

# Just War Moral Philosophy and the 2008–09 Israeli Campaign in Gaza

Jerome Slater

Scholars and policy-makers regard the Israeli-Palestinian conflict as one of the most serious and intractable conflicts in today's world. In particular, there continues to be fierce controversy over the most recent large-scale Israeli military action in that conflict: the three-week attack on Gaza that began on December 27, 2008.

Operation Cast Lead, as Israelis call the attack, was justified by Israel and its supporters as a legitimate use of force in self-defense, the purpose of which was to end Hamas's terrorist attacks on Israel's civilian population. Even critics of Cast Lead have mostly accepted this argument—despite condemning Israel's methods and, especially, its indiscriminate attacks on Gaza's civilian infrastructure and sometimes direct attacks on noncombatants. In particular, most of the leading investigations of Cast Lead, including those by the Goldstone Commission, Human Rights Watch, Amnesty International, and B'Tselem (Israel's leading human rights organization) did not seek to refute the self-defense argument, even as they concluded that Israel had been guilty of war crimes because of the manner in which it conducted the attack on Gaza.

The argument of this article, however, is not only that the Israeli methods were morally (and, in most cases, legally) wrong,<sup>1</sup> but that the very purpose of Cast Lead cannot be justified as one of self-defense. Rather, I argue that Cast Lead was a moral catastrophe, a wholesale violation of the just war philosophy that has guided Western thought on war and morality for more than 2,000 years. In addition, with regard to the history of Israeli military strategies, Cast

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1. The focus of this article is not on the international laws governing warfare, but on morality and warfare. Morality and law often overlap, but hardly always, and the methods of analysis appropriate to each realm differ. As Michael Walzer has put it, "The language with which we argue about war and justice is similar to the language of international law . . . but legal treatises do not . . . provide a fully plausible or coherent account of our moral arguments." Walzer, *Just and Unjust Wars*, 4th ed. (New York: Basic Books, 2006), p. xx. For example, if a state violates an international legal convention that it has refused to agree to, it could arguably claim that its non-agreement meant that its actions could not be considered illegal. Whether a state has formally agreed to a central just war principle, however, is irrelevant to judging the morality of its action. That said, modern international law has incorporated much of just war morality and, where appropriate, this article includes brief references to such laws.

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Lead was hardly unprecedented, because it must be understood in the context of Israel's "iron wall" strategy, which from the outset has included deliberate attacks on civilians or their economy, institutions, and infrastructures.

The first section of this article examines the iron wall strategy and summarizes its employment. After briefly explaining the main principles of just war theory, the article presents a moral evaluation of the iron wall strategy in general and Cast Lead in particular, in the framework of that philosophy. A review of the most important facts concerning Cast Lead—what led to the Israeli decision to attack Gaza at the end of 2008, and what happened in that attack?—is followed by an examination of the operation in the context of two main just war principles: those pertaining to the purpose of the attack and those pertaining to its conduct.

### *The Iron Wall and Israeli Attacks on Noncombatants*

In 1923 Zeev Jabotinsky, a Russian-born journalist, soldier, and early leader of right-wing Zionism, published "The Iron Wall." In it, Jabotinsky laid out the rationale for Jewish colonization and attacks against Palestinian civilians, concluding that "Zionist colonization . . . must be carried out in defiance of the will of the native population . . . under the protection of an iron wall of Jewish bayonets which the native population cannot break through."<sup>2</sup>

The iron wall strategy has served as the core of Zionist/Israeli policies toward the Arab world ever since Jabotinsky's article was published.<sup>3</sup> In the article, Jabotinsky did not elaborate on the military strategies that the Zionists should adopt to create the iron wall. His own history, however, as well as that of the Zionist movement in the prestate era and of Israel since 1948, reveal that attacks on Arab civilians resisting Jewish expansion in Palestine are a central component of the strategy.

