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# INTENTIONS, COLLATERAL DAMAGE AND INDIFFERENCE TO HUMAN LIFE

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## **ABSTRACT**

In this paper, I discuss a possible moral difference between terrorism and war. The standard approach to this question relies on the doctrine of double effect (DDE). The DDE advocates believe that it matters morally whether certain harm is intentionally caused or whether it merely occurs as a foreseen but unintended side effect. I suggest that the DDE does not answer the question and that the moral difference between terrorism and war cannot be adequately captured as long as one focuses on moral justification or permissibility. The critical difference, it is claimed, is not that war is sometimes morally right or permissible, but that terrorism and war do not display the same attitude toward innocent people. The distinction between permissibility and blameworthiness also enables us to see why some wars, such as those covered by the name “war on terror”, should be morally distinguished from terrorism.

## **KEYWORDS**

Blameworthiness, intention, negligence, permissibility, recklessness, terrorism, war.

## **1. INTRODUCTION**

Terrorism and war appear morally different, but it is sometimes argued that this appearance is deceiving. Once it is acknowledged that the loss of innocent lives is an indispensable part of every war and that the harm done to civilians in military conflict often far exceeds the harm caused by terrorist attacks, it is no longer obvious how to account for the difference between terrorism and war. Stephen Nathanson nicely summarizes the problem:

[M]ost people who condemn terrorist acts believe that war is often morally justifiable even though wars generally result in many more deaths of innocent people than terrorist attacks. But how can this be? How can terrorism be wrong because it kills innocent people while war, which generally kills more innocent people, may sometimes be right? (Nathanson 2010: 4)

Since the most common way to tackle this problem is to appeal to the doctrine of double effect (DDE), I briefly examine this doctrine in section 2 and consider an important objection often raised against it. I discuss how the advocates of the DDE respond to that objection, but I ultimately conclude that their response fails and that the DDE does not capture the moral difference between terrorism and war. In section 3, it is suggested that the moral distinction between terrorism and war cannot be drawn as long as one focuses only on moral justification or permissibility. The key difference, I argue, is not that war is sometimes right and terrorism always wrong, but that terrorism and war do not display the same attitude toward innocent people. In section 4, I further develop this proposal. More specifically, I appeal to the distinction between permissibility and blameworthiness (culpability) to undermine the suggestion, advocated by some authors, that there is no relevant moral difference between “war on terrorism” and terrorism. In section 5, I briefly outline the key points defended in the paper and give some concluding remarks.

## 2. RECKLESSNESS, NEGLIGENCE AND THE DDE

While it is undeniable that war “generally kills more innocent people” than terrorism, that still does not establish that war is morally worse than terrorism. The crucial moral difference, it is usually claimed, is that terrorists kill innocent people intentionally.<sup>1</sup> But when innocent people are killed in war, they are usually killed unintentionally as a side effect of legitimate military action. Hence, the claim is that in certain cases it could be morally permissible to perform an action that will have a harmful effect provided one does not intend to bring about that harm, but only foresees its unfortunate occurrence. Combatants usually intend to achieve a legitimate military aim or gain some military advantage, and the death of civilians, if it occurs, is an unfortunate event or ‘collateral damage’.

But this is not the whole story. Those who emphasize that terrorism and war cannot be morally distinguished without appealing to intentions do not say that one can justify killing innocent people merely by not intending to kill them. This is why the absence of a bad intention is only necessary, and not a sufficient condition for moral permissibility. Although intentions play a significant role in the process of justification, causing collateral damage, according to this view, is not morally permissible unless certain other conditions are met as well.

To justify collateral damage, one often invokes the doctrine of double effect (DDE).<sup>2</sup> The DDE says that in some instances it is morally permissible to perform an action that will have a harmful effect provided (1) the action itself is not wrong; (2) one does not intend to bring about that harm either as an end or as a means;

<sup>1</sup> In this paper, I assume the distinction between combatants and noncombatants.

<sup>2</sup> For example, see Frowe (2016: 147).

and (3) that the harm caused is not out of proportion to the positive value that the action brings about (cf. Timmons 2013: 83). It is only if all these conditions are fulfilled that performing that action becomes morally permissible.

