

# Correspondence

Just War Theory and the  
2008–09 Gaza Invasion

Davis Brown

Michael L. Gross and  
Tamar Meisels

Jerome Slater

*To the Editors (Davis Brown writes):*

Jerome Slater's normative treatment of Israel in the 2008–09 Gaza War spotlights an often misunderstood domain of the security studies field: just war theory.<sup>1</sup> This is a largely understudied area, given its normative framework of analysis in a field that historically is largely devoid of norms. My sense is that this journal may be becoming a forum for the reintroduction of this framework to the field, thanks to Slater's article and Robert Pape's call for a revised standard for humanitarian intervention.<sup>2</sup> As a student of the ethics of war, I welcome this development. But precisely because just war theory is understudied, it is still highly prone to oversimplification and abuse. Slater regrettably engages in both in his attempt to apply it to the conduct of Israel in the Gaza War.

## JUST WAR THEORY OVERSIMPLIFIED

Slater characterizes the two most important criteria of *jus ad bellum*, or the right to go to war, as "just cause" and "last resort" (p. 52). This claim is not supportable in the just war theory framework or literature. Rather, the three most important criteria, first articulated by Thomas Aquinas and more recently appropriately characterized by James Turner Johnson as "deontological," are (1) proper authority, (2) just cause, and (3) right intent. Although self-defense is widely recognized among scholars as a just cause for war, the criterion is not defined as "moral purpose," as Slater defines it (p. 52).<sup>3</sup> Rather, for Israel to have had just cause in the Gaza War, it must have had some injury inflicted on it. The more difficult question in evaluating just cause today concerns the closely related criterion of proportionality of cause.<sup>4</sup> An injury, once inflicted, must still be great enough to warrant the use of military force as an appropriate means of remediation.

Curiously, Slater overlooks the deontological criterion to which his factual presenta-

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1. Jerome Slater, "Just War Moral Philosophy and the 2008–09 Israeli Campaign in Gaza," *International Security*, Vol. 37, No. 2 (Fall 2012), pp. 44–80. Further references to this article appear parenthetically in the text.

2. Robert A. Pape, "When Duty Calls: A Pragmatic Standard of Humanitarian Intervention," *International Security*, Vol. 37, No. 1 (Summer 2012), pp. 41–80.

3. Thomas Aquinas, *Summa Theologica*, trans. Fathers of the English Dominican Province (Chicago: Encyclopaedia Britannica, 1952 [1274]), pt. ii-ii, q. 40, art. 1; and James Turner Johnson, *Morality and Contemporary Warfare* (New Haven, Conn.: Yale University Press, 1999), p. 42.

4. Davis Brown, "Proportionality in Modern Just War Theory: A Tort-Based Approach," *Journal of Military Ethics*, Vol. 10, No. 3 (September 2011), p. 213. This criterion is also called "proportionality

tion is the most relevant: right intent. The original Thomist definition is that the true motivation for war must be the advancement of good or avoidance of evil; in its secular iteration, right intent means that the belligerent's motivation must be genuinely to remediate the injury, not exact revenge or satisfy a lust for power. This criterion is considerably closer to Slater's "moral purpose" argument. (The criterion of proper authority, that the belligerent be a state instead of a nonstate actor, is easily satisfied for Israel but not for Gaza, a matter that I take up momentarily.)

The criterion of last resort, which Slater claims is central to just war analysis, did not originate with Thomas Aquinas. Rather, it emerged later from several strands of moral thought: that peaceful resolution of disputes is preferable to war, that war should be undertaken only when necessary, and that there is a general presumption against war. Many ethicists of war would challenge Slater's claim that "all . . . nonviolent means of achieving a just cause [must] have been tried and failed" (p. 52). There is always another potential solution in the distance that has not yet been considered, always a remote possibility that another round of talks will achieve a breakthrough, always the option of simply allowing the injury to go unredressed (which is often the immoral option). A requirement that every single peaceful solution be tried, no matter how futile or absurd, is unreasonable. For this reason, last resort is probably the most criticized of the just war criteria, and the most abused by critics of war and of particular wars.

Furthermore, last resort is among the criteria that are not widely regarded as central to the just war theory analysis. The peripheral, or "prudential" criteria as Johnson puts it, also include proportionality of cause and reasonable prospect of success. The first three deontological criteria are *sine qua non*s for justifying military force; the failure to satisfy any one of them delegitimizes the use of force. The same is not necessarily true for the prudential criteria.<sup>5</sup> As to last resort, specifically, I and others have argued that war is not so much a last resort as it is not a first resort.<sup>6</sup>

In addition to misstating just cause and last resort, Slater oversimplifies the criterion of discrimination, which is one of the *jus in bello* components of just war theory.<sup>7</sup> While combatants do have a duty not to deliberately target noncombatants, as Slater acknowledges (p. 65),<sup>8</sup> they must also distinguish themselves from noncombatants; they may

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of ends." It is, however, distinguishable from proportionality of means, which limits the use of force against a specific target to what is necessary to render the target unusable to the enemy.

5. Johnson, *Morality and Contemporary Warfare*, pp. 42–43. Johnson also mentions the goal of peace as a criterion, following the lead of several other modern sources including the Catholic Church. I would not include it as a separate criterion because it is redundant to right intent, a position for which Johnson expresses some sympathy.

