importance of culture, social relationships and social interactions. Eventually, politicians and lawmakers are not immune to the influence of the common ethics and morals of their own societies and the uses and habits of their own cultures, including religious aspects. Morals and ethics relate to “right” and “wrong” conduct; the first provides guiding principles, and the latter refers to rules provided by an external source, e.g., codes of conduct in workplaces or principles in religions. While morals are concerned with principles of right and wrong, ethics are related to right and wrong conduct of an individual in a particular situation. Ethics, morals and religion are intertwined in the antithetical principles “good and evil.” This work aims to scrutinize the crucial concept of just and unjust war, and just and unjust combatants, and to elaborate on some critical moral and ethical elements within the modern understanding of the interplay between terrorism, counterterrorism, fundamental human rights, and international humanitarian law. Through the examination of all pertinent theoretical positions the paper seeks to shed light on the limits of the use of force and the justification of the violation of fundamental rights in the War on Terror.

Keywords: *ethics; morals; terrorism; counterterrorism; just war; unjust combatant; unlawful combatant; terrorist*

I. Introduction

The War on Terror which followed the September 11, 2001, attacks opened for gross human rights violations including abduction and detention without trial in “black sites”¹ of which Guantánamo is the most notorious.² The term “war” is not a purely formal definition, but a conscious choice which led to a new doctrine: the application of the rules provided in time of war against non-state “enemy combatants” who are not nationals of countries at war with the United States. In the War on Terror, the U.S. government assumes that the best defense is the constriction of fundamental rights which are granted under the major international human rights and instruments and the core international humanitarian law (IHL). The crucial factor is the contested relationship between law and morals that puts at risk fundamental human rights.

Nardin gathers that the rule of law is a moral idea, that cannot distinguish between law as an instrument of power from law as a constraint on the exercise of the power itself.³ Hurd argues that the international rule of law simply reflects the way in which states use law to justify and pursue foreign policy.⁴ Taylor thinks that moral issues in counterterrorism are poorly understood and therefore offers a systematic normative theory for guiding, assessing, and criticizing counterterrorist policy.⁵ He observes that many commentators claim that in the fight against terrorism state actors should set aside ordinary moral and legal frameworks, and instead bind themselves by a different (and, generally, more permissive) set of ethical rules.⁶ Taylor finds

¹ See, e.g.: European Parliament, Committee on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, Rapporteur Giovanni Claudio Fava, *Report of the European Parliament on the Alleged Use of European Countries by the CIA for the Transport and the Illegal Detention of Prisoners* [2006/2200(INI)], Final A6-0020/2007, RR\382246EN, PE 382.246v02-00 (Strasbourg: European Parliament, 2007).

² See, e.g.: European Center for Constitutional and Human Rights (ECCHR), *Rupture and Reckoning: Guantánamo Turns 20. Reflecting on the Legacy of the Notorious Detention Camp and US Counter-Terrorism Policy Two Decades After 9/11* (Berlin: ECCHR, 2022), <https://www.ecchr.eu/flipbook/gtmo20/#0>; Amnesty International, *USA: Right the Wrong: Decision Time on Guantánamo*, Index no. AMR 51/3474/2021 (London: Amnesty International, 2021), <https://www.amnesty.org/en/documents/amr51/3474/2021/en/>.

³ Terry Nardin, “Theorizing the International Rule of Law,” *Review of International Studies* 34, no. 3 (2008): 385-401.

⁴ Ian Hurd, “The International Rule of Law and the Domestic Analogy,” *Global Constitutionalism* 4, no. 3 (2015): 365-395.

⁵ Isaac Taylor, *The Ethics of Counterterrorism* (Abingdon and New York: Routledge, 2018).

⁶ Ibid.

that counterterrorist efforts by states are sometimes thought to be subject to different moral principles than superficially similar practices, and concludes that normative elements, which explain how terrorism is morally distinct from other sorts of harmful actions, may be significant in thinking about what moral limits should be maintained when combating terrorism.⁷ Most of the ethical and moral questions on and around terrorism stem from the lack of a legally binding definition of the term, which this paper does not aim to investigate, rather than touching on it, for its purpose.

II. The multiple definitions of terrorism

The ability to define and understand terrorism is a problem that persists regardless of how many definitions are developed, or how wide encompassing they might be. So far, it has not been possible to reach an undisputed definition, either legal or academic, of the term “terrorism” due to major divergences on the legitimacy of the use of violence for political commonly accepted definition.⁸ Therefore, the definition of the concept of terrorism is ambiguous and legally undefined and adapts on the national interest.⁹ The problem lies in the fact that terrorism represents a very wide area of research that is murky, at best, and which is not of equal importance to every researcher, politician, or expert. According to Schmid,¹⁰ there are four main reasons why this is the case:

- I. Terrorism itself is a problematic concept that causes divergence in opinion between political, legal, social, and public opinion.
- II. The problem of definition is inherently linked to that of de-legitimization and criminalization of terrorism.
- III. There are a number of different iterations of terrorism, all purporting to different forms, methods, ideologies, and underlying causes.
- IV. The term itself has been defined in at least a hundred different ways over the last two centuries, whilst still missing a universally acceptable definition.

⁷ Isaac Taylor, “Counter-Terrorism, Ethics of,” in *Routledge Encyclopedia of Philosophy Online*, ed. Tim Crane (Abingdon: Routledge, 2022).

⁸ Marco Marsili, “The War on Cyberterrorism,” *Democracy and Security* 15, no. 2 (2019): 172.

⁹ *Ibid.*

¹⁰ Alex Schmid, “Terrorism – The Definitional Problem,” *Case Western. Reserve Journal of International Law* 36, no. 2 (2004): 375-419.

