The Ethics of Insurgency

James Turner Johnson

Terrorism and the Right to Resist: A Theory of Just Revolutionary War, Christopher J. Finlay (Cambridge, U.K.: Cambridge University Press, 2015), 339 pp., $103 cloth.

The Ethics of Insurgency: A Critical Guide to Just Guerrilla Warfare, Michael L. Gross (New York: Cambridge University Press, 2015), 337 pp., $93 cloth, $33.99 paper.

In the latter half of the twentieth century, lasting memories of two world wars and astonishment over the power of nuclear weapons left both policymakers and scholars of war largely preoccupied with the possibility of a catastrophic World War III. Instead, however, the face of war since 1945 has been that of regionally limited small wars and insurgencies fought with conventional weapons. Many of these conflicts began as armed rebellions against colonial regimes, but often later evolved into armed conflicts between and among various subgroups seeking control of state government. Such conflicts have usually been asymmetrical, with the party holding the reins of state power using aircraft, artillery, and armored vehicles, while those fighting against the regime have been limited to weapons that individuals can carry, such as automatic rifles, mortars, rocket-propelled grenade launchers, and improvised weapons of various sorts. The asymmetries have also typically gone deeper, with the fighters on the former side wearing uniforms and those on the latter often not; those on the former side making use of fortified bases and those on the latter side protecting themselves by blending in with the civilian population. Further, there have frequently been asymmetries in how each side has fought, with the militarily weaker side relying on stealth tactics, deception, and attacks against nonmilitary targets of more general public value, including direct attacks on people protected as noncombatants under the laws of war. The particular range of tactics classified as terrorism begins

Ethics & International Affairs, 31, no. 3 (2017), pp. 367–382.

doi:10.1017/S0892679417000259

at this point, with the specific, direct, and intentional targeting of noncombatants. Such attacks not only have been the means of choice for transnational nonstate actors, including al-Qaeda and the self-styled Islamic State, but have also been used to considerable effect in local civil wars.

Such has become the general face of war over the last seven decades. Yet while insurgency warfare is by no means a new phenomenon—though it has manifested itself in different ways throughout history—present-day insurgency warfare reflects specific recent political and social attitudes, and proceeds from its own moral and theoretical bases. It is into the ongoing debates over contemporary insurgency warfare that Christopher J. Finlay and Michael L. Gross have placed themselves.

Finlay is a political theorist whose approach to the ethics of insurgency is that of an analytic philosopher working within the frame of the "revisionist" understanding of just war defined by Jeff McMahan and others. In *Terrorism and the Right to Resist*, Finlay describes revisionism as "defined by the aim of rethinking the relationship between war and morality and, particularly, between liability to harm in war and moral responsibility for certain kinds of wrong" (p. 8). Like McMahan on the just war idea in general, Finlay seeks to construct a framework of "deep morality" for his chosen topic: "a theory of just revolutionary war." So far as concrete examples of such warfare are treated, they are essentially incidental, for on this approach the aim is to construct a theory on the basis of moral values that are valid regardless of the historical circumstances. Finlay's book, as a result, has the advantage of developing a moral analysis that in principle overarches all the differences among the many cases of insurgency warfare.

Michael Gross's *The Ethics of Insurgency* is of a very different sort altogether. Gross stays closer to the empirical side of political science, approaching his subject through analysis of real-world insurgencies while taking account of the frameworks of international law and categories drawn from a more traditional understanding of just war. His approach may in part reflect the fact that he lives and teaches in Haifa, Israel, in proximity to the long-ongoing insurgency warfare between the State of Israel and the various Arab forces arrayed against it. Gross's book on the ethics of insurgency joins his two other books on ethics and contemporary warfare, *Moral Dilemmas of Modern War* (2009) and the co-edited volume *Soft War: The Ethics of Unarmed Conflict* (2017). In important ways the book on insurgency depends on reasoning established in the former, and it includes a section on "Soft War" anticipating the latter.