However, the DDE faces difficulties. It is often argued that intentions as mental states cannot affect moral permissibility and that the doctrine involving such claim leads to some absurd results.<sup>3</sup> Similarly, it is sometimes pointed out that—due to its inability to accurately differentiate between intention and foresight—the DDE can justify conduct that most people would find impermissible. Since there are many serious attempts in the literature to meet these difficulties<sup>4</sup>, it is still an open question whether they have any real force and to what extent (if any) they succeed in undermining this ethical theory.

For the purposes of my discussion, however, it is worth examining in more detail a somewhat different problem that the advocates of the DDE confront. The problem arises because it seems that in the circumstances of war satisfying DDE requirements is not sufficient to render a conduct morally permissible.

By way of illustration, let us consider how things usually stand when we consider ‘normal’ circumstances—those that do not arise in the context of war. In those circumstances we often try to minimize the damage that occurs as a side effect of our actions. For example, a dentist who is about to perform surgery will most likely give anesthesia to his patient to relieve him of pain. Assuming that the operation itself is not wrong, that the dentist does not have a bad intention, and that the surgery’s expected outcome outweighs its negative aspects, one would still expect that the dentist will make sure that his patient is not in great pain. But suppose that it never occurs to the dentist that his patient should be given anesthesia, or perhaps it does occur to him, but he just does not care, so he decides to perform a surgery without anesthesia. If so, then although it might be true that the dentist is complying with the DDE, his behavior should nonetheless be considered negligent or reckless.

It might be replied that the dentist would in fact *not be* complying with the DDE. Performing surgery without anesthesia is permissible only if it cannot be performed in a less harmful way (for example, if anesthesia is not available in the given circumstances). This is why some authors (e.g, Kamm 2007: 93) note that the DDE should be supplemented with the following (necessity) condition:

(4) There is no less harmful way to bring about a good end.

However, the initial difficulty remains even if the DDE is supplemented in this way. David Rodin thinks of a case in which “a motorist ... drives across a crowded school yard to deliver a sick person to a hospital” (Rodin 2004: 764). Even if there is no other way to reach the hospital on time and the three previously mentioned requirements of the DDE are fulfilled, Rodin observes, “...if [the motorist] strikes

<sup>3</sup> See Thomson (1991).

<sup>4</sup> For instance, see Quinn (1989); FitzPatrick (2006); Nelkin and Rickless (2015).

and kills a child he will be held liable, in law and in morality, for manslaughter because of the *recklessness* of his actions” (Rodin 2004: 764 – italics added).

Rodin uses this example to show that acting in accordance with the DDE does not rule out culpable behavior. Satisfying the four conditions set by the DDE is still not sufficient to avoid the charge of recklessness. To avoid the recklessness charge, particularly in the circumstances in which harm is highly likely to occur (such as war, for example), one should demonstrate a sufficient level of care in one’s conduct. And this cannot be merely accomplished by satisfying the above mentioned conditions. Although the motorist cannot take any other route to the hospital and does not intend to strike a child, he certainly knows that the chances of that happening are very high. This is why he will not be absolved from culpability if his action results in harm.

Applying this to the context of war, since the DDE does not require an agent to take measures to reduce harm in given circumstances, the result is that combatants are granted moral permission to act recklessly and negligently, and in this way the number of civilian casualties in military conflict can become so large that—when considering things from that perspective—it is difficult to see how terrorism could be morally worse than war.

This insight leads Rodin to argue that, under the given circumstances, the term ‘terrorism’ should be equally applied to intentional, reckless and negligent harm to civilians (see Rodin 2004: 755). But many other philosophers and public intellectuals have raised similar concerns regarding the notion of collateral damage and, in one form or another, endorsed the view that terrorism and war are often morally indistinguishable.<sup>5</sup>

Perhaps the charge that the DDE allows reckless and negligent behavior could be avoided by expanding the doctrine with yet another condition. Thus, one may adopt Michael Walzer’s proposal that the DDE also requires an agent to:

(5) “seek to minimize [collateral damage], accepting costs to himself” (Walzer 1977: 155).

As Walzer says, an agent needs to have a “double intention”—not only to achieve a good end, but also to minimize the harmful side-effects as much as possible. It is only if this last condition is also met that action becomes justified and hence morally permissible.