6. Davis Brown, *The Sword, the Cross, and the Eagle: The American Christian Just War Tradition* (Lanham, Md.: Rowman and Littlefield, 2008), p. 129. See also J. Daryl Charles, *Between Pacifism and Jihad: Just War and Christian Tradition* (Downers Grove, Ill.: InterVarsity Press, 2005), p. 135; Darrell Cole, *When God Says War Is Right: The Christian's Perspective on When and How to Fight* (Colorado Springs, Colo.: WaterBrook, 2002), p. 82; Jean Bethke Elshtain, *Just War against Terror: The Burden of American Power in a Violent World* (New York: Basic Books, 2003), p. 61; Johnson, *Morality and Contemporary Warfare*, pp. 34–36; and Paul Ramsey, *The Just War: Force and Political Responsibility* (Lanham, Md.: Rowman and Littlefield, 2002 [1968]), p. 275.

7. The other *jus in bello* criterion is proportionality of means, described in note 4 above.

8. Slater further characterizes "discrimination" as being between military and civilian; the more precise terms are "combatants" and "noncombatants" (which is not synonymous with civilians). This imprecision further undermines Slater's analysis, as most or all of the Gazan combatants were civilians.

not embed themselves among noncombatants or use them as human shields. Doing so does not immunize the combatants from attack, even if the attack results in greater non-combatant casualties (subject to bounds of proportionality). In such a case, the responsibility for those casualties lies not with the attacker, but with the combatants who embedded themselves among noncombatants. For Slater to hold Israel morally responsible for such collateral damage, without also holding Hamas responsible for its role in the same, is thus patently unfair.

#### JUST WAR THEORY MISAPPLIED

Slater's analysis suffers not only from a shaky understanding of just war theory, but also from its poor application. In particular, his application of just cause and proportionality is faulty.

As a preliminary matter, the Israeli-Palestinian conflict may not be conducive to just war analysis at all, because just war theory originated as a framework for judging war between states (i.e., between juridical equals). Despite widespread recognition as a statelike entity among the Muslim world, the Palestinians have neither *de jure* nor *de facto* full statehood. By that logic, they have no right or authority to take up arms against Israel; when they do, they are unlawful combatants and subject to criminal penalties. Hamas is fundamentally an insurgent group, and surely no government is reasonably expected to concede its prerogative to suppress an armed insurgency (setting aside cause for the moment). It is difficult at best to apply just war theory to a conflict in which one side does not have proper authority to wage war. To continue a meaningful analysis, however, suppose that Gaza were a state, with Hamas as its elected government.

The larger problem in applying just war theory to the Israeli-Palestinian conflict is with the criterion just cause, which is what Israel must have to legitimately attack Gaza. For Israel to have just cause, it must have been injured in some way prior to its attack, and that injury must have some nexus to the object of the attack. A strong argument can be made that the rocket attacks from Gaza into Israel prior to Israel's invasion conferred the just cause that Israel needed. Israel's injury in this case would be the destruction and loss of life from those attacks, and its loss of security from attack. If Israel has been the object of armed attack, it has an inherent right of self-defense. Indeed, the widely held consensus among ethicists of war is that just cause is satisfied when a state has been attacked. In contrast, Gaza would not have just cause, having committed the armed attack that triggered Israel's right of self-defense (and except for very limited circumstances, there is no right of self-defense against self-defense).

For Israel to legitimately attack Gaza, even with just cause, the attack still must be a proportionate response to the injury. This does not mean that Israel is limited to a tit-for-tat response; all it means is that the foreseeable good to be achieved by going to war against Gaza must outweigh the foreseeable harm from the same, all calculated under a Rawlsian veil of ignorance (i.e., without knowledge of the war's actual outcome). This criterion, proportionality of cause, is the most difficult one to apply to any conflict, because goods and harms often are not easily quantified. This criterion raises three additional problems, which are acute in the Israeli-Palestinian conflict and further complicate the just war analysis for this war. First, it is possible for the injured party to respond in a way that is so disproportionate to the injury that it confers a new just cause upon the party that committed the original injury. This is one way in which un-

just means of warfare can affect the legitimacy of a belligerent's war effort, despite its having just cause. If this complication undermines Israel's justness, then it also undermines Gaza's. Second, it is not fully settled whether a series of small injuries may accumulate to the level of injury sufficient to warrant war, and if so, what that threshold would be.<sup>9</sup> Third, the point at which an injury is too old to justify war is also not settled.

These calculuses, relating to just cause and proportionality of cause, are heavily fact driven, which brings me to a third major problem with Slater's analysis: his factual account is so one-sided as to cast doubt on his objectivity. He highlights only Jewish violence against Palestinians, mentioning virtually nothing about Palestinian violence against Jews. In actuality, each side has suffered a long pattern of violence at the hands of the other, rendering it extremely difficult to determine now which side is ultimately responsible for precipitating it.