So as better to judge the contributions of Finlay's and Gross's books on insurgency warfare, it is useful to relate them to the deeper history of moral and legal thought bearing on such warfare. These roots go back to Hugo Grotius, who defined the idea of sovereignty as based in the right of individuals to defend themselves against aggression, and that of peoples to defend their "ancient rights and privileges." On this conception, sovereignty lay with the people in each political community, and the head of state derived governing authority from this. This conception became generally accepted within the international law of the Westphalian order that followed. In the late eighteenth and nineteenth centuries, though, an intensified focus on human rights and, among leftist thinkers, on the superiority of the common people over ruling elites, shifted moral priorities decisively in a direction that opened the door to uprisings and rebellions in the name of popular self-determination. The insurgency warfare of recent decades has built on this background.

At the same time, efforts continued to limit the destructiveness of such warfare. Historically, insurgency was often criminalized, but during the American Civil War the U.S. Army took a different tack, issuing the first official statement laying out rules to govern nonuniformed fighting bodies alternately called partisans or guerrillas: Francis Lieber's *Guerrilla Parties, Considered with Reference to the Law and Usages of War*. Prepared in 1862 at the request of the U.S. Army General-in-Chief and incorporated the following year into U.S. Army General Orders No. 100, *Instructions for the Government of Armies of the United States in the Field*, the "Lieber Code" (as G.O. No. 100 is commonly called) was a formal statement of the rules of engagement to be followed by Union armies during the remainder of the war. Here the term "partisan" was applied to self-constituted fighting groups that met four criteria (which have come to be called the "Lieber rules"): (1) that they be commanded by a person responsible for his subordinates; (2) that all members of such groups wear, in lieu of military uniform, a fixed distinctive emblem of some sort recognizable at a distance; (3) that all members carry their arms openly; and (4) that such groups carry out their operations in accord with the laws and customs of war. Armed groups conforming to these rules were to be considered lawful combatants and given the same treatment as uniformed enemy soldiers. Self-constituted fighting groups not meeting these criteria Lieber termed "guerrillas," deriding their acts as criminal—no more than "raids, extortion, destruction, and massacre." Subsequent usage of the term "guerrilla" (including that of Gross; see pp. 273–77) has not followed Lieber's, and the

relatively new term "insurgent" has largely replaced both his terms "partisan" and "guerrilla," but the distinction he was making remains clear: independently constituted fighting bodies are not all the same, with some deserving to be accepted as lawful combatants and others to be viewed as fundamentally criminal bands.

The adoption of the Lieber rules for partisans marks a significant turning point in thinking about the rights and treatment of such groups and their members in the context of an ongoing armed conflict. European authorities quickly recognized these rules on the laws and customs of war as relevant beyond the context of the American Civil War, and in the late nineteenth and early twentieth centuries a body of positive law on war began to be put together. In one of the foundational statements of such law, the "Convention Respecting the Laws and Customs of War on Land" included in the 1907 Hague Conventions, Lieber's rules for partisan warfare appear in Section I, Chapter I, Article 1, where they are defined almost word-for-word following Lieber. The importance of these rules continued to be recognized through the two world wars, and they were laid out in the same language in the Third Geneva Convention of 1949, Part I, Article 4(2).

When the 1907 Hague Conventions and the 1949 Geneva Conventions were adopted, the standard form of war under consideration was interstate conflict involving the uniformed forces of the belligerents. Partisan elements were viewed as auxiliaries at best, and when such fighters chose not to follow the Lieber rules, as was frequent among the various resistance movements in World War II, they were treated ruthlessly. Similarly, when anti-colonial rebellions and insurgencies erupted during and after the two world wars, established powers typically treated them as organized criminal activities, not as expressions of legitimate belligerency. In sum, though, the incorporation of the Lieber rules into positive international law on war constituted an important landmark in the development of legal and moral thinking on warfare not fought by the uniformed forces of states, but the remainder of positive law on war has continued to focus on interstate warfare.