While it may be questioned what exactly is involved in minimizing the harmful side-effects, we may set this worry aside and examine whether Walzer’s suggestion avoids the problem that the advocates of the DDE confront. For the sake of argument, let us assume that there is only one way, namely *F*, in which a legitimate

<sup>5</sup> See, e.g. Held (2003: 61-2); McPherson (2007: 534-39); Honderich (2002: 98-9); Fisk (2008: 355-57); Lichtenberg (1994: 363); Zinn (2001). Most of these people, Rodin included, discuss the notion of collateral damage in the context of “war on terrorism”.

military goal *M* can be achieved, and that *F* involves risking the lives of five innocent people as a side-effect. Assume further that all the previously mentioned conditions prescribed by the DDE are fulfilled and that an army pilot *S* is indeed seeking to minimize the risk to these five people while intending to achieve *M*. According to Walzer's version of the DDE, therefore, it is permissible for *S* to do *F*.

But it is difficult to understand how *S*'s attempt to minimize the risk of harm to the five innocent people affects the moral permissibility of *F*. Simply put, if *F* is the *only way* to achieve *M*, then *S* cannot achieve *M* in a way that would be less risky to the five people. It seems then that *S*'s attempt to reduce the risk of harm is not necessary to make *F* morally permissible, but instead that doing *F* is morally permissible (if it is permissible at all) irrespective of *S*'s search for another option.<sup>6</sup> This establishes that Walzer's amendment to the DDE is not doing any work and should at best be considered redundant.<sup>7</sup>

Perhaps the proponents of the DDE can easily avoid this worry. But even they can, it seems to me, we should still be careful not to overestimate DDE's significance for our initial problem—namely the problem of moral difference between terrorism and war.

First, even if collateral damage can be justified by invoking the DDE, one could say, that would not establish that war and terrorism are morally different, but only that *just* war and terrorism are morally different.<sup>8</sup> Following Jeff McMahan (2005), it could be pointed out that unjust combatants cannot appeal to the DDE because they cannot meet the proportionality condition that requires that its good effects outweigh bad side-effects of one's action. Those combatants who fight on the unjust side in war, McMahan says, cannot meet this requirement because their actions lack a just cause and hence cannot have good effects in the first place (McMahan 2005: 6). If correct, this view shows that invoking the DDE could only be a partial solution and that it still remains to be answered whether there are any moral differences between unjust war and terrorism.<sup>9</sup>

Second, invoking the DDE cannot be the whole story even if one rejects McMahan's argument about unjust combatants not being able to satisfy the proportionality requirement. The problem is that even if causing collateral damage is sometimes morally justified, it could be argued that terrorism is also sometimes

<sup>6</sup> For a similar argument, see Zohar (2007).

<sup>7</sup> This is not to say that *S*'s effort to find *G* does not count morally. While it does not affect moral permissibility, it does affect moral culpability or blameworthiness. Or so I will argue.

<sup>8</sup> Thus, Jeff McMahan argues that "[t]he most important intuitions that the relevance of intention to permissibility has traditionally been invoked to defend are ... those concerned with the difference between *just* war and terrorism" (McMahan 2009a: 359 – italics added).

<sup>9</sup> It should be mentioned that McMahan agrees that unjust war and terrorism are morally different. He discusses this issue in 2009b. Although his discussion contains important insights, my aim is to examine whether it is possible to provide a single and unique account of the moral difference between war and terrorism, namely an account that applies both to just and unjust wars.

morally justified. Granted, it may be highly controversial to take the latter view. Still, some argue that it is equally controversial to take the view according to which terrorism could never be morally justified. As Uwe Steinhoff (2004) remarks, while the burden of proof is carried by those who argue that some countervailing reasons could sometimes outweigh the protection of civilians, the burden of proof is also carried by those who are absolutists with regards to the rights of the innocents (Steinhoff 2004: 106).<sup>10</sup>

### 3. PERMISSIBILITY AND BLAMEWORTHINESS

If the above remarks are on the right track, it yet remains to be explained how one's intention to reduce the risk of collateral damage affects moral permissibility. In the absence of such an explanation, it is not clear why the DDE would require that an agent forms such an intention in the first place. Furthermore, as mentioned above, even if it turns out that intentions are relevant for moral permissibility, it is still open to doubt whether that would establish a moral distinction between terrorism and war.

Nevertheless, to say that one's intention to minimize the risk of collateral damage does not affect permissibility is not to say that it is morally irrelevant whether one has that intention. There is a sense in which an army pilot who does *F* in a way that he believes would minimize the risk of collateral damage still performs a morally different action than a pilot who does *F* without showing any concern for civilian casualties. In other words, it seems that one's intention to minimize civilian casualties has a certain moral weight. While it may not affect permissibility, the presence of such an intention may be relevant for determining the extent to which one's action is morally culpable or blameworthy.