Slater's choice of sources raises concerns. He frequently cites articles from *Haaretz*, a Hebrew-English newspaper as well known for its strongly left-liberal and opposition bias as Fox News is for its conservative bias. Slater can hardly produce an unbiased factual account when his information comes from such ideologically slanted sources. In addition, Slater cites the Goldstone report as evidence of a deliberate pattern of atrocities by Israel (pp. 53–76 *passim*). The namesake of the report, however, Richard Goldstone, published an editorial nineteen months later disavowing some of its key conclusions in light of new evidence and developments.<sup>10</sup> Slater acknowledges Goldstone's retraction (p. 73), yet continues to rely heavily on the original report. In his editorial, Goldstone concludes that despite some excesses by individual Israeli soldiers, Israel did not intentionally target Gazan civilians as a matter of policy. He notes that in 2011 Israel investigated more than 400 allegations of war crimes in Gaza; this is evidence of right intent and could also be evidence of just means, if individual soldiers are being punished for such misconduct. In contrast, Hamas has opened no investigations of war crimes by Palestinians (e.g., the deliberate targeting of Israeli civilians). Goldstone further points out that the report, which Slater uses to depict a pattern of crimes against humanity by Israel, also found evidence of similar crimes by Hamas. Slater has apparently ignored this.

#### CONCLUSION

Just war theory is a valuable framework for examining the ethical dimension of war and assessing the legitimacy of the conduct of the belligerents. It is a shame that this article—one of the few in *International Security* that highlights this understudied dimension of the field—actually exemplifies its abuse. When applied completely and objectively, and not selectively, just war theory reveals that it is far from certain whether Israel's actions are totally unjust (and the Palestinians' actions totally just).

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9. Yoram Dinstein, *War, Aggression, and Self-Defence*, 3d ed. (Cambridge: Cambridge University Press, 2001), p. 203.

10. Richard Goldstone, "Reconsidering the Goldstone Report on Israel and War Crimes," *Washington Post*, April 1, 2011.

To the Editors (Michael L. Gross and Tamar Meisels write):

In a thought-provoking piece, Jerome Slater argues that Israel's 2008–09 incursion into Gaza violated the basic principles of just war theory and international law.<sup>1</sup> Slater raises two provocative questions. First, was Operation Cast Lead, as Israelis refer to the incursion, a war of justifiable self-defense? Second, was Israel wrong to target civilian infrastructures? Pushing past Slater's long historical overview of degenerate Jewish behavior, we reach his first claim: Slater argues that Israel had no right to self-defense in launching a military campaign in the wake of Hamas rocket attacks because (1) "a state that occupies and represses another people has forfeited its claim to self-defense"; and (2) "every reasonable effort to seek a political solution must be tried before the use of force is allowable" (p. 57). Legally, these claims are demonstrably false: the United Nations Charter stipulates that every state, including Israel, has the right to self-defense in the face of an armed attack.<sup>2</sup> There is no requirement to first negotiate with one's enemy.

As regards the morality of Israel's actions, classical just war theory mirrors international law. Revisionist just war theories, on the other hand, reject the classical distinction between *jus ad bellum* and *jus in bello* and argue that soldiers who lack just cause have no moral right to kill. In this vein, Slater cites Jeff McMahan in noting that an unjust aggressor cannot claim the right to self-defense any more than a burglar can when he shoots the homeowner (p. 57 n. 43). Slater, however, misleads the reader by suggesting that this alternative morality of war would deny Israel's right to self-defense. Revisionists do not deny a nation's right to defend itself against terrorist attacks perpetrated against innocent civilians, nor do they deny that such attacks constitute just cause for war. Revisionist just war theorists confer liability on those responsible for unjust aggression or occupation—whether they be soldiers or (under highly restrained conditions) prominent civilians. According to the revisionists, these individuals may be targeted if doing so helps to end the aggression. No theory of just war condones direct attacks on ordinary civilians or permits the wholesale targeting of noncombatants. Noncombatants do not provide war-fighting aid or even indirect war-sustaining aid and have not forfeited their right to life.

Even if Israel could be likened to a bank robber, ordinary Israeli citizens are not liable for the state's actions, and Hamas is certainly not the police. Moreover, terrorizing, maiming, and murdering Israeli civilians is not a legitimate course of punishment. No serious just war theorist denies that murderous attacks against noncombatants constitute just cause for war regardless of his or her views concerning Israel's foreign or domestic policies. Consequently, when Slater writes that "a state that occupies and represses another people has forfeited its claim to self-defense" (p. 57), he is offering nothing more than his opinion. Neither of the reigning theories of just war nor international law negates Israel's right to self-defense against Hamas in Gaza. Perhaps for this reason, Slater states at the outset that "[e]ven critics of Cast Lead have mostly accepted this [the self-defense] argument" (p. 44). They could hardly claim otherwise,

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1. Jerome Slater, "Just War Moral Philosophy and the 2008–09 Israeli Campaign in Gaza," *International Security*, Vol. 37, No. 2 (Fall 2012), pp. 44–80; see especially pp. 44, 78. Further references to this article appear parenthetically in the text.

2. See Charter of the United Nations, chap. 7, art. 51, <http://www.un.org/en/documents/charter/chapter7.shtml>.

though this does not stop Slater from dedicating two-thirds of his article to advancing this patently false allegation against Israel (pp. 44–65).

Perhaps Cast Lead was launched prematurely and fails on moral grounds for this reason? As Slater notes, all schools of just war theory demand that aggrieved nations or groups turn to war only as a last resort. Two points are relevant here. First, the rocket attacks on southern Israel did not commence a day or a month before Cast Lead; the first rockets struck in 2002. By the close of 2008, more than 4,000 had been fired on Israel's southern towns. In the interim, Israel disengaged from Gaza and helped to facilitate democratic elections. Subsequently, the rocket attacks intensified until cities 30 to 40 kilometers away were being hit on a daily basis. Cast Lead was hardly precipitious.