When insurgency warfare emerged as the common face of war after World War II there was thus no broad structure of law in place for how to think about such war, how to conduct it, or how to respond to it. Nor could guidance be found in moral tradition, for there was no systematic development of the just war tradition as a moral idea from the era of Grotius to the mid-twentieth century, and those thinkers who sought to recover, or rather reinvent, just war beginning in the 1960s had little or nothing to say about insurgency warfare. After the positive-law adoption of the Lieber rules for partisan warfare, the next landmark legal step

addressing the phenomenon of insurgency warfare came with the 1977 Additional Protocols to the 1949 Geneva Conventions. These two Protocols addressed the protection of victims of international and non-international armed conflicts, respectively; and both, in different ways, bore on insurgency warfare.

Protocol I importantly modified the requirement in the Lieber rules that combatants wear distinguishing marks. The language of Protocol I, Article 44(3) reads as follows:

> In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
>
> (a) during each military engagement, and
>
> (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Related to this, and also relevant to insurgency warfare, is Part IV on the civilian population (Articles 48 ff.), which requires parties to distinguish between this population and combatants, and, among other provisions, forbids the use of civilians as human shields. This is echoed in the much briefer Protocol II, where Part IV (Articles 13–18) reiterates the protected status of civilians. Particularly important here are the following paragraphs from Article 13, which have a direct bearing on the conduct of insurgency warfare and on terrorism:

> 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
> 3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.

Various states, including the United States, have never ratified these Protocols, though the United States has generally accepted them as customary law. Debate continues on whether Protocol I, which deals with international warfare, applies to insurgency warfare involving nonstate parties, and the United States in particular does not accept the modification of the Lieber rules cited above.

A final source of international law relating to insurgency warfare is the Rome Statute of the International Criminal Court, which, in its article defining the jurisdiction of the court (Part II, Article 5.1), lists four types of offenses—genocide, crimes against humanity, war crimes, and aggression—with definitions of each of these provided in the subsequent paragraphs. The elaboration of these definitions is too lengthy to examine here, but it includes many practices that have become familiar in insurgency warfare. While there have been some high-profile prosecutions, much that is defined as a potential subject under ICC jurisdiction has gone unchallenged.

Four Problems in Addressing Insurgency

In my judgment, the resulting picture of law on insurgency warfare remains unclear, and efforts to address this shortcoming are plagued by four major problems. First, the term "insurgency" includes a wide variety of actual practices in warfare. Some insurgencies have held closely to the kinds of behavior laid out in the laws of armed conflict, while others have effectively made their own rules. Correspondingly, in cases where state forces have battled insurgents, these forces have sometimes operated in ways adhering to the laws governing interstate conflicts, while in other cases they have ignored these as not bearing on internal armed conflict. To their credit, both of the authors whose books are discussed here recognize the diversity characteristic of insurgency warfare.

Second, particular insurgency conflicts may be elements of larger cultural clashes, each of which has its own character. Examples include insurgency wars fought against colonial regimes, those between or among national or tribal groups seeking autonomy for themselves, others fought over perceived racial discrimination and domination, and still others in which religious identity is a major factor. Common features exist among these types of war, but there are also important differences, and an approach that closely fits one or another type may not well fit others.

Third, international law on war depends on the willingness of states to abide by the rules to which they have agreed and to police their own forces to ensure compliance. These agreements also include acceptance of oversight by guarantor states and by international bodies. But insurgency groups have not participated in the processes by which these laws have been established and maintained; nor do they always have adequate means to police and control the behavior of all their

fighters, and often it is against their interests to do so. States associated with insurgencies often function as supportive sponsors rather than providing checks on the insurgents' behavior.

Fourth, the nature of insurgency warfare tends to politicize how particular means of fighting are viewed and evaluated. Witnesses to bad behavior tend to be from one side of a conflict or the other, not independent in their perspective. Thus, it is difficult to separate judgments on the behavior of parties from preferences for one side against the other.