Even though Schmid is considered as the leading authority in the discussion about the definition of terrorism, other scholars have provided arguments as to the elusiveness of such a definition. The definition of terrorism, according to Ganor, is impossible because terrorist organizations by their very nature exist in secret, which makes any objective analysis nearly impossible. Further, the problem of definition is inherently linked to the question of loyalty. Are terrorists working for or against national interests of their homeland; the border between murder, guerrilla warfare, and terrorism; the ability of the state to translate any form of activity into a legitimate show of force; the linkage between terrorism and the question of self-determination; the goals and status of the terrorist acts and terrorists themselves. All these elements draw out inconsistencies in the many definitions. If all terrorism is criminal, then surely the practice of concealing prisoners in overseas "black sites," which was a widespread practice of the U.S. government, can be considered terrorism, much like armed attacks against civilians in Afghanistan and Pakistan which had nothing to do with the War on Terror. Moreover, where is the line between guerilla warfare and terrorism, such as it was in, for example, Ireland in the 20th century, or more recently in the Balkans.¹¹

Both Schmid and Ganor recognize the need to create a unified, universally applicable definition of terrorism. There are a number of arguments that support this assertion, linked to a variety of individual aspects of terrorism. As Schmid contends, the ability to create an effective counterterrorism strategy demands agreement on the core elements of the problem which necessarily requires a definition acceptable to all included parties. There is no workable way to combat terrorism effectively if every side has a different definition – which has been exemplified by the chaotic ongoing situation in Syria, where allied forces attacked targets based on individual understanding of terrorism. Moreover, some blatantly terrorist cells were supported by allied forces precisely due to the lacking definition of the term. The crux of the argument is that terrorism invariably arises from political reality and is therefore within the sphere of policy and judicial persecution. Since there are a number of different interpretations of terrorism, what constitutes a crime in the U.S. need not be a crime in Iran, or Pakistan, or Japan.¹²

It should be noted, here, that the author of this paper agrees with these positions, as it was realized that all past and current attempts

¹¹ Boaz Ganor, "Defining Terrorism: Is One Man's Terrorist another Man's Freedom Fighter?" *Police Practice and Research* 3, no. 4 (2002): 287-304.

¹² Schmid, "Terrorism – The Definitional Problem," 399-402.

to properly define terrorism ended up in a swath of incompatible definitions that just muddy the waters and make congruent and efficient international action against terrorism completely unfeasible – as evidenced by the over 25 year struggle that does not seem to yield anything other than more terrorist groups.

On the other side of the argument are those who consider current definitions of terrorism sufficient, and terrorism itself sufficiently recognizable to be fought successfully. According to Hoffman¹³ terrorism is a political concept that needs only recognition in terms of specific goals, motivations, and purposes. Moreover, it is necessary to differentiate terrorism from other forms of violence. To Hoffman, this is not problematic, and therefore does not require a universally acceptable definition.¹⁴ To this point, Wilkinson¹⁵ states that the public is aware and able to recognize terrorist activities. This implies that Wilkinson sees conceptual and empirical distinction between terrorism and other forms of political violence as the crux of the problem rather than the existence of a universal definition. However, in both instances it became apparent, especially over the last several years, that terrorist activity is ambiguous in its nature, and that individuals within the public cannot correctly differentiate (in all cases) between political violence and terrorism – for instance the 2016/2017 riots in the U.S. have frequently been labeled as terrorist activity, whereas they should have been labeled as politically motivated violence instead.

According to Nacos,¹⁶ individuals can intuitively recognize terrorist activities and differentiate them from other forms of violence, and he supports this assertion by arguing that terrorism is in many ways like pornography, one can recognize it when one sees it, but cannot place it within a well-defined category. This argument is characteristic for political actors who often have no interest in reaching a consensual solution, since the existence of a goal, universal definition would place many of the illegal activities of state actors into the light, and potentially lead to judicial culpability of governments or individual agencies. To further this point, it is indicative to note the words of the UK permanent representative to the United Nations, Jeremy Greenstock, who said that the problematization of the definition of terrorism avails no

¹³ Bruce Hoffman, *Inside Terrorism* (New York: Columbia University Press, 2002), 2.

¹⁴ *Ibid.*, 2-3.

¹⁵ Paul Wilkinson, *Terrorism Versus Democracy: The Liberal State Response* (London: Routledge, 2006), 1.

¹⁶ Brigitte L. Nacos, *Mass-Mediated Terrorism: Mainstream and Digital Media in Terrorism and Counterterrorism* (Lanham: Rowman and Littlefield, 2016), 25.

benefit, what is important is to recognize that terrorism is terrorism.¹⁷ This points to the fact that states, much like non-state actors play a critical role in this problem, which adds credibility to the chosen methodology and line of reasoning in this dissertation. Provided that state actors do engage in acts that can be classified as terrorism, it seems plausible to assert that there is no political will to define and objectively assess terrorism, as that leaves little room for maneuvering via security and intelligence agencies on the global scale.¹⁸

There exists a third line of reasoning that argues terrorism is an overly subjective concept that can best be described by the claim “one man’s terrorist is another man’s freedom fighter,” and that, under such circumstances, the search for a universal definition of terrorism becomes impossible. As Wardlaw¹⁹ points out, terrorism is a moral issue, which is why it is impossible to define objectively. This position is quite common in individuals who themselves were a part of terrorist organizations – such as Yasser Arafat, who said such in front of the UN general assembly. To them, the difference between a terrorist and a freedom fighter lies solely in the eye of the beholder – who supports a just cause will call oneself a freedom fighter, the other who is on the other side will see terrorism. The most cited example of this dichotomy is the American Revolutionary War, where the U.S. used tactics that some call terrorist activities, while the UK used the regular military to suppress rebellion. Translated in modern terms, this could be used to describe the Palestinian problem, albeit with several other issues. Firstly, modern terrorism includes purposeful acts of aggression against civilians, which was not the case in the past; second, modern terrorism diverges from that of the 20th century in terms of the level of radicalization – suicide bombers, various attacks whose sole aim is to maximize civilian casualties.²⁰

The UN, also, does not have a universal position on the definition of terrorism. In 1998, the UN found that there is no plausible method of reaching a universal consensus on the nature of terrorism, or on the specific nature of threats, challenges, and changes in the modalities of

¹⁷ John M. Collins, “Terrorism,” in *Collateral Language: A User’s Guide to America’s New War*, eds. John M. Collins and Ross Glover, 155-173 (New York: New York University Press, 2002), 167-168.

¹⁸ Alex P. Schmid, *The Routledge Handbook of Terrorism Research* (London: Taylor and Francis, 2011), 39.