Second, the principle of last resort applies equally to the Palestinians. True, some Palestinians tried nonviolence in the first intifada (1987–90) and to forge a peace agreement in Oslo (1993). Regardless, of all contemporary national liberation movements, none comes close to embracing terrorism the way the Palestinian movement has. Guerrillas in East Timor and Eritrea rejected terrorism entirely. Guerrillas in Kosovo, Indonesia, the Western Sahara, and even Ireland used terrorism sparingly, alongside public diplomacy and nonviolent resistance. Even in Chechnya, terrorism accounted for no more than 3 percent of all casualties.<sup>3</sup> In contrast, no less than 70 percent of all Israeli casualties are attributable to terrorism. No modern guerrilla movement (thereby excepting al-Qaida) has attacked innocent civilians with the tenacity and viciousness of Hamas and Fatah.

Still, Slater and the authors of the Goldstone report correctly note that Israel attacked “Gazan economic targets as well as other civilian infrastructures and institutions, including government institutions and police stations; schools; hospitals and ambulances; electrical generation plants and power lines; industrial facilities; fuel depots; sewage plants; water storage tanks; and various food production systems, including orchards, greenhouses, and fishing boats; and even private homes” (p. 55). This is a long and varied list; and according to international law, some targets are appropriate and others not.

First, there are technically, no dual-use targets in war; only military objectives. A facility that serves military and civilian populations may be targeted, however, as long as the collateral harm is proportionate. These targets might include electric plants, roads, industrial facilities, and fuel depots.

Second, international law prohibits the targeting of civilian infrastructures—schools, hospitals, and so on—but only if they are not being used at the time for military purposes. Hospitals used by guerrillas as command posts, as well as schools and other civilian facilities used as bases for launching rockets, storing munitions, or harboring terrorists, are legitimate wartime targets. The Goldstone report did not examine all of these instances and does not deny Israel's accusations that Hamas violated medical neutrality.<sup>4</sup>

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3. James Hughes, *Chechnya: From Nationalism to Jihad* (Philadelphia: University of Pennsylvania Press, 2008), pp. 149–150.

4. Richard Goldstone is disingenuous on this point. Chief among Israel's allegations was the use of al-Shifa Hospital as a military base. While Goldstone concludes, “On the basis of the investigations it has conducted, the Mission did not find any evidence to support the allegations made by



Clearly, some targets must be forgone altogether if securing them would inflict disproportionate harm to civilians in relation to the military advantage anticipated. Israel was certainly adhering to this rule when it refrained from attacking al-Shifa Hospital despite information that members of Hamas's leadership were hiding in its maternity ward, shielded by young mothers and newborn infants, as the former habitually placed their command and control centers in hospitals.

Third, international law unequivocally condemns attacks on economic targets, schools, government buildings, police stations, and other facilities that only provide war-sustaining aid. Not all nations, however, accept this position. The United States, for example, permits attacks on "economic objects of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability."<sup>5</sup> Just war theory also diverges on this point. Traditional just war theory does not permit attacks on civilian targets. A revisionist theory, on the other hand, would attribute a measure of liability to war-sustaining infrastructures, because these facilities and the civilians who work in them bear a measure of responsibility for a state or nonstate's war-making capability. These civilians, therefore, are legitimate targets. At the same time, because they pose no lethal threat, they may not be subdued if the attacks are accompanied by extensive casualties. Barring recourse to sophisticated, nonlethal weapons, one solution is to first evacuate the facilities.

Israel's efforts to spare civilians are noteworthy in this context. Before selecting its targets, Israel notified local residents by dropping leaflets, sending personal text messages, and making telephone calls to Gazan residents, urging them to temporarily evacuate the designated target. The Israeli Defense Forces also deployed a tactic known as "roof-knocking," setting off small, but loud, explosives on rooftops to scare people out of the battle zone prior to an aerial attack.

As Slater notes, however, such precautions are not always effective. Not all civilians are capable of fleeing: some may be physically disabled; others may be forcefully prevented from doing so. Hamas routinely responded to Israel's warnings by encouraging civilians to climb up to their rooftops to shield from attack residential buildings that Hamas used for military purposes. In any event, the casualties directly attributable to strikes on schools, universities, financial institutions, and other civilian infrastructures in Gaza were relatively low.<sup>6</sup>

Finally, international law does not allow direct attacks on civilians or facilities that provide civilian needs: sewage, water treatment plants, and agricultural fields. Proportionate collateral destruction of facilities that provide for civilian needs—sewage and

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the Israeli Government," he emphasizes that "[t]he Mission did not investigate the case of al-Shifa hospital and is not in a position to make any finding with regard to these allegations." United Nations Human Rights Council, "Report of the United Nations Fact Finding Mission on the Gaza Conflict," September 15, 2009.

5. *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M (Washington, D.C.: Naval Warfare Library, July 2007), par. 8.2, 8.2.5, [http://www.lawofwar.org/naval\\_warfare\\_publication\\_N-114M.htm](http://www.lawofwar.org/naval_warfare_publication_N-114M.htm). See also Michael N. Schmitt, "Deconstructing Direct Participation in Hostilities: The Constitutive Elements," *International Law and Politics*, Vol. 42, No. 3 (Spring 2010), pp. 697–739.

