

CONTEMPORARY JUST WAR

Theory and Practice



TAMAR MEISELS



‘Tamar Meisels restores social realities to the discussion of just war. This outstanding book presents a provocative, powerful, and eloquent alternative to the reigning apolitical revisionism applicable only to a far better world than this. Socially adrift abstraction here meets a formidably grounded challenger specifying principles that can be action-guiding in the world of violent groups that confronts us now.’

—Henry Shue, *University of Oxford, UK*

‘Tamar Meisels’ *Contemporary Just War: Theory and Practice* is a superb discussion of the major debates in contemporary just war theory and their bearing on the conflicts of today. Hers is a lucid and humane voice that speaks with precision to today’s major disagreements on the morality of war and also speaks with compassion to the difficult decisions people face in war, seeking to maintain their moral bearings. Those of us who have admired Tamar Meisels’ writings on these topics can now be grateful they have been developed into a single, sustained discussion that everyone concerned with these issues will want to read.’

—Cheyney Ryan, *University of Oxford, UK*

‘With this accessible account of just war theory, Tamar Meisels has done us all a great service in showing us why we should still hold onto the main tenets of Michael Walzer’s traditional view, and why revisionist critiques of that account fail to the degree that they cannot bridge “deep” moral theory with practical moral and legal guidance in war. Here, Meisels walks us through concrete cases to do with civil war, targeted assassinations of nuclear scientists, and pre-emptive strikes. With her feet firmly on the ground and with young soldiers often in mind, she makes it clear that just war theory – traditionalist, revisionist, or a convergence of both – can’t stay in the clouds, but needs to speak directly to the realities of war.’

—Nancy Sherman, *Georgetown University, USA*



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CONTEMPORARY JUST WAR

This book offers a renewed defense of traditional just war theory and considers its application to certain contemporary cases, particularly in the Middle East.

The first part of the book addresses and responds to the central theoretical criticisms levelled at traditional just war theory. It offers a detailed defense of civilian immunity, the moral equality of soldiers and the related dichotomy between *jus ad bellum* and *jus in bello*, and argues that these principles taken together amount to a morally coherent ethics of war. In this sense this project is traditional (or “orthodox”). In another sense, however, it is highly relevant to the modern world. While the first part of the book defends the just war tradition against its revisionist critics, the second part applies it to an array of timely issues: civil war, economic warfare, excessive harm to civilians, pre-emptive military strikes, and state-sponsored assassination, which require applying just war theory in practice. This book sets out to reaffirm the basic tenets of the traditional ethics of war and to lend them further moral support, subsequently applying them to a variety of practical issues.

This book will be of great interest to students of just war theory, ethics, security studies, war and conflict studies, and IR in general.

Tamar Meisels is Professor of Political Theory in the Department of Political Science at Tel Aviv University, Israel. She is author of *Territorial Rights* (2005), *The Trouble with Terror* (2008) and co-editor of *Soft War: The Ethics of Unarmed Conflict* (2017, with Michael L. Gross).

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Theory and Practice

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First published 2018
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

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British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data

A catalog record for this book has been requested

ISBN: 978-1-138-04366-4 (hbk)

ISBN: 978-1-138-04369-5 (pbk)

ISBN: 978-1-315-17297-2 (ebk)

Typeset in Bembo and Stone Sans
by Florence Production Ltd, Stoodleigh, Devon, UK

For my beloved aunt, Marianne Meisels, of blessed memory



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PREFACE

In the course of Israel's 2014 operation "protective edge," four Israeli mothers of combat soldiers in elite units published a letter calling on Prime Minister Netanyahu to refrain from endangering their sons in order to minimize collateral damage to Gazans. These mothers, joined by a handful of Facebook supporters, were responding to reports that the IDF (Israel Defense Forces) rules of engagement place Israeli soldiers at considerable risk in attempts to spare enemy civilians. Specifically, the mothers complained about instructing soldiers to hold their fire in cases of doubt as to whether a person is a civilian or combatant.¹ The letter described the resultant risks to Israeli soldiers as unacceptable to their mothers, and closes by reminding the Prime Minister that "the lives of our sons, daughters, brothers and sisters—are more important than the lives of the enemy's civilians."² Subsequently, some bumper stickers emerged, stating that: "The lives of our soldiers take precedence over those of enemy civilians."