Both Finlay and Gross address the ethics of insurgency within the frame of this mixed picture, though their approaches are quite different. Finlay, as noted earlier, employs the approach of contemporary analytic philosophy with the aim of defining a "deep morality" for insurgency against which any particular insurgent phenomenon can be judged. Unfortunately, despite certain strengths, this approach also creates problems.

Like other work on war from analytic philosophers, Finlay's proceeds from a conception of just war constructed on the basis of certain ideas drawn out of Michael Walzer's *Just and Unjust Wars*, producing a conception of just war that is intentionally disconnected from both empirical warfare and the historical tradition on just war and accepted only by those theorists working in the same frame. While Finlay adds a new dimension to the corpus of analytic philosophical writing on the ethics of war, people in fields closer to actual cases of insurgency will need to work to connect Finlay's analysis to such cases, and in doing so they will inevitably derogate from the intention of his analysis, which is to remain above the particulars of historical reality and experience.

Something similar can be said about the basis in moral values from which Finlay works. Essentially, this is what Finlay calls "a reasonable conception of justice" (p. 25), a concept drawn out of the idea of human rights. But Finlay makes no effort to connect these values to internationally agreed-upon reference points or to argue that the universality he assumes for them exists in fact. Rather, the moral values from which he moves look very much to be those of liberal Western thought and, particularly for the idea of justice, the product of philosophical work like that of John Rawls, whom Finlay cites in developing his own thinking. For those who accept this value frame there is gain in elaborating an ethic for insurgency warfare; it is good to have a well-developed understanding of where one stands. Yet most insurgency warfare has taken place in contexts where other frames of value dominate. Insurgents' own self-justifications have appealed

to other value bases, and some insurgencies explicitly reject Western culture and its values. Finlay's line of reasoning thus has real limits.

Even in the frame of Western thinking about the nature of politics and the idea of just war, there is another issue in Finlay's approach—one signaled in his description of revisionism cited above—that I think focuses on the wrong target. "Moral responsibility" for Finlay and the revisionists who have defined this approach is fundamentally personal and individual: it understands the justification for war by extrapolation from the individual's perspective, and it describes and evaluates each action from this same perspective. While every individual of course bears final responsibility for his or her own actions, it is by no means clear that it is adequate to approach a group phenomenon like war, including insurgency warfare, without taking into account how membership and participation in a group may affect individual moral responsibilities and the priorities among them. Moreover, groups have their own moral responsibilities as collectives, which can be in tension with those of individuals. This may come to bear in situations of armed conflict—whether insurgencies or interstate warfare—on how a group defines the obligations of its members. Important, for example, is how the group understands combatancy and noncombatancy, and the degree to which noncombatants are expected or required to support combatants even at the cost of jeopardizing their own lives and their moral obligations to members of their families and their immediate communities.

Though Finlay never speaks this way about insurgency warfare, his theoretical analysis recognizes at least some of the issues involved in taking ethics as a group phenomenon seriously. In the first section of his book, "Theory and Principles," he defines five distinct "codes" establishing different rules of engagement for insurgencies and explores these as "frames of war" (pp. 105–109). These include (1) Purely Defensive Violence, (2) Strategic Nonviolence, (3) Organized Offensive Violence under the Standard JIB (Finlay's acronym for *jus in bello*), (4) Organized Offensive Violence in the form of Partisan War under the Code of the Partisan *Jus in Bello*, and (5) the Terrorist JIB. The meaning of the first two codes needs no explanation. What Finlay means by "Standard JIB" is armed conflict according to the international laws of war. The code for what he calls "Partisan War" (with "Partisan" here having a very different meaning from that in Lieber's rules) differs from the "Standard JIB" in that it "would set aside the legal criterion of combatant status as the basis for discrimination and involve selecting targets . . . on the basis of their *moral responsibility* for the threat of unjust harm" (pp. 101–102, emphasis

in text). Last, he defines the "Terrorist JIB" as "deliberate attacks on civilians simply *qua* civilians, that is, independently of whether they were morally responsible for injustice as individuals" (p. 103).