6. For example, attacks on government buildings on January 1, 2009, may have killed four people. "Israel Resumes Bombardment of Gaza," *Al Jazeera*, January 1, 2009, <http://www.aljazeera.com/news/middleeast/2009/01/2009118156881174.html>. There are, however, no detailed studies correlating collateral harm with attacks on war-sustaining targets.

water treatment plants, agricultural fields, and so on—is permissible, however, in the course of necessary military strikes.

Ultimately, the moral questions of Operation Cast Lead turn not on the targets chosen—most were indeed military objects or war-sustaining facilities—but on the large number of collateral victims. Assessing proportionality is one of the most difficult exercises of modern warfare. Proportionality does not compare the number of casualties on each side. This is a common mistake. Equal numbers of casualties on each side are not necessarily more proportionate than a lopsided outcome. Relative casualties are a function of war-fighting capability, technology, and troop numbers. And although the casualty figures from Cast Lead were lopsided, a broader view reveals a more sobering picture typical of a long attritional conflict. Since 1987, approximately 1,000 Israeli and 4,000 Palestinian civilians have lost their lives (and 500 and 4,000 combatants, respectively).<sup>7</sup>

Proportionality, instead, compares civilian casualties to the military benefits one expects to gain by launching an attack. One may therefore try to compare the number of enemy civilians killed to the number of compatriots saved by a military action. Or, one may try to quantify military benefits in terms of reducing enemy capabilities or establishing deterrence. Regardless, proportionality is an extremely elastic concept that allows field commanders almost unlimited leeway when determining whether civilian casualties are excessive.

What precautions did Israel take to avoid civilian casualties? Apart from forgoing costly targets and conveying warnings, Israel also held its fire for several hours a day throughout Cast Lead to enable Palestinian civilians to leave their houses safely and acquire basic goods, which Israel supplied. This was an unprecedented humanitarian measure in the course of war. Still, Hamas did not hold its fire.

Were civilian deaths excessive during Cast Lead? Except in the most obvious cases (wiping out a village to kill a soldier on leave is the exemplar the Red Cross uses), this question is difficult to answer absent neat algorithm to weigh innocent lives against military gains. Even counting casualties is fraught with ambiguity. Were the roughly 300 Palestinian police officers and cadets who lost their lives, for example, civilians or paramilitary troops?

In asking these questions, one should also ask whether Israel might nevertheless have reduced the number of collateral casualties during the operation. With different rules of engagement, precision weapons, nonlethal technologies, and more imaginative thinking, the answer is “most probably.” These are vital questions to ask and ones that many Israelis are trying to answer. Somehow, though, we doubt that Hamas will ever ask whether they can kill fewer Jews the next time around.

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7. B'tselem, the Israeli Information Center for Human Rights in the Occupied Territories, <http://old.btselem.org/statistics/english/Casualties.asp>.



*Jerome Slater Replies:*

There are many depressing aspects of the Israeli-Palestinian conflict, as the letters by Davis Brown and Michael Gross and Tamar Meisels illustrate: it is hard to think of any other long-standing conflict in which the most important facts are so obvious and incontrovertible, yet seem to matter so little.<sup>1</sup> Although Brown's letter purports to be about my supposed misunderstanding of just war theory, the real issue is our apparent difference about the most important facts in this case. Nonetheless, I begin by addressing the just war issues that he raises.

JUST WAR THEORY

There is no single just war theory whose every principle must be applied in all cases, but rather a general set of principles—some embodied in international law, some not—by which we morally judge war. Some just war theorists emphasize (or call by different names) certain principles; others focus on different ones. Consequently, in analyzing different cases, one need not mechanically proceed through a checklist of every just war principle, because not all of them will be equally compelling or relevant; rather, informed judgment—and in the case under consideration here, plain commonsense—is required.

In the case of Israel's history of attacks on noncombatants and their institutions, especially in "Operation Cast Lead," the massive Israeli three-week attack on Gaza in 2008–09, I argue that the most important principles were those of just cause, last resort, discrimination, and noncombatant immunity.<sup>2</sup> Brown claims that they should have been the principles of right intent, proper authority, and proportionality. In addition, he maintains that the principle of last resort is too uncertain or ambiguous to be useful, and that my argument that Israel failed the principle of discrimination—that is, the need to "discriminate" or distinguish between military and nonmilitary targets—is wrong, because I do not take into account Hamas's alleged use of Gazan civilians as human shields.

First, I do not consider the principle of right intent because it is subsumed under, and is indistinguishable from, that of just cause: Was Israel's true intention to defend itself from armed attacks by the only means it could, or was its actual intention to crush resistance to its occupation and maintain its repression of the Palestinian people?

Second, I do not consider the principle of right authority because it is not relevant in this case. Moreover, it could, as Brown unwittingly demonstrates, lead to absurd conclusions—as when he writes that, by the logic of right authority, "the Palestinians not being a state . . . have no right or authority to take up arms against Israel." That is, because it is a recognized state, Israel satisfied the right authority principle, but Gaza, because it is not a state—and Israel would not allow it to become one—did not.