¹⁹ Grant Wardlaw, *Political Terrorism: Theory, Tactics and Counter-Measures* (Cambridge: Cambridge University Press, 1989), 4.

²⁰ *Ibid.*, 4-5.

terrorist violence in the world. Moreover, one of the UN panels pointed out that the absence of a universal definition is subversive for the creation of a normative and moral based stance on the fight against terror and allows individual interpretations to be made.²¹

The argument by Ceci²² that terrorism is a conceptual anomaly is based on five elements that obstruct the process of forming a definition-emotional burden, heterogeneity, subjectivity and lack of value-neutral explanations, definitions made by those who fight terrorism, and pejorative nature of the term itself. All the problems that surround the definition of terrorism, and the inherent nature of the reality in which terrorism exists, leads to simplification and generalization, which further alienates any semblance of a consensus. The fact that information today is available at an unprecedented level, and that individuals can join terrorist organizations remotely has worsened the problem, as it now includes considerations of domestic regulation, information control, securitization of daily life, and a number of other problems that all further problematize the definition of terrorism. In this context, objective reality of terrorism falls behind to make space for highly subjective, opinionated elements which is another critical element that prompted this article – in lack of objective reality (or at least lacking the ability to objectify a problem), the only recourse is to examine the problem from a different standpoint.

III. Moral and ethical issues

Terrorism has legal, political, moral, ethical, and even religious implications. Theoretical problems arise about terrorism, such as the definition of the term and the concept of collective responsibility and specific ethical and moral issues in counterterrorism.²³ There is a general and genuine interest on and around such issues stemming from the intersection of terrorism with counterterrorism that pose some of the most significant challenges to governments and people.²⁴ This enters the terrain of relativism where everything is possible; a land of opportunities, available to those who argue better. It makes me think of Silver Surfer, the fictional superhero created by Jack Kirby for Marvel Comics, who has a very rel-

²¹ Schmid, "Terrorism – The Definitional Problem," 396-397.

²² Giovanni Mario Ceci, "A 'Historical Turn' in Terrorism Studies?" *Journal of Contemporary History* 51, no. 4 (2016): 888-890.

²³ Adam Henschke, Alastair Reed, Scott Robbins, and Seumas Miller, eds., *Counter-Terrorism, Ethics and Technology* (Cham: Springer Nature, 2021).

²⁴ Ibid.

ative concept of justice – a sound of relativism which deny claims to objectivity asserts that valuations are relative to the perspective of an observer or the context in which they are assessed.²⁵

Maria Baghramian²⁶ identifies sixteen different forms of relativism, all intertwined, among which three are relevant to the scope of this paper. Moral relativism includes the differences in moral judgments among folks and cultures.²⁷ Epistemic relativism supports the idea that there are no absolute principles on normative belief, justification, or rationality, but relative ones.²⁸ Alethic relativism (also “factual relativism”) holds that there are no absolute truths, i.e., that truth is always relative to some particular frame of reference, such as a language or a culture (so-called “cultural relativism”).²⁹

If terrorism is presented as an absolute threat, then counterterrorism measures must also be unlimited. Scholars investigate the ethical implications of the participation in counterterrorist operations³⁰ and what the limits of counterterrorism and which actions are ethical.³¹ It all revolves around a critical question: what is right and what is wrong? The right way is one which is proper, appropriate, and suitable while the wrong way is one which not suitable or appropriate. Ethics, or moral philosophy, defends and recommends concepts of right and wrong behavior. We can infer that what is ethically correct is morally just; it serves as a syllogism to justify – or condemn – certain actions or conducts.

The American philosopher Jeff McMahan provides an interesting definition of just war: “the collective exercise of individual rights of self- and other- defense in a coordinated manner against a common threat.”³² Security and justice are two faces of the “common good” or “commonwealth,” which can be achieved only through political means. This issue has been addressed by political theorists and moral philosophers since the era of Ancient Greece.³³

²⁵ Maria Baghramian and J. Adam Carter, “Relativism,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (2022), <https://plato.stanford.edu/archives/spr2022/entries/relativism/>.

²⁶ Maria Baghramian, *Relativism* (London: Routledge, 2004).

²⁷ Baghramian and Carter, “Relativism.”

²⁸ Ibid.

²⁹ Ibid.

³⁰ Magdalena Badde-Revue and Marie-des-Neiges Ruffo de Calabre, eds., *Ethics in Counter-Terrorism* (Leiden: Brill-Nijhoff, 2018).

³¹ Michael Kowalski, ed., *Ethics of Counterterrorism* (Amsterdam: Uitgeverij Boom, 2011).

³² Jeff McMahan, “The Ethics of Killing in War,” *Philosophia* 34, no. 1 (2006): 30. See also Jeff McMahan, “War as Self-Defense,” *Ethics and International Affairs* 18, no. 1 (2004): 75-80.

³³ Simon Lee, “Common Good,” in *Encyclopedia Britannica Online* (Chicago: Encyclopedia

In *The Prince*, Niccolò Machiavelli concludes that common good can be achieved through military or political action.³⁴ In chapter 17, exploring cruelty versus mercy, the Italian philosopher states very pragmatically that a few exemplary executions would avoid disorder that would give rise to murder and harm the whole community, while an execution ordered by the state harms only a single individual.³⁵ This requires “inhuman cruelty,” which is referred to as a virtue opposed to “excessive mercy.” In *Two Treatises of Government*, John Locke speaks about the commonwealth as a government goal (§133, 134, 137).³⁶ Thomas Hobbes, who addresses the issue of the commonwealth in the second and third part of *Leviathan*, removes from the concept of natural law any notion of the promotion of the common good³⁷ he believes corresponds to state power.³⁸

Immanuel Kant, who was a supporter of the death penalty,³⁹ thinks that moral law has a universal value, and not a particular one.⁴⁰ In the second chapter of the *Critique of Practical Reason*, he asserts that one can only know that something is morally right by intellectually considering whether a certain action that one wishes to commit could be universally performed. The German philosopher calls the idea that one can know what is right or wrong only through abstract reflection of “moral rationalism.” His position on the fundamental nature of morality is that moral goodness, which consists of following the rule of the categorical imperative, is more basic to ethics than good consequences, and that it is the right motivations – an obligation to duty – which is criteria in defining a person as good. This rationalism is at the basis

Britannica, 2013), last modified Oct. 15, 2016, <https://www.britannica.com/topic/common-good>.