These last three codes deserve a closer look. Finlay further describes the "Standard JIB" as having three core components: "the principle of combatant/non-combatant discrimination, the equal moral status of opposing soldiers, and the convention governing uniforms" (p. 98). Interestingly, he regards these simply as "conventions," commonly agreed-upon rules for the purpose of fighting, much like the rules for a game of cards. As such, these conventions might be changed at any time by decision of the parties, and they should not necessarily be regarded as binding outside the circle of those who have formally signed on to the conventions. Understood this way, the "Standard JIB" has no real moral content. This illustrates a point I made earlier, that Finlay's method intentionally brackets history out of consideration. This is problematic, for while the laws of armed conflict can indeed be narrowly reduced to positive law—conventions put in place simply by mutual agreement of the parties—their background is rooted in the historical tradition of just war and includes moral reflection on the experience of war and the conduct of governments and international relations. That is, Finlay's construction of the "Standard JIB" eviscerates the moral content embodied in the laws of armed conflict.

Finlay's "Partisan JIB," by contrast, is defined by moral judgments made by the insurgents (pp. 101–102). His argument explaining this understanding tracks that of McMahan against the idea of the moral equality of soldiers: that whatever the legal conventions might say, "ordinary morality" would regard soldiers on the just side in a conflict as morally different from those on the unjust side, so that the latter are liable to attack though the former are not. This moral distinction also modifies the principle of discrimination, so that the moral responsibilities borne by some noncombatants on the unjust side make them liable to direct attack, despite their legal status under the "Standard JIB."

What is not addressed here is that the two parties to a conflict may not agree on "ordinary morality." Rather, no matter how firmly the insurgents are one-sidedly convinced of the justice of their cause and the moral liability of their enemies, those who oppose the insurgents may be expected to have exactly the opposite position. It was just this kind of situation that originally gave rise to the idea that soldiers on *both* sides in a war should be regarded as moral equals and that noncombatants should be defined by their function regarding the war rather than their moral attitudes and judgments. The idea I call "simultaneous ostensible

justice," first appearing in Vitoria and brought into the modern law of nations by Grotius, took account of the reality that in a conflict the opposing sides hold to different positions on the justice of the matter in dispute, and that in at least some of these cases there is no possibility of deciding between them. The practical implication of this was that each side should follow the rules for right conduct in war, the *jus in bello*, as closely as possible, treating enemy soldiers as moral equals and respecting enemy noncombatants as immune from direct attack. The defining characteristic for noncombatancy here is whether the individuals are functioning in direct support for military activities, not absence of preference for one side or another, since it is assumed that the civilians on each side morally prefer their own forces. Civilians are protected from direct attack despite the assumption of such moral preference, so long as they do not act in ways giving direct support to the military forces on their side in the conflict.

On Finlay's description of the "Partisan JIB," however, insurgent fighters are allowed to target noncombatants *because* they regard them as bearing moral responsibility in the cause the insurgents are opposing. But it is precisely this choice that defines what is commonly understood to be terrorism. This was, after all, the argument made by al-Qaeda justifying the 9/11 attacks in the United States, the 2004 Madrid train bombings, the 7/7 attacks in Britain, and other cases. It is also a core element in the Islamic State's justification of attacks on Shiite, Yazidi, and Christian noncombatants. Though Finlay wants to reserve the term "terrorism" for attacks against civilians regardless of their moral status, in fact his conception of the "Partisan JIB" collapses into terrorism as commonly understood. Accordingly, Finlay's code of the "Terrorist JIB" is defined too narrowly. It does not correspond to the reality of terrorism and the language of self-justification employed by terrorist groups and individuals. When Finlay explores terrorist war as he conceives it later in the book (ch. 9), he speaks of it as involving "deliberately targeting parties who are presumed to be morally innocent" (p. 247), but this presents the terrorists as *recognizing* those parties as morally innocent. The reality is different: Those on the targeted side may regard the victims as morally innocent, but, on the terms of their own justifications, those responsible for such attacks do not.