We indeed tend to blame those who fail to take necessary precautions if they engage in conduct that exposes others to the risk of harm. But our ascription of blame is sometimes independent of the question of whether such conduct is permissible. Not everyone seems to recognize this. According to Colm McKeogh, for example,

for there to be a difference in moral culpability between the collateral killing of civilians and the direct killing of civilians, there must be a difference in the probability and magnitude of civilian deaths between the two cases. If the same number of

<sup>10</sup> Fortunately, we do not need to resolve this issue here. And that is because, as we will see soon, the question whether terrorism and war should be equally *condemned* can be examined independently of the question whether terrorism is always *wrong* and war sometimes *right*.

civilians is just as likely to die in both cases, then the wrongness of the acts is the same. (McKeogh 2002: 170)<sup>11</sup>

But even if “the *wrongness* of the acts is the same”, that does not mean that there could be no difference in moral culpability. An act is either right or wrong, permissible or impermissible, but moral culpability comes in degrees. Even if two people perform the same (morally wrong) act, their acts might still not be equally blameworthy. An action could be blameworthy not because it is morally impermissible (or wrong), but because it is performed with a culpable state of mind. In that regard, malicious, reckless and negligent behavior can be subject to blame because it signals a morally unacceptable attitude toward others’ well-being.<sup>12</sup>

The claim that moral permissibility and blameworthiness may sometimes diverge can be supported with an example. Let us assume that one mistakenly takes another person’s umbrella when leaving a restaurant. In that case, it could be argued that one’s action is impermissible, but that it is not blameworthy, or at least that it is not blameworthy to the extent it would have been had one taken another person’s umbrella intentionally (see Graham 2010: 94; Ferzan 2005: 713-14). The crucial point is that we sometimes do not condemn people even if their actions are impermissible. This is because it is sometimes much more important whether an agent has acted with a “guilty mind”.<sup>13</sup>

Maybe all this suggests that the question of moral difference between terrorism and war should be approached somewhat differently. Perhaps we should set aside the question of whether collateral damage is sometimes morally justified and instead focus on the issue of blameworthiness. Maybe the difference between terrorism and war needs to be captured in terms of culpability or blameworthiness, not permissibility. It could be that our condemnation of terrorism is not grounded in the issue of justification at all, but rather in the attitude that terrorist actions display. It could be that the reason why we usually condemn terrorist acts is that there is something in the very nature of those acts that makes them morally repugnant, and it may turn out that this feature of terrorism cannot be fully captured if one focuses only on the notion of permissibility. Maybe the point is *not* that war—unlike terrorism—is sometimes right, but that acts of war and terrorist acts do not signal the same attitude towards innocent people and are thus not equally blameworthy. It is this suggestion that I would like to explore.

<sup>11</sup> See also Lichtenberg (1994).

<sup>12</sup> Cf. Scanlon (2008: 123-28); Rosen (2002: 73).

<sup>13</sup> Perhaps more controversially, one may also claim that an agent can be held culpable despite acting permissibly. To modify slightly an example by Judith Thomson (1991: 293-94), suppose A intends to kill B by poisoning B’s drink. However, A is not aware that the stuff he possesses is not a poison but medicine that can cure B’s illness. Thus, if A puts this stuff in B’s drink, the argument might go, A can be held culpable even though his action is permissible. For criticism of this example, see McMahan (2009a: 352-54).



Perhaps one could reply that separating permissibility and blameworthiness in this way cannot help us to make any significant progress concerning the distinction between terrorism and war. It might be argued, for example, that some terrorists may even take steps to ensure that the harm they plan to cause is not excessive in relation to the end they intend to achieve. Thus, Helen Frowe thinks of a terrorist who “chooses to attack at night in order to avoid killing any more people than necessary to achieve his goal of terrorising the munitions works” (Frowe 2016: 150). Why not say that such a terrorist also expresses concern for innocent lives?

While it should be conceded that the possibility of there being such a terrorist cannot be entirely ruled out, Frowe’s scenario is not plausible. Briefly, that is not a behavior that we have reason to expect from terrorists. Although defining terrorism is not an easy task, as McMahan points out, “virtually everyone agrees that [it] involves intended harm to innocents” (McMahan 2009: 360). In light of that, to argue that even a terrorist may be willing to carry out his mission with the attempt to reduce the number of civilian casualties is to assume that the terrorist acts in a way that goes against the very logic of terrorism. It just does not make much sense to assume that people who kill innocents in order to spread as much fear as possible would decide to be restrained in their killing of innocents.