³⁴ Ibid.

³⁵ Niccolò Machiavelli, *The Prince*, trans. and ed. Peter Bondanella; intro. Maurizio Viroli (Oxford: Oxford University Press, 2008), original edition, 1532.

³⁶ John Locke, *Two Treatises of Government* (London: A. Millar et al., 1764), original edition, 1689.

³⁷ James R. Jr. Stoner, *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* (Lawrence, KS: University Press of Kansas, 1992), 71. See also John Phillip Reid, “In the Taught Tradition: The Meaning of Law in Massachusetts-Bay Two-Hundred Years Ago,” *Suffolk University Law Review* 14, no. 4 (1980): 938-940.

³⁸ Thomas Hobbes, *Leviathan, or the Matter, Forme, and Power of a Common-Wealth Ecclesiastical and Civill* (London: A. Crooke, 1651), xviii, 119.

³⁹ Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (New York: Cambridge University Press, 1996), 6:333.

⁴⁰ Immanuel Kant, *Kant's Critique of Practical Reason and Other Works on the Theory of Ethics*, trans. Thomas Kingsmill Abbott (London: Kongmans, Green and Co., 1889), 4:402.

of the determination by which a government feels “morally justified” in using the lethal force on the assumption that its action will be acknowledged as just, and, therefore, legal.

The law of war legalizes the killing of a human being, what is a crime of murder and punished as such in peacetime. Gill and van Slie-dregt infer those actions of regular combatants, which should qualify as serious crimes, such as murder, are lawful because they are covered by privilege.⁴¹ War provides opportunity for a different moral compass: in an armed conflict and in conformity with the laws of war, international law confers immunity from culpability under peacetime law.⁴²

Walzer finds that the morality of war corresponds to our sense of what is right.⁴³ McMahan considers that a moral reason for violating a convention should be assessed by individual conscience.⁴⁴ Klabbers argues that previous instruments regulating the law and customs of war, such as the Liber Instructions of 1863 and the Brussels Project of 1874, refused to distinguish between just and unjust combatants.⁴⁵ Mavrodes concludes that the distinction between combatant and non-combatants is intended to reduce the cycle of violence by limiting the parties’ capacity to fight.⁴⁶

How do you decide whether an act is just or unjust? As things are not *mala in se*, and morality is an individual category, it cannot serve as an acceptable justification. The concept of “moral combatant” introduced by Sidgwick in his book *The Elements of Politics*⁴⁷ must be rejected, as well as the characterization of “moral innocence” and “oral cul-

⁴¹ Terry Gill and Elies van Slie-dregt, “Guantánamo Bay: A Reflection on the Legal Status and Rights of ‘Unlawful Enemy Combatants,’” *Utrecht Law Review* 1, no. 1 (2005): 31. See also: Knut Dörmann, “The Legal Situation of Unlawful/Unprivileged Combatants,” *International Review of the Red Cross* 85, no. 849 (2003): 45; Kurt Ipsen, “Combatants and Non-Combatants,” in *The Handbook of Humanitarian Law in Armed Conflicts*, ed. Dieter Fleck, 66-67 (New York: Oxford University Press, 1995); Horst Fischer, “Protection of Prisoners of War,” in Fleck, 326-327; Yoram Dinstein, “The Distinction between Unlawful Combatants and War Criminals,” in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, ed. Yoram Dinstein, 103-106 (Leiden: Martinus Nijhoff, 1989).

⁴² See Art. 43 (2) of Protocol I (1977) Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3.

⁴³ Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), 133.

⁴⁴ McMahan, “The Ethics of Killing in War,” 40.

⁴⁵ Jan Klabbers, “Rebel with a Cause? Terrorists and Humanitarian Law,” *European Journal of International Law* 14, no. 2 (2003): 302.

⁴⁶ George I. Mavrodes, “Conventions and the Morality of War,” *Philosophy and Public Affairs* 4, no. 2 (1975): 117-131.

⁴⁷ Henry Sidgwick, *The Elements of Politics* (London: Macmillan, 1891), 254.

pability” presented by McMahan, who finds that the moral position of unjust combatants is indistinguishable from that of just combatants.⁴⁸

In *The Ethics of Killing in War*, McMahan speaks about just combatants taking up arms in a just cause, most commonly defense against unjust aggression,⁴⁹ or an unjust war of defense.⁵⁰ He argues that the laws of war diverge significantly from the “deep morality” of war.⁵¹ The American philosopher thinks that an act of war by unjust combatants against just combatants is proportionate and permissible.⁵² According to McMahan, unjust combatants are justified in fighting according to a “moral assessment,”⁵³ even if one admits that both just and unjust combatants cannot wage war without doing wrong.⁵⁴ McMahan rejects the assumption that unjust combatants are not wrong in fighting if they respect the rules of engagement.⁵⁵ Further, McMahan argues that it is general inadmissible for unjust combatants to attack just combatants⁵⁶: while there are no legitimate targets for the former, there are legitimate targets for the latter with some limitations regarding enemy non-combatants.⁵⁷ On the contrary, Walzer thinks that one does not lose immunity only by fighting in an unjust war, but by fighting in any war.⁵⁸

While admitting that just combatants are not allowed to kill enemy non-combatants, McMahan affirms that it is permissible to use defensive force against anyone who poses an unjust threat.⁵⁹ This assumption supports non-combatant liability, sometimes to a greater degree than any combatant.⁶⁰ The theory is based on the “responsibility criterion.” McMahan asserts that posing an unjust threat does not make one lose the right not to be attacked if one is no morally

⁴⁸ McMahan, “The Ethics of Killing in War,” 24.

⁴⁹ Ibid., 27.

⁵⁰ Ibid., 30.

⁵¹ Ibid., 38-40.

⁵² Ibid., 28, 34.

⁵³ Ibid., 38-40.

⁵⁴ Ibid., 28.