Far from a mass popular movement, the opening lines to the mothers' letter nonetheless expresses a common, near consensus, Israeli sentiment. Roughly translated: "No cause could be more just than fighting terrorist organizations that endanger the security of millions of Jews. We are proud of our sons for taking part in this important mission."³

To what extent should such convictions affect our rules of engagement? This is essentially the central divide within contemporary just war theory: should justice of cause and its urgency influence the way we fight? Nothing could be less theoretical for Israelis. If I were asked to describe the answer developed in the following chapters while standing on one leg, I would say: we should sympathize with the mothers, without incorporating their personal perspective into our military handbooks.

This book brings together various wartime issues I have been working on in recent years. My own Israeli perspective is undeniable, nor would I deny it if I

could. Between 2012 and 2016, my research was supported by the Israel Science Foundation (Grant no. 45/12). The majority of chapters in this book are based on previously published articles, written roughly within or around this time frame. I thank the following journals for allowing me to re-use these materials here, as well as for the helpful comments and suggestions offered by their anonymous reviewers:

“Economic Warfare—The Case of Gaza,” *Journal of Military Ethics*, Vol. 10, No. 2 (2011), 94–109.

“Preemptive Strikes—Israel and Iran,” *The Canadian Journal of Law and Jurisprudence*, Vol. 25, No. 2 (July, 2012), 447–463.

“In Defense of the Defenseless—The Morality of the Laws of War,” *Political Studies*, Vol. 60, No. 4 (December 2012), 919–935.

“Assassination: Targeting Nuclear Scientists,” *Law and Philosophy*, Vol. 33, (2014), 204–234.

“Fighting for Independence—What Can Just War Theory Learn from Civil Conflict?” *Social Theory and Practice*, Vol. 40, No. 2 (April 2014), 304–326.

I am grateful to Tamar Caner for her research assistance on civil war, and useful discussion and comments on earlier drafts of Chapter 3.

Previous versions of the practical parts of this book, specifically Chapters 4–7, were presented at various workshops and seminars in Israel and abroad. Most memorably, my arguments on economic warfare in Gaza were presented at the Nuffield Political Theory Workshop in Oxford, and at the Law and Philosophy Workshop at the Hebrew University in Jerusalem. Drafts of Chapters 6–7, concerning Israel’s dilemmas in the face of Iranian nuclear development, were presented at the *Faculty Seminar de Theorie Politique* at *Sciences Politiques* during a short teaching stay in Paris in 2012, and at the Oxford Institute for Ethics, Law and Armed Conflict/Changing Character of War, lunchtime seminar. The latter forum is always invaluable to me in forming the final version of my arguments. I thank the participants of these seminars, among many others, for their critical comments on some very contentious issues.

Various friends and colleagues offered written comments and/or the opportunity for discussion and debate along the way. Both types of contribution have proved equally valuable. Special thanks are due to Yitzhak Benbaji, Eyal Benvenisti, Richard Brunaugh, Astrid von Busekist, Ariel Colonosmos, David Enoch, Cecile Fabre, Chaim Gans, Alon Harel, Michael Gross, Robert Johnson, Seth Lazar, Judith Lichtenberg, David Luban, Jeff McMahan, David Miller, David Rodin, Guy Sela, Daniel Statman, Henrik Syse, Jeremy Waldron, Michael Walzer, Lea Ypi and Ruvi Ziegler.

Of those listed, many disagree with my views on Israel, others disagree with my traditional approach to just war theory; some object to both. To those who engaged with me in heated arguments and passionate debates, I am all the more grateful for the time and attention contributed to my work.

Notes

1. Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1, June 8, 1977), Article 50 (1) requires that “in case of doubt whether a person is a civilian, that person should be considered to be a civilian.” www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079.
2. www.nrg.co.il/online/1/ART2/601/474.html.
3. Ibid.



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INTRODUCTION

The existing laws of armed conflict, and the traditional rules of just war after which these laws are fashioned, comprise three basic principles: civilian immunity, the moral equality of soldiers and the independence of *jus in bello* (the laws regulating how a war is fought) from *jus ad bellum* (the legitimacy of a state engaging in war). All three of these tenets are gradually losing general support both in theory and in practice. All three require a renewed defense if the laws and customs of war are to withstand the ravages of time and to continue to command compliance. Why may we kill all combatants during combat, while all civilians remain immune from direct attack? If only defensive war is legitimate, how can the rights and liabilities of its individual participants remain independent of the justice of their cause? Why should soldiers fighting an aggressive war continue to enjoy immunity from prosecution for murder? And how can an unjust war fulfill the legal and moral requirements of necessity and proportionality? If a war is aggressive, futile and injurious, how can any of its measures be necessary and proportionate?