But why would one think that the morally unacceptable attitude toward the well-being of others is displayed only by terrorist acts and not by some acts of war? As Rodin argues, reckless and negligent killings in war are “*morally culpable to the same degree* and for the same reasons that typical acts of terrorism are culpable” (Rodin 2004: 769 – italics added). Hence, people who share Rodin’s view might point to some specific acts of war—such as those performed within the so-called “war on terror”—and say that insensitivity toward innocent people displayed by such acts is no different than the one displayed by terrorist attacks.

In the following section, I will argue against that view. As I will suggest, those who claim that some acts of war (i.e., those that were carried out within the “war on terror”) belong in the same moral category as terrorist acts do not provide compelling reasons in favor of such moral assessment. More precisely, I will not argue that those acts of war do not exhibit a morally unacceptable attitude toward the lives of innocent people, but only that the reasons which allegedly support that view are much weaker than they appear to be.

#### 4. THE ATTITUDE OF INDIFFERENCE

The following argument summarizes our discussion:

- (1) Recklessly and negligently harming innocent people is part of every war.
- (2) Recklessly and negligently harming innocent people in war is morally on a par with terrorism.

(3) Therefore, every war consists of actions that are morally on a par with terrorism.

Let us first examine (1). Recklessness and negligence are common phenomena, present in everyday life, so it is difficult to believe that reckless and negligent harm does not exist in warfare. Nevertheless, it is important to specify conditions under which military conduct should be considered reckless or negligent. If innocent people die as a result of some military operation, is that a reason to think that such operation was recklessly or negligently performed? Should we be inclined to think that a military operation is culpably performed if it harms innocent people?

Those who argue that some military operations are reckless or negligent and hence no different than terrorism sometimes seem to support this assessment by pointing to the bad outcomes those actions bring about. This can be seen in the following assertion by Rodin: “[W]hen noncombatant fatalities are caused as the unintended but foreseen side effect of bombardment, this must raise serious questions of culpable negligence or recklessness” (Rodin 2004: 766). It is important to notice that Rodin says only that unintended civilian casualties “*raise serious questions of culpable negligence and recklessness*”, not that noncombatant fatalities demonstrate that the conduct in question was in fact reckless or negligent. However, some parts of his discussion suggest that he is inclined to accept the latter view in some instances. For example, he often appeals to the number of civilians killed in military operations carried out by such powers as the United States, NATO and Israel (cf 2004: 752, 762, 771) and then writes that “[o]ne will be inclined to view many of the noncombatant casualties caused in the course of military operations (including those of Western nations) *to be culpably reckless or negligent*” (Rodin 2004: 767 – italics added). But why does Rodin think that one will have this inclination?

He would presumably answer that civilian death tolls indicate that some of these operations have been conducted with insufficient care for civilian lives. And exposing noncombatants to a high risk of harm, he would add, is not justifiable unless they have freely and autonomously decided to bear it, or unless they have made themselves susceptible to such harm through their actions. To expose noncombatants to a high risk of harm is to violate their rights. For this reason, Rodin would say, civilian casualties can sometimes be a sure sign of reckless or negligent behavior (see Rodin 2004: 764-769).

To evaluate Rodin’s argument, let us focus on the concept of recklessness as the American Model Penal Code defines it. To say that one is reckless is to say that one “consciously disregards a substantial and unjustifiable risk” that one’s conduct may bring about the bad result.<sup>14</sup> However, as Nathanson (2010) correctly points out, there are two different ways in which the phrase “consciously disregards” can

<sup>14</sup> American Law Institute, *Model Penal Code*, sec. 2.02(2)(c).

be understood: if what counts is *the mere performance* of the action that is likely to cause harm, then it trivially follows that the one who performs the action in question consciously disregards the risk. But things may change if we consider the broader context. For example, if one makes a serious *effort to reduce the risk of harm* prior to the action taken, it is no longer clear that one consciously disregards the risk (Nathanson 2010: 270). Relying on Nathanson's observation, it is possible to argue that the reasons Rodin invokes to establish that certain military actions are performed recklessly do not support such assessment at all.