⁵⁵ Ibid., 26.

⁵⁶ Ibid., 36.

⁵⁷ Ibid., 30-31.

⁵⁸ Michael Walzer, “Five Questions About Terrorism,” *Dissent* 49, no. 1 (2002): 5-16. Republished in Michael Walzer, *Arguing About War* (New Haven, CT: Yale University Press, 2004), 6-41.

⁵⁹ McMahan, “The Ethics of Killing in War,” 31.

⁶⁰ Ibid., 36.

responsible for this fact.⁶¹ What makes a human a legitimate target in war is the moral responsibility for an unjust threat.⁶² Coady supports the idea that only combatants are legitimate targets, while all others are non-combatants, and enjoy immunity.⁶³

McMahan considers that moral responsibility is important to liability, and thus the defense against unjust threats is permitted.⁶⁴ Further, posing an unjust threat is neither necessary nor sufficient for moral liability to force or violence that is necessary to eliminate the threat, but then deduces that unjust combatants are almost morally responsible at least to some degree for the unjust threats they pose, and, hence, all unjust combatants are legitimate targets.⁶⁵ He acknowledges that just combatants may act wrongly in fighting “by force or violence that is unnecessary, excessive, disproportionate, or indiscriminate,”⁶⁶ but he argues that the requirement of proportionality, in its application to unjust combatants, is merely a device that serves the moral purpose of limiting the violence.⁶⁷

Coady, who criticizes Walzer’s approach, morally justifies the use of violence, arguing that only “just warriors” participating in a just war have a license to kill enemies without being charged with murder.⁶⁸ The Australian philosopher admits self-defense as a just cause for the use of violence only if it is a necessary means, and the best means, for preventing abuse in practice, but refuses to characterize it as an ethical justification. Nielsen argues that terrorism employed in conjunction with guerrilla warfare in a war of liberation may be justified.⁶⁹ According to the Canadian philosopher, acts of terrorism are justified if used as a political weapon in the revolutionary struggle, and if they cause less damage than other types of violence. Fotion believes that terrorism targeting government officials is justifiable under certain cir-

⁶¹ Ibid., 31.

⁶² Ibid., 33-37.

⁶³ Cecil Anthony John Coady, “Terrorism and Innocence,” *Journal of Ethics* 8 (2004): 37-58.

⁶⁴ McMahan, “The Ethics of Killing in War,” 32-33.

⁶⁵ Ibid., 32-35.

⁶⁶ Ibid., 28.

⁶⁷ Ibid., 29.

⁶⁸ Cecil Anthony John Coady, *Morality and Political Violence* (Cambridge: Cambridge University Press, 2008), 19.

⁶⁹ Kai Nielsen, “Violence and Terrorism: Its Uses and Abuses,” in *Values in Conflict*, ed. Burton M. Leiser, 435-449 (New York: Macmillan, 1981), 446.

cumstances, while terrorism targeting innocents is never.⁷⁰ Corlett⁷¹ and Young⁷² are on the same line of Fotion, while Held,⁷³ Bauhn,⁷⁴ Gewirth⁷⁵ and Nathanson⁷⁶ find that terrorism targeting non-combatants or common citizens is never justified. Saul suggests that some acts of terrorism, in exceptional cases, can be excused and considered “‘illegal but justifiable’ (or at least excusable) in stringently limited, objectively verifiable circumstances,” maybe as “collective defense of human rights.”⁷⁷

Revolutions may serve as touchstones to assess the validity of the theory of just combatants, which seems to rest on weak and faulty assumptions. The foundations of the right to revolution, as a fair path to democratic change, lean on morals and ethics, as relies on controversial sources. These sources sanction, but at the same time justify, the use of violence. The concept of just and unjust rests on the same moral categories, which are not sufficient to justify or condemn an act, such as a revolution, as lawful or unlawful. On the other side, a strictly legal approach proves inadequate due to the unlawful nature of revolution. An act can be unjust, but not unlawful, and can be just, although unlawful.⁷⁸

Self-defense is also used by Trotsky to justify the Red Terror during the Russian Civil War (1917-1923) that began with the October Revolution.⁷⁹ Also Africa experimented state terror in the 1970s: after taking control of the Derg, the military junta, in 1977, the new head of state, Menghistu Hailè Mariàm, a Marxist-Leninist army officer, started

⁷⁰ Nicholas Fotion, “The Burdens of Terrorism,” in *Values in Conflict*, ed. Burton M. Leiser, 463-740 (New York: Macmillan, 1981).

⁷¹ J. Angelo Corlett, *Terrorism: A Philosophical Analysis* (Dordrecht: Kluwer, 2003).

⁷² Robert Young, “Political Terrorism as a Weapon of the Politically Powerless,” in *Terrorism: The Philosophical Issues*, ed. Igor Primoratz, 55-64 (New York: Palgrave Macmillan, 2004).

⁷³ Virginia Held, *How Terrorism Is Wrong: Morality and Political Violence* (Oxford: Oxford University Press, 2008).

⁷⁴ Per Bauhn, *Ethical Aspects of Political Terrorism: The Sacrificing of the Innocent* (Lund: Lund University Press, 1989).

⁷⁵ Alan Gewirth, “Are There Any Absolute Rights?” *The Philosophical Quarterly* 31, no. 122 (1981): 16.

⁷⁶ Stephen Nathanson, *Terrorism and the Ethics of War* (Cambridge: Cambridge University Press, 2010), 191-208.

⁷⁷ Ben Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2006), 69.

⁷⁸ Marco Marsili, “The Twilight Zone of Political Transition: Between Revolution and Democratic Change,” *Political Reflection* 5, no. 4 (2019): 24-25.