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1. Davis Brown, "Correspondence: Just War Theory and the 2008–09 Gaza Invasion," *International Security*, Vol. 38, No. 1 (Summer 2013), pp. 160–163; and Michael L. Gross and Tamar Meisels, "Correspondence: Just War Theory and the 2008–09 Gaza Invasion," *International Security*, Vol. 38, No. 1 (Summer 2013), pp. 164–167.

2. Jerome Slater, "Just War Moral Philosophy and the 2008–09 Israeli Campaign in Gaza," *International Security*, Vol. 37, No. 2 (Fall 2012), pp. 44–80. Further references to this article appear parenthetically in the text.

This line of argument would delegitimize all anticolonial revolutions and national liberation movements, as well as the right of resistance to tyranny, so long as the tyrants had a state but their victims did not.

Apparently in recognition of this problem, Brown adds, “To continue a meaningful analysis, however, suppose that Gaza were a state, with Hamas as its elected government.” (Of course, Hamas was and remains Gaza’s elected government.) Even so, he concludes that “a strong argument” can be made that the Gazan rocket attacks gave Israel just cause, but that Gaza did not have just cause because it started the conflict with its unjustified attacks. This goes to the heart of the issue, which I address later in this reply.

Finally, Brown criticizes me for not directly addressing the issue of proportionality. I do not do so because, in this case, the principle would apply primarily to the question of “collateral damage”—that is, whether the benefits of attacks on military targets were sufficiently high to outweigh the costs in terms of unintended civilian destruction. Israel, however, chose to attack civilian infrastructures precisely because, for reasons of “deterrence,” it wanted civilians to feel the pain—just as they had in the past. Consequently, the real issues in Cast Lead were not those of proportionality but of discrimination and noncombatant immunity, which are categorical in nature and do not permit calculations of the kind Brown wishes to make—namely, that Israel’s invasion might have been morally legitimate if “the foreseeable good to be achieved by going to war . . . outweighed the foreseeable harm.”

In addition to his objection that I do not consider some just war principles, Brown challenges my arguments about those that I do consider. First, he argues that I should not consider the “last resort” principle in the context of Cast Lead, arguing that it is difficult to apply because “there is always another potential solution . . . that has not yet been considered, always a remote possibility that another round of talks will achieve a breakthrough.” Brown fails to mention that I acknowledge that in some cases his objection might be well taken, but decidedly not in the case of the Israeli attack on Gaza (pp. 57–65). As I summarize, “[I]nstead of exhausting all reasonable alternatives to war, Israel has deliberately ignored or even sabotaged them . . . [refusing] to negotiate cease-fires with Hamas or to abide by those that were negotiated, as well as . . . [refusing] to seek an increasingly attainable negotiated political settlement with that organization” (pp. 57–58).

#### THE FACTUAL ISSUES

Brown also challenges my argument that Israel violated the just war requirement that military attacks discriminate between combatants and noncombatants. Here he relies on the common Israeli contention that Hamas regularly concealed itself among Gazan civilians, making it impossible for the Israelis to comply with the principle of discrimination. Brown does not mention, however, that both the Goldstone Commission and Human Rights Watch examined this issue in great detail and concluded that, despite some unavoidable mixing of combatants and noncombatants in Gaza’s densely populated cities, Hamas had no strategy of using civilians as “human shields.” In support of its conclusion that Israel’s “wanton destruction” of civilian infrastructures could be prosecuted as “war crimes,” an extensive investigation by Human Rights Watch stated that the Israel Defense Forces continued to bomb civilian targets even though “the fighting had ended prior to Israeli attacks.” I review these reports in detail on pages 75 and 76 of my article; Brown does not mention this evidence, let alone seek to refute it.

More generally, Brown charges that my “factual account is so one-sided as to cast doubt on [my] objectivity.” He insists on a symmetry that he claims I ignore: “[E]ach side has suffered a long pattern of violence at the hands of the other, rendering it extremely difficult to determine now which side is ultimately responsible for precipitating it.” This insistence that both sides are equally responsible for the ongoing Israeli-Palestinian conflict is unpersuasive, because Brown does not even mention the most well-known and obvious moral issues at the heart of the conflict, particularly concerning the founding of Israel in a land long the home of another people; the subsequent political disenfranchisement of most of those people; the dispossession of hundreds of thousands of Palestinians from their homes and villages; and—above all—that since 1967 Israel has occupied, repressed, repeatedly attacked, deliberately impoverished, and on a daily basis, in ways both large and small, humiliated the powerless Palestinians.

Had Brown taken these facts into account, he undoubtedly would have wished to rethink his argument that Hamas was to blame for Cast Lead. Further, Brown does not mention that Israeli violence (in an unjust cause) has far outstripped that of the Palestinians—including the use of terrorism. The evidence for this is overwhelming. Although Brown claims that I rely mainly on the Israeli daily *Haaretz*, my general analysis of the Israeli-Palestinian conflict is based on more than forty years of teaching (including in Israel), research, and writing about the conflict. And in the case of Cast Lead, I base my argument on the reporting and investigative analyses not only of *Haaretz* during and after the invasion, but also of the *New York Times* and leading European newspapers, as well as on the extensive reports of the Goldstone Commission,<sup>3</sup> Amnesty International, Human Rights Watch, B’Tselem (Israel’s leading human rights organization), Breaking the Silence (an organization of former Israeli combat soldiers providing first-hand testimony about Israel’s behavior in the occupied territories), Israeli Physicians for Human Rights, and other Israeli and international human rights nongovernmental organizations—all cited in my article.