Let us return to the previously mentioned example of an army pilot *S* who performs the action *F* and thus risks the lives of five innocent people. We may set aside whether *F* is morally right or wrong and focus on whether *S* acts recklessly. Consider two different ways in which *S* performs *F*:

- (a) *S* performs *F* without even trying to minimize the risk of causing harm to the five innocent people.
- (b) *S* performs *F* after making a considerable effort to reduce the risk of harm to the five innocent people.

Now, *S* either acts recklessly in both (a) and (b), or he acts recklessly only in (a). But it should be emphasized that, contrary to what Rodin seems to be suggesting, neither account entails that the actual outcome of the action determines reckless behavior. Namely, if what counts is the mere performance of the action (say, dropping the bomb), *S* in both cases acts recklessly irrespective of whether the harm actually occurs (i.e., regardless of whether the bomb actually kills the five). If conduct is reckless, it is reckless even if by sheer luck things do not turn out badly. Similarly, if we say that *S* in (b) does not act recklessly because he takes the necessary precautions prior to the action, we will not withdraw that judgment if the harm actually does occur. The occurrence of a bad outcome, therefore, is not sufficient evidence that *S* consciously disregarded the risk and behaved recklessly.<sup>15</sup> As already noted, since recklessness and negligence are common phenomena, there are good reasons to think that reckless and negligent harm of innocent people occurs in every war. But to firmly establish that a military operation has been recklessly or negligently conducted, it is not enough to point out that it has resulted in the high number of noncombatant casualties.<sup>16</sup>

<sup>15</sup> The same applies to negligence. A negligent person acts without being aware that his conduct is (potentially) harmful. The reason why negligence is considered culpable is that a person should be aware of the harm his conduct may cause. But again, if the harm actually occurs as a result of his conduct, that is not yet evidence that this person acted negligently. For the argument that negligence is in fact *not* culpable, see L. Alexander and K. Ferzan (2009: 69-85).

<sup>16</sup> Here I side with those authors who argue that the results of our actions do not affect blameworthiness at all. For example, see L. Alexander and K. Ferzan (2009: 171-196).

Furthermore, even if it is true that some military operations (such as those carried out by Western nations) *unjustifiably* exposed noncombatants to the risk of harm, that does not yet mean that they were performed recklessly. Exposing others to “unjustifiable” risk is only a necessary but not a sufficient condition for recklessness. What remains open is whether those who engaged in such military actions “consciously disregarded” the risk they imposed upon noncombatants. Namely, does one act recklessly if one exposes others to unjustifiable risk of harm but makes a considerable effort to reduce that risk? Consider a hypothetical case in which one reasonably, but falsely, believes that the risk imposed by one's conduct is justifiable. And if one also makes a significant effort to minimize that risk, should we say that one acts recklessly? It is far from evident that we should say that.

Returning to the distinction between permissibility and blameworthiness (culpability) introduced in the previous section, it may as well turn out that it is not *morally permissible* to expose noncombatants to a high risk of harm. To that extent, Rodin is right to point out that noncombatants have rights not to be harmed and that it is difficult to justify the risks military operations impose on them. Whether such imposition of risk is morally permissible, it seems to me, ultimately depends on which account of the moral permissibility is correct. But even if it is not morally permissible to expose noncombatants to a high risk of harm, that does not mean that such imposition cannot be performed in a nonculpable way.<sup>17</sup> As long as we are careful to distinguish between permissibility and blameworthiness (culpability), such possibility cannot be ruled out.

Another way in which one may respond to the above argument is to cast doubt on (2). If some acts of war are reckless or negligent, does that mean that they should also be described as acts of terrorism?

One could support an affirmative answer by appealing to what seems to be an analogous case in law. Since terrorism, as it is usually conceived, involves intentional killings of innocent people<sup>18</sup>, it is not surprising that it is often compared to murder. While law commonly distinguishes between murder, manslaughter and negligent homicide—and this classification essentially depends on the culpable state with which a criminal act is performed—it is important to notice that one does not need to intentionally cause death in order to be liable for murder. Although the degree

<sup>17</sup> Now, just as it seems possible to act nonculpably while imposing an unjustifiable risk to others, it also seems possible to act culpably while imposing a justifiable risk to others. Consider the following example. Suppose that some military operation justifiably imposes a high risk of harm on two innocent people in the course of preventing a massive terrorist attack. But suppose further that a combatant *S*, who acts as a member of the team preventing the attack, somehow ensured not to have the option of preventing a terrorist attack without risking collateral damage (e.g., *S* deliberately destroyed the weapon that enables one to accurately discriminate between terrorists and civilians). Although the risk imposed on the civilians is justifiable, it might be argued, the military operation is still carried out in a culpable way.