Finlay's chapter on terrorist war has a good deal more to say on this topic and others, and readers must make their own judgments as to whether my criticisms are fair or not. In any case, within the book as a whole the subject of terrorism plays a relatively minor part. For *Terrorism and the Right to Resist* brings an

analytic philosophical method to bear on insurgency understood more broadly, and the majority of the book deals with insurgency warfare that does not involve terrorism. As I have argued, I think this approach has real limits, but the book nonetheless lays out a framework of analysis that is consistent in itself and provides a distinctive vantage point from which to think about insurgency.

Michael Gross's book, as noted earlier, proceeds very differently. The book ranges broadly, treating both large- and small-scale guerrilla warfare, the use of human shields, economic warfare, diplomacy, propaganda/use of the media, and nonviolent forms of insurgency. Yet its core is in the early chapters, which treat what Gross calls "the right to fight" or, in other words, the justification of insurgency warfare. Approximately a third of the book is given over to this discussion, with the remainder evenly divided between chapters associated with "hard" and "soft" war. Gross's subjects correspond closely to those covered by Finlay, the work of both authors reflecting the variety that exits in insurgency warfare.

In classic just war tradition, the requirement of sovereign authority has priority because sovereign rulers represent the court of last resort in disputes within their commonwealths. Each ruler is understood as acting as the final arbiter in such disputes, interpreting the meaning of natural law so as to determine what is just and what violates justice, and then acting to maintain or restore justice, thereby honoring the three defining goods of politics: order, justice, and peace.

Gross begins differently. Noting that "jurists and philosophers" have put aside consideration of *jus ad bellum*, whose main requirements are just cause and legitimate authority, to concentrate on "the just and legitimate conduct of war," Gross argues that the *jus ad bellum* criteria are essential for insurgency warfare:

> Without [just cause and legitimate authority], non-state actors—guerrillas, insurgents, rebels, and/or freedom fighters—are without standing, deprived of combatant rights and treated as criminals. With just cause and just authority, these same non-state actors regain their standing as combatants and their right to fight (p. 22).

Gross first examines just cause from the perspective of law, associating it with the right of self-determination, established as "an individual and collective right" by the International Covenant on Civil and Political Rights. Thus, for him the right in question is not a moral abstraction, but a legally defined obligation that states have agreed to observe and to which they may be held. Within this

frame, Gross continues, the right to fight is a "license": "On this view, a nation that forcibly denies a people's right of national self-determination is no longer immune from attack" (pp. 30–31). But this license extends only "so far as the legal instruments permit—that is, to those national liberation movements fighting for independence against colonial, alien, and racist governments" (p. 31).

Considerations of just cause from a moral perspective "turn on self-defense and ask when a people facing aggression may turn to force of arms" (p. 31). But the aggression must be substantial—"only aggression, colonization, or occupation that keeps a people below the threshold of a dignified life can anchor the right to fight"—and the resort to armed force may come only after the endangered people have tried other possible remedies (p. 33). This sets a high bar for the moral justification of insurgency warfare. Exactly what it means in actual cases, though, still needs interpretation, and to elaborate on this Gross turns not to moral argument, but to precedents involving international law and historical cases in which the bar has been surpassed. In the end he observes, "Things get muddy when revolutionary groups claim just cause to fight" (p. 34), and in some cases "a minority will be left to suffer until conditions change for the better or deteriorate to the point of severe deprivation" (p. 35).