⁷⁹ Leon Trotsky, *Dictatorship vs. Democracy (Terrorism and Communism): A Reply to Karl Kautsky* (New York: Workers Party of America, 1922), 62.

a violent political campaign against members of the competing Ethiopian People's Revolutionary Party (EPRP).⁸⁰

Marsavelski states that terrorism and revolution are two sides of the same coin, and that there has never been a revolution without terrorism or war without war crimes.⁸¹ To name just two that succeeded without terror: the Glorious Revolution, also called the Bloodless Revolution which in 1688 overthrew King James II of England (James VII of Scotland) and ushered in the reign of William III and Mary II; the Carnation Revolution, a military coup in Lisbon, Portugal, on 25 April 1974, supported by massive popular participation, which ended the authoritarian regime of the *Estado Novo*.⁸² Revolutions gave birth to many of today's Western democracies (see: American Revolution of 1775-1783, French Revolution of 1789, and European revolutions of 1848).⁸³ An attempt to overthrow state order cannot be considered by default an act of terrorism as Marsavelski infers – it does not mean that revolutionaries do not commit crimes.

Castrén argues that if an insurgency takes on a big size, rebels should not be treated as common criminals.⁸⁴ Walzer believes that anti-insurgents fighting against a resistance movement or a violent uprising that enjoys popular support are fighting an unjust war against the guerrilla forces.⁸⁵ Meisels doubts that popular, democratic support for an insurgency should automatically render its opposition unjust or confer legitimacy to irregular combatants.⁸⁶ The Bolsheviks probably had the consent of a majority of the population when they overthrew the Tsar in 1917 and established a terror regime.

Terror(ism) and revolution constitute a frequent binomial. People have rights until they are able to defend them. Marsavelski encompasses the right of revolution (*ius resistendi*) within the right to self-determination against alien occupation and racist regimes,⁸⁷ but acknowledges that it is not an

⁸⁰ Jacob Wiebel, "The Ethiopian Red Terror," in *Oxford Research Encyclopedia of African History*, ed. Thomas Spear (Oxford: Oxford University Press, 2017).

⁸¹ Aleksandar Marsavelski, "The Crime of Terrorism and the Right of Revolution in International Law," *Connecticut Journal of International Law* 28, no. 241 (2013): 394.

⁸² Marsili, "The Twilight Zone of Political Transition," 21.

⁸³ Ibid.

⁸⁴ Erik Johannes Sakari Castrén, *Civil War* (Helsinki: Suomalainen Tiedekatemia, 1966), 97-98.

⁸⁵ Walzer, *Just and Unjust Wars*, 187.

⁸⁶ Tamar Meisels, "Combattants – Lawful and Unlawful," *Law and Philosophy* 26, no. 1 (2007): 42.

⁸⁷ Marsavelski, "The Crime of Terrorism and the Right of Revolution," 247.

absolute right and has its limits as a *sui generis* right.⁸⁸ Assassination is an ancient method to put an end to tyranny. *Sic semper tyrannis* (“thus always to tyrants”); this phrase, said to have originated with Roman Marcus Junius Brutus during the assassination of Julius Caesar on March 15, 44 BC, was repeated two thousand years later by John Wilkes Booth after shooting to death President Lincoln.⁸⁹

Natural law theory provides the basis for challenging the sovereign power and to establishing positive law and government – and thus legal rights – as a derivation of the social contract. Conversely, opponents invoke natural rights to challenge the legitimacy of these foundations. Grotius, who has a view of international law as natural law, rejects the possibility of justifiable use of force against the sovereign.⁹⁰ Hobbes thinks that the sovereign prevails over natural law as the sovereign’s decisions need not be grounded in morality. Otherwise, Vattel believes that the legitimate use of revolution, evolved from the natural right of self-defense, is premised under the principle of proportionality, when no other remedy can be applied to the evil.⁹¹ Marsavelski gathers that, under natural law, the recognition of the right to self-defense leads to the recognition of the law of necessity.⁹²

Self-defense is allowed under Art. 51 of the UN Charter. Under this provision, preemptive strikes are considered as legitimate self-defensive acts. Marsavelski affirms that under the doctrine of self-defense the assassination of the Syrian president, Bashar al-Assad, could be justified.⁹³ It is not clear if assassination would be permitted only in self-defense, or in a state of necessity, to prevent the killing of innocent civilians by regime forces.⁹⁴ Blum suggests that humanitarian necessity should be narrowly defined to be a justification to exculpate anyone violating the laws of war in the name of a greater humanitarian good.⁹⁵

⁸⁸ *Ibid.*, 290.

⁸⁹ Robert G. Eisenhauer, *After Romanticism* (Bern: Peter Lang, 2008), 119.

⁹⁰ Hugo Grotius, *The Rights of War and Peace: In Three Books*, Book 1, ed. Jean Barbeyrac (London: W. Innys and R. Manby, J. and P. Knapton, D. Brown, T. Osborn, and E. Wicksteed, 1738) [Original edition, *De jure belli ac pacis libri tres*, 1625].

⁹¹ Emmeric de Vattel, *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, ed. Joseph Chitty and Edward D. Ingraham (Philadelphia, PA: T. and J. W. Johnson and C., 1883), 20, 22.

⁹² Marsavelski, “The Crime of Terrorism and the Right of Revolution,” 285.

⁹³ *Ibid.*, 286.

⁹⁴ Art. 31(d) of the Rome Statute defines necessity: “a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.”

⁹⁵ Gabriela Blum, “The Laws of War and the ‘Lesser Evil,’” *Yale Journal of International Law* 35,

In Book 1 of *The Rights of War and Peace*, Grotius advances his concept of war and natural justice, arguing that there are some circumstances in which war is justifiable. In Book II, Grotius finds three “just causes” for war: self-defense, reparation of injury, and punishment. Although Grotius considers legitimate for a nation to invade foreign soil to overthrow a tyrant, he does not recognize to oppressed people the right to revolt.

Even Locke advocates the right to stand against an oppressive government. In *Two Treatises of Government*, the English philosopher concludes that, according to the theory of social contract, people have the right to overthrow the unjust government, and to change it with one that serves the interests of citizens (§ 222 et seq.). Locke believes that under natural law people have the right to self-defense when their liberty is threatened by the local government or by a foreign nation. Accordingly, the right of revolution is a safeguard against tyranny. His contributions to liberal theory are embodied in the *United States Declaration of Independence* of 1776,⁹⁶ which in its preamble proclaims the right of the people to alter or to abolish a government whenever becomes destructive, and to replace it. The U.S. government has always supported the right of revolution,⁹⁷ thus making an essential contribution to root it in international law.⁹⁸ By applying this right, the U.S. courts uphold the principle of proportionality in the use of revolutionary force, considering violence the ultimate means to overthrow the government.⁹⁹

The right of revolution is incorporated in the preamble of the French Constitution of the Fifth Republic (1958),¹⁰⁰ which recalls the *Declaration of the Rights of Man and of the Citizen* of 1789.¹⁰¹ Art. 2 of the Declaration of human and civil rights states as imprescriptible the right of man to resist to oppression. Preamble to the Algerian Constitution, issued after the war against France (1954-1962), which led the African country gaining its independence, justifies the Revolution.¹⁰²

no. 1 (2010): 1-69.