<sup>18</sup> Cf. McMahan (2009: 360).

of culpability usually varies depending on whether death is caused intentionally, recklessly or negligently, there are circumstances where this is not the case. Sometimes the legal and moral culpability for reckless and intentional killings is the same.

These circumstances are also mentioned in the American Model Penal Code, which states that homicide can qualify as murder if it is “committed recklessly under circumstances manifesting extreme indifference to the value of human life”.<sup>19</sup> Needless to say, it will sometimes be a matter of dispute whether one’s behavior manifests such indifference, but that does not mean that there are no cases for which it is more than clear that they fall under that description. For example, a person who starts shooting into a room full of people may not intend to harm anyone, but since the chances of someone getting harmed in such circumstances are extremely high, it seems safe to say that the value of human life is of no great concern to this individual (cf. Husak 1994: 65).

The circumstances of war, however, are such that many military operations are like shooting into a room full of people. And if so, then being reckless in war is not much different from being extremely indifferent to the value of human life. If terrorism is like murder, and if one can sometimes be liable for murder even when death occurs as a result of mere recklessness, then it is plausible to think that reckless harm in the circumstances of war can also qualify as terrorism.<sup>20</sup>

To respond to this argument, it should be noted that there are two ways in which we may think about culpable mental states in the context of war. We may either attribute such mental states to (a) an individual combatant, or (b) to a collective of which an individual combatant is part. As mentioned before, there are no good reasons to believe that states such as recklessness and negligence do not exist in warfare, especially at the individual level. It would be unreasonable to deny that the acts of some individual combatants can indeed display indifference to the value of human life. But whether such indifference can be attributed to a military as a whole seems to be an entirely different matter.

<sup>19</sup> American Law Institute, *Model Penal Code*, sec. 210.2(1)(b).

<sup>20</sup> Noam Chomsky is an excellent example of someone who believes that some allegedly reckless or negligent acts of war clearly display the attitude of extreme indifference to the value of human life and that such acts are often even more repulsive than murder. For example, his view on Clinton’s decision to bomb a pharmaceutical plant in Sudan in 1998 is clearly expressed in his discussion with Sam Harris. Chomsky writes: “[I]t just didn’t matter if lots of people are killed in a poor African country, just as we don’t care if we kill ants when we walk down the street. On moral grounds, that is arguably even worse than murder, which at least recognizes that the victim is human. [...] There was clear negligence – the fate of probably tens of thousands of African victims did not matter” (<https://samharris.org/the-limits-of-discourse/>). It remains unclear, however, why Chomsky is so sure that the fate of these people “did not matter”. If his assessment is exclusively based on the number of civilian casualties, then, as suggested above, there is a reason to take it with a grain of salt.

The obvious problem here is that a collective cannot have mental states, so thinking of a military as being indifferent to the lives of others, it might be pointed out, does not make much sense. And taking into account the suggestion that our practice of blame is essentially dependent on the attitudes manifested by one's behavior, this further raises a question of whether blaming the military as a whole could ever be appropriate. But this would be too quick. As Thomas Scanlon argues, a collective can be the object of blame if it is organized in a way that makes it "responsive to reasons", and a collective is responsive to reasons only if there are procedures that determine its conduct (Scanlon 2008: 162-65).

This surely applies to military forces. Military forces can be the object of blame because of their internal structure: since their actions are guided by formal rules, it seems that such collectives can indeed be responsive to different kinds of considerations. And blame becomes appropriate when some of these considerations—such as well-being of innocent people—are not sufficiently taken into account.

Arguably, whether one takes such considerations into account is typically manifested by what one does, but some actions cannot properly be understood unless they are placed in a wider context. For example, actions performed on the battlefield are the final product of various human interactions that take place on many different levels. Zohar strongly emphasizes this point when he observes that it is a mistake to think of combatants as "individual agent[s]" because their "individual contributions can only be understood in the context of collective action" (Zohar 2007: 737-40). And it is only in the context of collective action, he argues, that the search for the differences between terrorism and war makes sense (Zohar 2007: 741).