Gross does not finally resolve the problems here, instead shifting focus to what he variously calls "just" or "legitimate" authority. He begins by ranking this as having equal importance to just cause, though as his discussion proceeds, sometimes authority appears to depend on just cause, and at other times the inverse. Despite this ambiguity, he argues that to establish such authority insurgency groups must satisfy four conditions: effectiveness, domestic recognition, representation, and international approval. In practice, however, insurgent groups have taken different paths toward doing so, and different groups have achieved different degrees of success.

Armed struggle, Gross continues, must meet additional standards beyond just cause and just/legitimate authority: effectiveness, necessity, and proportionality (p. 44). Without them an armed insurgency is not justified whatever the claims of the insurgents. "Effectiveness" is Gross's term for what elsewhere in just war discourse is called "reasonable hope of success," and "necessity" and "proportionality" together correspond to the criterion of "last resort." His discussion of these terms suggestively draws a line of connection, which I have not seen in other authors, between efforts to pursue solutions short of armed conflict and the establishment of legitimate authority for the group in question.

Establishing the Right to Fight

What to make of all this? Gross's answer is that these considerations, when satisfied, establish "the right to a fighting chance." Though he offers only a limited discussion of what this entails and the impediments that remain in its way, this "right" is a key concept for him, one central to his later discussions of particular issues in the prosecution of insurgency war. Many, I suspect, will think Gross goes too far in how he treats this "right" in these discussions, and this deserves a close look. Specifically, the final chapter in the section on "The Right to Fight" introduces several issues prominent in Gross's *in bello* discussions, on which his treatment may be controversial: what he calls "the right to shed uniforms," how he treats noncombatant immunity and civilian liability, and the relationship of insurgency warfare to the laws of war.

First, what of insurgents' right to shed uniforms? Gross begins his discussion of this topic by declaring, "The right of a guerilla army to fight without uniforms evolved from the same right granted to partisans by the 1949 Geneva Conventions" (p. 61). But the language there, like that of the 1907 Hague Conventions and General Order No. 100 before it, does not establish a right to *shed* uniforms; rather, it imposes an obligation on partisan groups to *wear a distinguishing mark* of some sort. The true change comes with 1977 Protocol I, Article 44(3), where the obligation to wear a distinguishing mark is waived in situations "where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself" (cited in Gross, p. 61). This language clearly refers to specific situations, and it is a bit of a stretch to extend it to a general right for insurgents not to wear uniforms or other marks to distinguish themselves from the civilian population. Gross accepts this extension as established, though he calls it "a controversial privilege that also makes it possible for guerrillas to hide among the general population" (p. 60). He regards the right to fight in civilian clothes without distinguishing marks as essential to allowing "guerrilla forces to fight better" (p. 62), a theme to which he returns numerous times.

The original Lieber rule aimed at marking off irregular fighters from the civilian population, thus protecting the noncombatant immunity of the latter, and this protection is impaired or even forfeited when the irregulars do not wear distinguishing marks. The qualification made in Protocol I undercuts noncombatant immunity by allowing irregulars to deceive their adversaries by appearing to be civilians until it is too late for the adversaries to defend themselves, with the

subsequent result that the latter have reason to distrust civilians in similar situations and to treat them as fighters. To extend Protocol I's qualification into a general right for insurgent forces not to wear distinguishing marks removes noncombatant protection in broader ways. Gross admits this, but he argues that in insurgency wars the local population already forfeits its immunity by providing "war-sustaining financial, legal, and logistical aid to insurgents." This means, he goes on, that "as a result, there is room to ask whether these civilians deserve blanket and absolute protection" (p. 60). To be sure, when people who are assumed to deserve noncombatant protection engage in activities closely supporting warfighting, they lose that protection. But this is a situational exception, and Gross's language is that of a more general argument, shifting the burden of proof away from the assumption of noncombatancy for the civilian population associated with the insurgents' aims to the assumption that they do not have such status. While civilians inevitably get harmed and killed in war, just war thinking and the laws of armed conflict aim to minimize this by reducing such harm and killing to the indirect results of attacks on combatant forces or sites. Gross's language, however, opens the way to direct attacks on civilians in insurgency warfare. This problem persists in his discussion of noncombatant immunity and civilian liability in the same chapter, as well as those on human shields in chapter 6 and attacks on civilians in chapter 7.