In the 1930s, Jabotinsky assumed the leadership of the Irgun, the dissident right-wing Zionist group that rejected what it considered to be the excessively soft policies of the Haganah, the military wing of the mainstream Zionist group, led by David Ben-Gurion. In the ensuing years, the Irgun and the even more extremist "Stern Gang" (in the 1940s led, respectively, by future Israeli

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2. The quotation is from an English language translation of Vladimir Jabotinsky, "The Iron Wall: We and the Arabs," 1923, <http://www.marxists.de/middleeast/ironwall/ironwall.htm>.

3. The most important work on the iron wall concept and its influence on Zionist/Israeli policies is Avi Shlaim, *The Iron Wall: Israel and the Arab World* (New York: W.W. Norton, 2000). In 2012 Shlaim updated and elaborated his argument in "The Iron Wall Revisited," *Journal of Palestine Studies*, Vol. 4, No. 2 (Winter 2012), pp. 80–81.

Prime Ministers Menachem Begin and Yitzhak Shamir) sought to terrorize the Palestinians by planting bombs in buses, marketplaces, movie theaters, and other public places.<sup>4</sup>

According to Avi Shlaim, although Ben-Gurion “did not use the terminology of the iron wall, his analysis and conclusions were virtually identical to Jabotinsky’s.”<sup>5</sup> Thus, under his leadership during the 1947–48 period, Israeli forces often launched attacks designed to drive large numbers of Arab civilians out of areas designated by the 1947 United Nations partition plan for the creation of a Jewish state or otherwise claimed by Israel. These actions created the refugee issue that still plagues the conflict: most of the estimated 700,000 Palestinians who fled into neighboring Arab countries did not do so “voluntarily,” as the Israeli mythology has it, but either because they were driven out or because they fled in fear of being killed. This was a legitimate fear, given that many Palestinians were killed by deliberately indiscriminate Israeli artillery and mortar fire—and sometimes in outright massacres, as in the case of Deir Yassin.<sup>6</sup>

The expulsion of the Palestinians led to the creation of the Palestinian guerrilla movement known as the Palestine Liberation Organization (PLO), which for many years operated out of bases in Egypt, Syria, Jordan, and Lebanon. Guerrilla attacks inside Israel were met with heavy retaliation, deliberately intended to inflict far more death and destruction than the Israelis had suffered.

Moshe Dayan, Shlaim writes, was also a believer in the iron wall strategy and “had few inhibitions and no moral qualms about the use of military force,

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4. The Zionist use of terrorism in the prestate era, against both the British occupying forces and the Palestinian Arabs, is beyond dispute. The literature is extensive. See, for example, J. Bowyer Bell, *Terror Out of Zion* (Dublin: Academy Press, 1977).

5. Shlaim, *The Iron Wall*, p. 19.

6. During this period, Israel employed massive violence against Arab civilians. See, for example, *ibid.*; Simha Flapan, *The Birth of Israel: Myths and Realities* (New York: Pantheon, 1987); Benny Morris, *Righteous Victims: A History of the Zionist-Arab Conflict, 1881–2001* (New York: Vintage, 2001); Benny Morris, *The Birth of the Palestinian Refugee Problem* (New York: Cambridge University Press, 1987); Ilan Pappé, *The Making of the Arab-Israeli Conflict, 1947–1951* (London: I.B. Tauris, 1992); Ilan Pappé, *The Ethnic Cleansing of Palestine* (London: One World, 2006); and Tom Segev, *1949: The First Israelis* (New York: Henry Holt, 1998). Morris provided an update of his work in *1948: A History of the First Arab-Israeli War* (New Haven, Conn.: Yale University Press, 2008). In a review essay, Shlomo Ben-Ami, Israel’s foreign minister in 2000–01, wrote that “Morris shows that the Zionists committed more massacres than the Arabs, deliberately killed far more civilians and prisoners of war, and committed more acts of rape. Israel’s leaders were not blind to the evolving Palestinian tragedy. . . . Morris found that far more Palestinians were expelled on explicit orders from commanders in the field than fled for fear of military attacks. And in some cases, Ben-Gurion personally authorized such orders.” Ben-Ami, “A War to Start All Wars,” *Foreign Affairs*, Vol. 87, No. 5 (September/October 2008), pp. 150, 152. For a summary of the primary literature on the 1947–48 events, see Alexander B. Downes, *Targeting Civilians in War* (Ithaca, N.Y.: Cornell University Press, 2008), especially pp. 179, 185, 191, 199–200.