⁹⁶ Carl Lotus Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (New York: Harcourt, Brace and Company, 1922), 27.

⁹⁷ Green Haywood Hackworth, *Digest of International Law*, vol. 1 (Washington, D.C.: U.S. Government Publishing Office, 1940), 177.

⁹⁸ Marsavelski, “The Crime of Terrorism and the Right of Revolution in International Law,” 271.

⁹⁹ *Dennis v. United States*, 341 U.S. 494 (1951), § 501.

¹⁰⁰ French Constitution of October 4, 1958.

¹⁰¹ Declaration of the Rights of Man and of the Citizen of August 26, 1789 (Declaration of Human and Civic Rights).

¹⁰² Constitution of the People’s Democratic Republic of Algeria of 1989, reinstated on Nov.

In the First Article, the Constitution of Iran glorifies the Islamic Revolution of 1979.¹⁰³ The right of the use of force by people to resist, as *ultima ratio*, if no other remedy is available, is enshrined in Art. 20 (4) of the Basic Law for the Federal Republic of Germany.¹⁰⁴

Preamble to the *Universal Declaration of Human Rights* (UDHR) speaks about the rebellion against tyranny and oppression as a last resort recourse to protect human rights. The right of colonized or oppressed peoples to free themselves is set forth also in Art. 20(2) of the *Charter on Human and Peoples' Rights* and in the preamble to the *Convention on the Prevention and Combating of Terrorism* adopted by the Organisation of African Unity (OAU) in 1999,¹⁰⁵ which reaffirms the legitimate right of peoples for self-determination and independence pursuant to the principles of international law and the provisions of the Charters of the OAU and of the *African Charter on Human and Peoples' Rights* (ACHP), also known as the Banjul Charter.¹⁰⁶ Article 3 of the OAU Convention says that armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered a terrorist act. Section 4(xl) of the *African Model Anti-Terrorism Law*, adopted by the African Union (AU)¹⁰⁷ in 2011, says that none of such behaviors shall be considered as terrorist acts.¹⁰⁸

The *Cairo Declaration on Human Rights in Islam* (CDHRI), an Islamic response to the UDHR, adopted by the Organization of the Islamic Conference (OIC) in 1990, enshrines the right to the peoples oppressed or suffering from colonialism and of all forms of and occupation have the full right to freedom and self-determination (Art. 11). These principles are recalled also in the preamble to the three Islamic counterterrorism instruments: the *Arab Convention on the Suppression of Terrorism* of 1998, the *OIC Convention for Combating International Terrorism* of 1999, and the *Convention of the Cooperation Council for the Arab States of the Gulf on Combating Terrorism* of 2004, which confirm the legitimacy of the right of peoples to struggle against for-

28, 1996, and modified in 2002 and 2008.

¹⁰³ Constitution of the Islamic Republic of Iran, adopted by referendum, on Dec. 2-3, 1979.

¹⁰⁴ Basic Law for the Federal Republic of Germany of May 23, 1949.

¹⁰⁵ Organisation of African Unity, *Convention on the Prevention and Combating of Terrorism*, adopted by the 35th OAU Summit in Algiers, Algeria, July 1, 1999.

¹⁰⁶ Organisation of African Unity, *African Charter on Human and Peoples' Rights*, concluded at Nairobi on June 27, 1988. In *United Nations Treaty Series* 520, no. 26363, 218-292.

¹⁰⁷ The AU replaced the OAU in 2002.

¹⁰⁸ African Union, *The African Model Anti-Terrorism Law*, final draft as endorsed by the 17th Ordinary Session of the AU Assembly in Malabo, on June 30-July 1, 2011.

eign occupation and colonialist and racist regimes by all means, including armed struggle to liberate their territories and attain their rights to self-determination and independence in compliance with their charters and resolutions, and with the purposes and principles of the Charter and the resolutions of the United Nations.

Modern constitutions refer to sovereignty that resides/emanates from the people – this is the core principle of democracy. Marsavelski concludes that the right to revolution is a general principle of law which exists in international customary law, even if is not mentioned in any treaty.¹⁰⁹

Under legal philosophy, natural rights (*ius naturale*), among which is placed the right of revolution, intersect natural law theory, which justifies the supremacy of the strongest. According to the natural law theory (*lex naturalis*), some rights are inherent by virtue of human nature endowed by nature, God, or a transcendent source, and are universal.¹¹⁰ These binding rules of moral behavior originate from nature's or God's creation of reality and humankind. For some philosophers, jurists and scholars the term "natural law" is equivalent to "natural rights," or "natural justice,"¹¹¹ while others differentiate between natural law and natural right.¹¹² In *Leviathan*, Hobbes defines natural law as

a precept, or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life, or takes away the means of preserving the same; and to omit that by which one thinks it may best be preserved.¹¹³

He believes that in the state of nature nothing can be considered just or unjust, and every man must be considered having a right to all things.¹¹⁴ According to the British philosopher there are nineteen Laws of nature: the first two are expounded in chapter XIV of *Leviathan* "of the first and second natural laws; and of contracts," the others in chapter XV "of other laws of nature." The first law of nature provides states

¹⁰⁹ Marsavelski, "The Crime of Terrorism and the Right of Revolution," 276, 277.

¹¹⁰ Leo Strauss, "Natural Law," in *International Encyclopedia of the Social Sciences*, ed. David L. Sills, 80-90 (London: Macmillan, 1968), 2.

¹¹¹ Max Solomon Shellens, "Aristotle on Natural Law," *The American Journal of Jurisprudence* 4, no. 1 (1959): 72-100.