Gross's conception of the right to fight lies at the center of his position on these matters. He writes:

> Just as the right to fight provides grounds to relax the requirement to fight in uniforms, the right to fight also reaches into the principle of noncombatant immunity and other basic principles of just war. . . . Victory will come [in conventional warfare] when belligerents can disable sufficient numbers of *combatants*. Asymmetric warfare, on the other hand, must contend with small guerrilla armies and much larger political wings that make no small contribution to their war effort. Hence, victory comes only when belligerents can disable sufficient numbers of fighters *and* the civilians who aid them (p. 63).

To my mind, this is wrong in a number of ways. First, victory in conventional warfare also depends on disruption of a society's ability to support its combatant forces; and in conventional war, as already noted, members of the civilian population are liable to be harmed or killed as the war is prosecuted. But the difference between this and what Gross describes is that harm and killing on the former conception must be a secondary effect of the warfighting, not direct and intentional.

Second, the support given by political wings of insurgencies is not all reducible to the kind of military support that would nullify noncombatant status; there is an important spectrum of liability here. Third, it is wrong to suggest that whatever liability comes with participation in the political wing of the insurgency extends to the *entire* civilian population from within which the insurgents fight and on whose behalf they claim to be fighting. In short, Gross's description allows too much for both insurgents and the forces opposing them. It strips away much of the content of the restrictions imposed on warfighting by both moral tradition and the laws of armed conflict.

Reliance on the right to fight as defining what is allowed in conducting insurgency war also makes *jus ad bellum* the arbiter of *jus in bello*. In an armed conflict each party has its own idea of what is just cause, but, again, in the past this realization has led to a heavier emphasis on war-conduct within commonly accepted limits. My concern with Gross's stress on insurgents' right to fight, grounded in their own biased understanding of just cause, is that it has the opposite effect, tending to justify war-conduct that erodes or removes limits long agreed upon. This is exactly what his position on fighting without uniforms and the extension of combatant liability into the civilian population does. I have long argued against the erosion of noncombatant immunity in contemporary armed conflicts, urging that efforts be made to hold those responsible to account so as to try to change their behavior. Gross's position looks to do just the opposite.

Much more could be said about both these books, and there is enough here to provide rewarding reading, whatever one's own thinking may be. This point raises one final matter that needs to be addressed: Exactly at whom are these books aimed? For Finlay, the answer is straightforward: his book is aimed at other political theorists and philosophers, especially at those discussing revisionist just war theory. Gross's audience, on the other hand, is not at all obvious throughout most of his book. Is he writing to tell insurgents what they may do in combat and how to establish the basis for their resort to armed force? Or is he writing to warn opponents of insurgencies what to expect? Or does he hope for at least a bit of both? The answer finally comes in the very last chapter. Responding to the question, "Who will listen or care about what might be called a liberal theory of guerrilla warfare?" (p. 271), he writes, "The just conduct of guerrilla warfare should serve the interests of liberal statesmen, just war theorists, *and* guerrillas

aspiring to join the international community" (p. 272). In the pages that follow he grants that "at first glance, the permissible practices that just guerrilla warfare endorses are alarming" (p. 273). Still, he goes on to say that "while states are right to condemn" unfettered guerrilla warfare, the worst "defects can be remedied" (p. 275) by the distinctions and qualifications that he has offered. He then follows this with language reflecting the very concerns I have voiced: "Will guerrillas respect such provisos? Or have I given away too much and gifted guerrillas a concession that insurgents will only exploit without ever accepting the law of war?" (p. 277). I wonder.

https://doi.org/10.1017/S0892679417000259 Published online by Cambridge University Press