even against civilians.”<sup>7</sup> For example, while chief of staff of the Israel Defense Forces (IDF) in the 1950s, Dayan created a special secret unit in the Israeli army; led by Ariel Sharon, it carried out a number of cross-border retaliatory raids that targeted Palestinian civilians, the rationale for which was to “persuade the Palestinian population that it was not in their interest to support raids on the Israeli communities across the border.”<sup>8</sup> In addition, there is now growing evidence that during the 1956 Israeli-Egyptian war, Israeli forces massacred hundreds of Palestinian refugees in the Gaza Strip.<sup>9</sup>

Yitzhak Rabin apparently held views similar to those of Dayan, at least during his military career. Shlaim writes that, in 1966, PLO raids from Jordan convinced Rabin, then chief of staff of the IDF, that “the problem was the civilians who assisted Israel’s Palestinian enemies”; as a result, the Israeli cabinet agreed to Rabin’s plan to attack civilians “to serve as a warning . . . not to cooperate with the Palestinian saboteurs.”<sup>10</sup>

Israel did not limit its attacks on civilians to the Palestinians. In 1968 Dayan warned that Israel might attack Egyptian cities to “strike terror into the hearts of the Arabs of the cities . . . [and] break the Arab will to fight.”<sup>11</sup> During the 1970–73 Suez Canal War of Attrition between Egypt and Israel, Israel responded to Egyptian attacks against its armed forces along the canal with massive artillery shelling and bombing of Egyptian towns and cities along the western banks of the canal. The Israelis’ “undeclared aims” were “to break Egyptian morale” by deliberately making life miserable for the Egyptian population and thus increasing pressure against Presidents Gamal Abdel Nasser and later Anwar el-Sadat.<sup>12</sup>

Leading Israeli officials have sometimes acknowledged that Israel has used such “pressure tactics” as an instrument of policy. In 1978, for example, following the first of a number of major Israeli attacks on Lebanese population cen-

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7. Shlaim, *The Iron Wall*, p. 102.

8. Avner Yaniv, *Dilemmas of Security: Politics, Strategy, and the Israeli Experience in Lebanon* (New York: Oxford University Press, 1987), p. 94.

9. The detailed evidence, including contemporary reports of UN military observers stationed in the Sinai, is summarized in Amira Hass, “A Thin Black Line,” *Haaretz*, February 12, 2010. See also Joe Sacco, *Footnotes in Gaza: A Graphic Novel* (New York: Metropolitan, 2010). Sacco calls his book a “graphic novel,” but he accurately describes the reality of the 1956 events.

10. Shlaim, *The Iron Wall*, p. 233.

11. Quoted in Yaacov Bar-Siman-Tov, *The Israeli-Egyptian War of Attrition, 1969–1970: A Case-Study of Limited Local War* (New York: Columbia University Press, 1980), p. 122.