¹¹² Strauss, "Natural Law."

¹¹³ Hobbes, *Leviathan*, 100.

¹¹⁴ *Ibid.*, XIII.13.

that every man may seek and use all helps and advantages of war.¹¹⁵ The second law gives a man the right to self-defense.¹¹⁶ The third law of nature provides the motivation to rebel against the authority:

When a covenant is made, then to break it is unjust and the definition of injustice is no other than the not performance of covenant. And whatsoever is not unjust, is just.¹¹⁷

The Catholic Church holds the concept of natural law introduced by medieval Catholic philosophers such as Albertus Magnus (AKA Saint Albert the Great) and Thomas Aquinas. The Catholic jurisprudence draws the foundations of natural law in the *Bible*.¹¹⁸

The connection between ethics, morals and religion is clear in the eternal dualism of Christianity between good and evil, assumed as antithetical principles. Right and wrong – or just and unjust – are dualistic antagonistic opposites deriving from the Manichaeian dichotomy “good and evil,” in which good should prevail and evil, that is often used to denote profound immorality, should be defeated.¹¹⁹ In such perspective, terrorism is absolute evil,¹²⁰ and Western soldiers are the new crusaders engaged in a just war against it.

In evaluating the moral aspect of “killing the enemy” should be considered texts that lie on morality, and on which rest the values of the Western civilization. “Thou shalt not kill” is a moral imperative enshrined in the Ten Commandments of the Torah,¹²¹ which can be found in Exodus 20:13 and Deuteronomy 5:17. The imperative to not kill is claimed in the context of “unlawful” killing resulting in bloodguilt.¹²²

¹¹⁵ Ibid., 86 et seq.

¹¹⁶ Ibid.

¹¹⁷ Ibid., 97.

¹¹⁸ The author consulted the *King James Bible* (1769/2017).

¹¹⁹ Paul Ingram and Frederick John Streng, eds., *Buddhist-Christian Dialogue: Mutual Renewal and Transformation* (Honolulu, HI: University of Hawaii Press, 1986), 148-149.

¹²⁰ Antonio Guterres, “Message to Special Meeting of the Security Council Counter-Terrorism Committee on ‘Countering the Use of New and Emerging Technologies for Terrorist Purposes,’” Mumbai, October 28, 2022, https://www.un.org/counterterrorism/sites/www.un.org.counterterrorism/files/sg_mumbai_28_october_2022-_sg_video_message_to_special_meeting_of_the_counter-terrorism_committee.pdf.

¹²¹ Exodus 20:1-21; Deuteronomy 5:1-23.

¹²² Genesis 4:10; Genesis 9:6; Genesis 42:22; Exodus 22:2-2; Leviticus 17:4; Leviticus 20; Numbers 20; Deuteronomy 19; Deuteronomy 32:43; Joshua 2:19; Judges 9:24; 1 Samuel 25; 2 Samuel 1; 2 Samuel 21; 1 Kings 2; 1 Kings 21:19; 2 Kings 24:4; Psalm 9:12; Psalm 51:14; Psalm 106:38; Proverbs 6:17; Isaiah 1:15; Isaiah 26:21; Jeremiah 22:17; Lamentations 4:13;

The Hebrew *Bible* contains numerous prohibitions against unlawful killing, but also contains prescriptive imperatives for lawful killing in the context of warfare, capital punishment, and self-defense.

According to the Torah (Exodus 22:2-3), justified killing is allowed in some circumstances as self-defense. A home defender who struck and killed an intruder at home is not guilty of bloodshed:

If a thief is caught breaking in and is struck so that the thief dies, the defender is not guilty of bloodshed; but if it happens after sunrise, one is guilty of bloodshed.

The New Testament agrees that murder is a “grave moral evil,”¹²³ and supports the Old Testament.¹²⁴ Jesus himself repeats the commandment: “Do not murder.”¹²⁵ The reference to the Christian roots of Western civilization deserves further theological studies, but the purpose here is only to demonstrate the limits and contradictions of a perspective based on ethics and morals.

IV. Concluding remarks

The distinction between just/unjust war/combatant – that is the dualistic Manichaeic dichotomy between antagonistic opposites right/wrong or good/evil – is based on moral and ethical considerations and therefore is weak because it leaves the door open to different and opposing assessments. Morals and ethics can be used to sanction or justify the use of the lethal force, depending on the interpretation of the sources on which they rely. The concept of what is just or unjust rests on the same moral categories that are not sufficient to justify or condemn an act as lawful or unlawful. On the other side, a strictly legal approach proves inadequate, due to the status of unlawful/unprivileged combatants under IHL. An action may be unjust, but not unlawful; it may be just, although unlawful. On a legal point of view, the distinction between lawful and unlawful combatants, lies in the moral evaluation between just and unjust combatants (or right and wrong), with the former that have a “license to

Ezekiel 9:9; Ezekiel 36:18; Hosea 4:2; Joel 3:19; Habakkuk 2:8; Matthew 23:30-35; Matthew 27:4; Luke 11:50-51; Romans 3:15; Revelation 6:10; Revelation 18:24.

¹²³ Matthew 5:21; Matthew 15:19; Matthew 19:19; Matthew 22:7; Mark 10:19; Luke 18:20; Romans 13:9; 1 Timothy 1:9; James 2:11; Revelation 21:8.

¹²⁴ Matthew 23:30-35; Matthew 27:4; Luke 11:50-51; Romans 3:15; Revelation 6:10; Revelation 18:24.

¹²⁵ Matthew 5:21; Matthew 19:19; Mark 10:19; Luke 18:20.

kill.” In the War on Terror the syllogism “just equals lawful” and “unjust equals unlawful” leaves the door open to the national interest, with all the consequences that this entails. While it would be unrealistic to expect any significant shift in the understanding of terrorism as both state and non-state activity, it is legitimate to contemplate the compliance with *ius cogens* while countering terrorism.

Acknowledgements

The author gratefully acknowledges the European Social Fund (ESF) and the Fundação para a Ciência e a Tecnologia (FCT), Portugal, for supporting his work through grant SFRH/BD/136 170/2018.

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