Following up on Zohar's proposal, we indeed find that the well-being of civilians plays a key role in determining the conduct of the military as a whole. Military conduct is subject to various rules and constraints specifically established to reduce harm to the civilian population. Since the risk of harm to which innocent people are exposed in the circumstances of war is extremely high, the existence of such rules and constraints shows that the military as a whole is sensitive to the value of human life.

It is for this reason that we may question the second premise of the above argument. Even if, due to recklessness or negligence, a military action causes harm to innocent civilians, it is wrong to think of such conduct as being morally on a par with terrorism. Namely, such reckless and negligent conduct still takes place within the collective that imposes all sorts of measures to protect civilian lives. Of course, that does not mean that reckless or negligent conduct, when it does occur, should be exempt from moral criticism, but it does mean that it is not appropriate to put it in the same moral category with terrorism. While these measures, embodied in the Laws of Armed Conflict, are not imposed to prevent actions under highly risky

circumstances, they are imposed to reduce the risk of collateral damage as much as possible. The conduct of terrorist organizations, obviously, is not constrained by similar measures. Hence, once this broader view is taken, one realizes that we should not equally condemn harmful conduct that occurs within a collective aiming to minimize harm to innocent people and harmful conduct that occurs within a collective gathered around the plan to inflict harm on innocent people.

## 5. FINAL REMARKS

I have suggested that the best way to approach the question of moral difference between terrorism and war is to avoid moral justification altogether and focus instead on the attitude that terrorist actions display. Our condemnation of terrorism is not grounded in the thought that terrorism, unlike war, is never morally justified, but in the morally repugnant attitude that terrorist actions manifest toward human lives. Even if acts of war cause more civilian casualties than terrorist attacks, I have claimed, that is not sufficient evidence that they are performed recklessly or negligently. Furthermore, the claim that such acts manifest indifference to the value of human life becomes less plausible when one considers them through the lens of collective agency. In the second part of the paper, I have applied this approach to evaluate the view, shared by some contemporary authors, that certain military actions carried out within the so-called “war on terror” are morally on a par with terrorism. I have claimed that the arguments invoked in defense of that view are not as strong as they may appear. My aim in this part of the discussion was modest: I did not argue in favor of the strong claim that those actions *are not* morally on a par with terrorist actions, but rather that the view that they *are* morally on a par with terrorist actions is not adequately supported.

All that being said, one may reasonably wonder whether the moral difference between terrorism and war can properly be accounted for even if one takes the above approach and sets aside the problem of moral justification. Namely, it could be assumed, following Walzer, that “[i]n rare and narrowly circumscribed cases, it may be possible, not to justify, but to find excuses for terrorism” (Walzer 2006: 7). Although Walzer does not elaborate further on the distinction between “justification” and “excuse”, he probably has in mind something like this: to say that terrorism can sometimes be excused but not justified is to say that there are circumstances under which terrorism can cease to be blameworthy but that there are no circumstances under which it can cease to be wrong.

But then, does that mean that there are circumstances in which terrorist acts do not manifest indifference to the value of human life? And if so, does that further mean that terrorism and war are morally close to each other after all? One way to approach these questions is to think about what kind of circumstances could those possibly be. In an earlier work he describes such circumstances as those in which

“a threat to human values [is] so radical that its imminence would surely constitute a supreme emergency” (Walzer 1977: 253). He also believes that the Nazis in fact posed such threat at the beginning of World War II and that the terror bombing of German cities that took place may indeed have been the only available response (see Walzer 1977: 255-263).<sup>21</sup>

However, the reason why it is reasonable to say that terrorism in such circumstances can be excused (and hence not subject to blame) is that the options one faces are limited. In such circumstances, it might be argued, the attitude of indifference can be attributed to one's conduct *no matter what one does*. In other words, should we not say that one is indifferent to the value of human life not only if one deliberately harms innocent people but also if one allows mass atrocities to take place when one could have easily prevented them? But these are the circumstances that terrorists, in the usual sense of that term, never face. Their actions are not forced by the unfortunate circumstances. On the contrary, they choose to be indifferent.<sup>22</sup>

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<sup>21</sup> Walzer's “supreme emergency” argument is criticized by Coady 2004.

<sup>22</sup> Compare the following statement by Walzer: “Terror is a strategy that has to be chosen from a fairly wide range of possible strategies. It is always a choice” (Walzer 2006: 7).



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