These are old philosophical issues, but they raise contemporary questions as increasing numbers of belligerents and bystanders begin to view the traditional rules and customs of war as obsolete. Terrorists defy civilian immunity and claim their right to target the citizens of democracies who vote, pay taxes and otherwise support regimes that the terrorists regard as oppressive. Governments question the immunity of civilians who condone terrorism, harbor terrorists, act on their behalf or serve as their human shields. When states resort to economic warfare—imposing sanctions, blockades or outright sieges on a population—civilians are placed at the forefront of the fight, as they are often the first to suffer.

States and paramilitary organizations alike increasingly view their justifications for war as lending them greater license with regard to its conduct. Terrorists invoke “liberation” and “last resort” as justifications for murdering civilians, while states defy the international legal prohibitions on torture, assassination and aggression in the name of self-defense. Philosophers, for their part, question the morality of

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modern legal arrangements. Some propose deeper moral principles of war that might replace our older moral norms and intuitions, and possibly effect changes in the laws of armed conflict. Contemporary just war theory is deeply divided on these issues. This book sets out to reaffirm the basic tenets of the traditional ethics of war and to lend them further moral support, subsequently applying them to a variety of practical issues.

The definitive account of just war theory in modern times appears in Michael Walzer's classic *Just and Unjust Wars*, which forms the theoretical point of departure both for its advocates and its critics.¹ Opponents of the just war tradition question whether its traditional tenets, reflected in our laws of war, correspond to any deep moral principles. This critical approach is represented most prominently in the work of Jeff McMahan, who denies that existing legal rules reflect the deep morality of war.² While traditional rules may be efficacious in regulating war, McMahan argues that they cannot represent an ethics of war because their corresponding moral principles are false: the reasons for fighting a war to begin with (just or unjust, defensive or aggressive) cannot be morally detached from the very license to fight and kill.³ Accordingly, just and unjust combatants cannot be morally equal. If killing in war is justified as self-defense, then only soldiers on the defensive side can possess this license, while their aggressive opponents have no moral right to fight and kill. Finally, not all civilians are innocent or non-threatening, so there can be no deep moral justification for their automatic immunity as a group.

Morally speaking, McMahan argues, liability or immunity to harm in war ought to be judged case by case, on the basis of individual contribution and responsibility for injustice, in the same way as we judge liability in civilian life. According to McMahan, our traditional rules of war, as well as our international laws of armed conflict, are out of step with our everyday moral beliefs, though they may have their use in limiting the overall extent of suffering in war.⁴

These challenges are not easy to answer. They have been adopted and developed in various directions by a variety of contemporary scholars addressed in this book, such as Cecile Fabre and David Rodin. Some of these arguments, particularly on combatant inequality, have their roots in the writings of Francisco de Vitoria's "On the Laws of War". Writing in the sixteenth century, Vitoria denied that soldiers fighting on the objectively unjust side act permissibly when they fight and kill their opponents.⁵ Gregory Reichberg argues that the contemporary separation between *jus in bello* and *jus ad bellum* is actually a modern development, and not the traditional view as Walzer presents it. He points out that

From the thirteenth to the seventeenth centuries (Aquinas to Grotius), concerns that now go under the heading of *jus in bello* were in fact treated largely as an extension of *jus ad bellum*. On this understanding, belligerent rights attached only to the party that was possessed of a just cause. By virtue of its guilt, the opposing party possessed no such rights, and for this reason, there could be no set of *in bello* rules that applies to both sides, just and unjust, simultaneously.⁶

Consequently, many of Walzer's critics have dubbed their revisionist morality of war as "neo-classical," referring to his *Just and Unjust Wars* as the "orthodox (or traditional) account," of killing in war.⁷ Revisionists also describe their critiques as "individualist," because they aim to supply a careful and precise account of individual rights and responsibilities in times of war, as opposed to the traditional understanding of war as essentially a collective enterprise.⁸ The result is the emergence of not one but two reigning theories of the just war. Following the most prominent writers in both schools of thought, I refer to Walzer's account as the just war tradition, or traditional just war theory, and to his critics' accounts of the morality of war as revisionist theory.⁹

The first part of this book addresses the central theoretical challenges posed to traditional just war theory, and answers its critics. It offers a detailed defense of civilian immunity, the moral equality of soldiers and the related dichotomy between *jus ad bellum* and *jus in bello*, and argues for their moral coherence as an ethics of war. In this sense my project is "old school" (or "orthodox"). As such, it is distinct from the majority of contemporary accounts of the morality of war, most of which criticize the existing rules and question their moral validity. In a further sense, however, the book is also highly contemporary. While it affirms the just war tradition, it further applies it to an array of timely issues: civil war, economic warfare, excessive harm to civilians, preemptive military strikes, and assassination, which require applying just war theory in practice.