Moreover, Brown’s characterization of *Haaretz* as leftist and ideologically biased, and as unreliable as Fox News is in its right-wing commentary in the United States, is preposterous. *Haaretz* is almost universally regarded by serious and unbiased scholars and journalists as the best and most reliable Israeli newspaper, and one whose factual reporting is almost never successfully challenged. When Brown argues that *Haaretz*’s criticism of Israeli behavior should be discounted because it is “strongly left-liberal”—which in the Israeli context means critical of Israeli policies toward the Palestinians—he is committing a common logical fallacy. Brown’s argument confuses cause and effect: it ignores the possibility that *Haaretz*’s critical reporting and commentaries can be explained not as the result of “bias” or a particular “ideology,” but as entirely convincing analyses based on the plain facts of Israel’s behavior.

In his concluding sentence, Brown writes that “just war theory reveals that it is far from certain whether Israel’s actions are totally unjust (and the Palestinians’ actions totally just).” I agree, and nothing I wrote indicates otherwise. Rather, my point is that there is no moral or factual symmetry between Israel and the Palestinians, because both

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3. Brown criticizes me for continuing to cite the Goldstone report, despite Richard Goldstone’s alleged “disavowal” of its “key conclusions.” I examined the Goldstone affair in great detail and pointed to a number of reasons why the overall report—not to mention all the other investigations—were more reliable than Goldstone’s subsequent op-ed column, clearly written under great personal pressure (pp. 72–74). In any case, it was far less of a “retraction” than has been portrayed by Brown and others.

in the past and in Cast Lead, Israel's actions have been mostly unjust and the Palestinians' mostly just.<sup>4</sup>

#### GROSS AND MEISELS

In the first paragraph of their critique, Michael Gross and Tamar Meisels state that they will be "[p]ushing past Slater's long historical overview of degenerate Jewish behavior" in order to proceed to an examination of the self-defense issue. Their decision to ignore history and their choice of wording in this sentence are revealing. First, their statement is false, because I most certainly do not characterize Israel's behavior as "degenerate" or describe it as "Jewish," but rather as reflecting "Zionist" or "Israeli" policies or actions. Second, it is hard to avoid the impression that these mischaracterizations are designed to have a certain unpleasant but familiar implication—a point that I make more explicitly in the conclusion.

Perhaps most important, it is indefensible for scholars to unmistakably suggest that the historical record—as I describe it and to which Gross and Meisels offer no rebuttal—is gratuitous and irrelevant to understanding Operation Cast Lead. As I wrote, the most contentious issue regarding Cast Lead is whether or not Israel deliberately and directly attacked civilians *per se*, as opposed to merely attacking civilian institutions and infrastructures, a fact that is not in contention. Consequently, a historical review of the many previous times in which Israel had unmistakably attacked civilians is relevant—even though not dispositive—in considering the evidence in the Cast Lead case.

For that reason, many of the reports by human rights organizations include the historical background, especially in noting the similarities between Israel's behavior in Cast Lead and its previous attacks on Lebanon—particularly in 2006, just two and a half years earlier. As I demonstrate at considerable length and with myriad sources, the evidence is irrefutable—which is perhaps why Gross and Meisels want to ignore ("push past") it—that on many occasions since 1948 Israel has deliberately attacked Palestinian and other Arab civilians. It has done so in part for the purpose of revenge or punishment for terrorist attacks against its own population—although even in those cases, Israel's terrorist counterattacks have deliberately inflicted far more civilian deaths than Israelis have suffered. In any case, Israeli terrorism has had an essentially political purpose—for example, deterring governments and peoples in the region from supporting the Palestine Liberation Organization or Hezbollah (in the cases of Jordan and Lebanon), ending their conflict with Israel (Egypt), and since the 1970s, preventing the Palestinians from gaining an independent state in the occupied territories.<sup>5</sup>

#### THE SELF-DEFENSE ISSUE

Gross and Meisels reject my argument that Israel was not entitled to invoke the principle of self-defense to justify its various military attacks on Gaza on the grounds that "the United Nations Charter stipulates that every state, including Israel, has the right to self-

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4. The exception is Palestinian terrorism, as I discuss in my response to Gross and Meisels. In any case, Israeli terrorism against the Palestinians and other Arab peoples has far outstripped Palestinian or other Arab terrorism against Israel.

5. Meisels has written on terrorism, defining it in this manner: "the intentional random murder of defenseless non-combatants . . . with the intent of instilling fear of mortal danger amidst a civilian population as a strategy designed to advance political ends." That sounds right. Of course, the context makes it clear that she has Palestinian terrorism in mind. Tamar Meisels, "Combatants—Lawful and Unlawful," *Law and Philosophy*, Vol. 26, No. 1 (January 2007), p. 32.

defense in the face of an armed attack” and that “there is no requirement to first negotiate with one’s enemy.” A historical review of Article 51 of the Charter (to which Gross and Meisels refer) makes it clear, however, that the UN intended this article to apply to large-scale, unprovoked armed attacks across national borders, in which there was no time for the victim to negotiate first with the aggressors or to wait until the Security Council had met its collective security responsibilities. What the framers of Article 51 surely had in mind were the German and Japanese aggressions of World War II, rather than situations such as the Israeli-Palestinian conflict, in which for nearly half a century Israel has engaged in repeated armed attacks against Gaza and the West Bank to maintain an illegal occupation and to prevent the establishment of an Arab state, as specifically intended by the 1947 UN partition resolution to accompany the creation of a Jewish state.

#### THE TERRORISM ISSUE

As I write in my article, the Palestinians’ use of terrorism makes the self-defense issue morally more complicated than if the armed Palestinian resistance to the Israeli occupation and repression had been limited to attacks on military targets (pp. 57, 79). Even so, my argument was (1) that the overwhelming military superiority of Israel made nonterrorist armed resistance impossible; (2) that Israel has either ignored or crushed all forms of nonviolent Palestinian resistance, sometimes by lethal force; and (3) that if Israel’s genuine purpose had been to end Palestinian terrorism, it could have done so by ending the occupation or at least by ending its refusal to enter into political negotiations with Hamas—or, short of that, by simply refraining from breaking several promising cease-fires. I would now add a fourth point: Israel has no moral standing to refuse to negotiate with Hamas on the grounds that it is a terrorist organization, given that Israel’s own terrorist activities (i.e., attacks on civilians) have far surpassed those of Hamas (pp. 45–51).

Gross and Meisels characterize my argument that the terrorism issue does not support the Israeli claim of self-defense as “nothing more than [my] opinion.” Well, if so, it is different in nature and relevance from other kinds of opinions—say, that chocolate ice cream tastes better than vanilla ice cream. Consequently, the more appropriate characterization is that it is an argument, one that readers can accept or reject.

#### THE ISRAELI ATTACKS ON CIVILIAN AND ECONOMIC TARGETS

As I state above, I base my argument about Israel’s behavior during Operation Cast Lead on extensive sources, including numerous investigative reports by Israeli as well as international newspapers and human rights organizations. Gross and Meisels greatly exaggerate the extent of Palestinian terrorist attacks occurring before Cast Lead and ignore the Israeli provocations and armed attacks that preceded many of them; they seriously understate the extent of the unlawful and immoral Israeli attacks on nonmilitary Gazan economic, societal, and even educational and public health facilities; they accept Israeli propaganda claims about the extent to which Hamas fighters used these nonmilitary targets as shelters or “human shields,” even though impartial investigations have rejected the Israeli claims; they greatly exaggerate the seriousness of purpose, the extent, and the effectiveness of Israeli warnings to Palestinian civilians to evacuate intended civilian targets; and they offer a muddled and unpersuasive case exonerating Israel from “disproportionate” civilian casualties.

With respect to this last point, Gross and Meisels make two different arguments that

not only are unpersuasive but are in conflict with each other. First, they argue that the civilian casualties resulting from Israeli infrastructure attacks in Gaza were “collateral damage” and “proportionate” to the military value of those targets. As I argue in my article, the evidence from both Cast Lead and past history shows that Israel’s targeting of noncombatants and infrastructure was neither accidental nor an unwanted by-product of attacks on legitimate military targets. For that reason, the operative legal and moral principle in the case of Cast Lead is not proportionality but noncombatant immunity, which—to repeat—categorically prohibits attacks on civilians.

In their second argument concerning civilian casualties incurred during Cast Lead, Gross and Meisels seemingly abandon the collateral damage claim in favor of the even more dubious argument that implicitly concedes that the attacks might have been deliberate—but not morally or legally wrong. That is, they concede that both international law and “traditional” just war theory prohibit “attacks on civilian targets,” such as “economic targets, schools, government buildings, police stations, and other facilities that only provide war sustaining aid”—all, of course, attacked by Israel in Cast Lead. They argue, however, that not all countries, including the United States, adhere to this position—that is, that of law and “traditional” morality.

Gross and Meisels also claim that a more recent “revisionist” version of just war theory—one that they clearly prefer—allows attacks on civilians who work in “war-sustaining infrastructures,” and therefore those individuals “bear a measure of responsibility for a state or nonstate’s war-making capability.” To be sure, even traditional just war theory allows attacks on targets such as munitions factories—subject to the further provision that the number of noncombatants killed must not be disproportionate to the military value of such attacks. Those were not the kind of attacks that critics of Cast Lead have labeled war crimes, however, but rather the economic and civilian infrastructure targets repeatedly struck by Israel.

In any case, I am unaware of a revisionist brand of just war theory that allows attacks on vaguely defined “war-sustaining infrastructures.” But if it exists, I would argue that civilization is best served by sticking to traditional moral theory rather than going down this slippery and dangerous road to erase the distinction between combatants and noncombatants and between legitimate military targets and illegitimate civilian ones.

#### CONCLUSION

I am afraid that I must conclude on a rather severe note. As Israeli political scientists, Gross and Meisels must know the facts about Israel’s behavior—at least about Operation Cast Lead, if not of the long history of previous Israeli attacks on noncombatants and civilian infrastructures. On that assumption, their response to my article is not a case of scholars seeking the truth, but an example of defense lawyers seeking to exonerate their client, regardless of the facts. Finally, if they want to suggest that my argument is anti-Semitic, as I think they do with the language they employ in their opening paragraph—in which they falsely assert that I accuse Israel of “degenerate Jewish behavior”—they should have the courage to make that charge directly and not rely on innuendo.

—Jerome Slater  
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