Two preliminary points are in order with regard to these practical sections of the book. First, while the theoretical analysis in Part I offers a moral argument for the traditional rules of practice, the revisionist, or "neo-classical," approach is never disregarded. These two competing ethics of war often complement each other, contributing different perspectives and helpful insights in hard cases.

Where these accounts are at odds with each other, the debate between them nonetheless assists our moral thinking on practical cases. Quite plausibly, both parties of opinion have a portion of the truth on their side, as John Stuart Mill thought most likely in cases of deep ethical disagreement.¹⁰ Neither account is ignored or downplayed here, either in the discussions of theory or in those of the practice of war.

Second, the particular tactics and dilemmas of modern warfare considered in Part II of the book draw heavily on the Israeli experience. This is not merely a personal preference. For all the ongoing conflicts worldwide, the Middle East, particularly Israel, remains a source of international interest and concern. Within this region, Israel alone is home to free and open public debates of its military conduct. Israel has also been the focus of considerable academic attention from theorists of the just war worldwide.

In practice, Israel and its neighbors offer a variety of interesting military dilemmas for theorists to engage with. Bordering Israel in the north, Syria is the primary ongoing example of civil conflict discussed in Chapter 3. Israel's incursions into the Gaza Strip and its restrictions on Gaza's economy form the focus of discussions throughout Chapters 4 and 5. Iran is another big issue for Israelis.

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Questioning whether early military strikes are ever justified, Chapter 6 considers the morality of a preemptive Israeli strike against Iran's nuclear facilities. Chapter 7 asks whether targeting scientists working on a nuclear project can ever be a legitimate alternative, or a complementary measure, to full-scale war.

More specifically, the book proceeds as follows: Chapters 1–3 set out the theoretical background for the subsequent analysis of these various issues. Chapter 1 reaffirms the “moral equality of soldiers” defending it against a renewed wave of philosophical criticism and lending it further support. So long as international conflicts lack an effective common authority to adjudicate disputes and administer justice, this first chapter argues, participants must remain equally at liberty to interpret and defend their natural rights as they see fit.

Moreover, for a variety of reasons, individual soldiers cannot be proved personally guilty of injustice, and ought therefore at least to be presumed innocent. Absent proof of individual liability beyond reasonable doubt, holding soldiers personally responsible for their nation's cause for war would amount to collective punishment. Respect for individual human rights requires recognizing soldiers' symmetrical standing in battle, fashioning them with equal permissions and liabilities, rather than penalizing or disabling some of them for their nation's collective causes.

Chapter 2 offers a moral justification of the traditional wartime immunities guaranteed by law to all civilians and prisoners. Some of these legal immunities appear artificial, even contradictory to moral reasoning, because many civilians and prisoners are both guilty of injustice and quite eminently dangerous.¹¹ McMahan suggests that sometimes these legal protections are senseless and inconsistent with our everyday moral thinking about guilt and innocence.¹²

Why refrain from directly targeting villagers who harbor terrorists, or require soldiers to risk their lives in order to separate terrorists from their civilian supporters? Why not torture a suspect who refuses to divulge life-saving information, thereby placing many innocent people in harm's way? Should we always refrain from killing prisoners, even if keeping them alive endangers soldiers on the defensive side and considerably hampers the advancement of a just cause? Why is it legal to kill innocent young soldiers, but illegal to assassinate their warmongering civilian leaders who control the army, or target the civilians who put them in power?

On some of these points, McMahan argues, the laws of war diverge significantly from its deep morality. While the legal protection of civilians and prisoners has merit as a rule, some civilians and prisoners (those fighting for injustice) may be morally liable to attack in an attempt to avert an unjust threat in which they are participants or for which they are responsible.¹³ More generally, revisionist just war theorists suggest that the laws of war diverge significantly from its deep morality: at war's deepest moral level it is sometimes justified to violate these legal protections.¹⁴

As against this, I argue that the various legal protections in wartime do not diverge from morality at all. They are soundly based on the age-old moral prohibition on attacking the defenseless, which is both timeless and cross-cultural.