12. The quote is from Shlaim, *The Iron Wall*, p. 292. David Shipler, at the time the *New York Times* correspondent in Israel, later wrote that Israeli bombardments of Egyptian villages “forced the evacuation of 750,000 civilians, destroyed 55,000 homes, and killed and wounded an untold number. . . . It was a pressure tactic on the Egyptian authorities.” Shipler, *Arab and Jew: Wounded Spirits in a Promised Land* (New York: Penguin, 1986), p. 45.

ters, Gen. Mordechai Gur, then chief of staff of the IDF and later a leading Labor Party politician, responded to criticism of Israeli tactics this way: "I've been in the army thirty years. Do you think I don't know what we've been doing all those years? What did we do the entire length of the Suez Canal? A million and a half refugees! . . . Since when has the population of South Lebanon been so sacred? They know very well what the terrorists were doing. . . . I had four villages in South Lebanon bombarded . . . [as, he says, happened in Jordan]." <sup>13</sup> Zeev Schiff then comments, "You maintain that the civilian population should be punished?" Gur responds, "And how. . . . I have never doubted it, not for one moment." Schiff concludes, "In South Lebanon we struck the civilian population consciously, because they deserved it. . . . The importance of Gur's remarks is the admission that the Israeli Army has always struck civilian populations, purposely and consciously . . . even when Israeli settlements had not been struck." <sup>14</sup>

In 1981 Prime Minister Menachem Begin, head of Israel's right-wing Likud Party, wrote a column in the Israeli press responding to what he considered to be "hypocritical" criticisms of his government's bombing of Beirut, which killed hundreds of Lebanese and Palestinian civilians. In his defense, he offered a "partial list" of more than thirty Israeli military attacks against Arab civilians under Israeli Labor governments: "Under the Alignment [Labor] government, there were retaliatory actions against civilian Arab populations; the damage was directed against such structures as the canal, bridges and transport." <sup>15</sup> Abba Eban, a former Labor Party foreign minister, responded: "The picture that emerges is of an Israel wantonly inflicting every possible measure of death and anguish on civilian populations in a mood reminiscent of regimes which neither Mr. Begin nor I would dare to mention by name." Although Eban complained that Begin's charge helped "Arab propaganda," he did not contest Begin's facts. On the contrary, he defended Israel's earlier attacks on civilians on the grounds that, unlike the 1981 case, "there was [then] a rational prospect, ultimately fulfilled, that [the] afflicted population would exert pressure for the cessation of hostilities." <sup>16</sup>

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13. The interview, in the May 10, 1978, edition of the Israeli newspaper *Al Hamishar*, is quoted in David Hirst, *The Gun and the Olive Branch: The Roots of Violence in the Middle East* (New York: Nation Books, 1977), pp. 567–568.

14. Zeev Schiff, *Haaretz*, May 15, 1978.

15. The Hebrew edition of *Haaretz* printed the Begin letter on August 4, 1981. For the English translation, see Edward Herman, *The Real Terror Network: Terrorism in Fact and Propaganda* (Montreal: Black Rose Books, 1982), p. 77.

16. Abba Eban's response, "Morality and Warfare," was published in the *Jerusalem Post* on August 16, 1981. It is not available online, so I have relied on the most complete account, in Herman, *The Real Terror Network*, p. 77.

There have been four other major (and many smaller) Israeli air and ground force attacks against Lebanon: in 1982, 1993, 1996, and 2006. Although Hezbollah and PLO forces based in Lebanon were the main targets, a wealth of evidence demonstrates that during those attacks Israel deliberately visited widespread destruction on ordinary Lebanese civilians, killing more than 10,000 and wounding many thousands more; destroying hundreds of thousands of homes, factories, and small businesses; and attacking the Lebanese electricity network, roads and bridges, fuel depots, ports and airports, and dozens of schools and hospitals.<sup>17</sup>

Israeli officials sometimes warned of their intentions. After Hezbollah's 2006 capture of several Israeli soldiers, for example, IDF Chief of Staff Gen. Dan Halutz called Hezbollah a "cancer" that the Lebanese must eliminate, "because if they don't their country will pay a very high price."<sup>18</sup> Senior officers in the IDF elaborated: "If the kidnapped soldiers are not returned alive and well, the Lebanese civilian infrastructures will regress 20, or even 50, years."<sup>19</sup> In addition, Eli Yishai and Haim Ramon, both cabinet members in the government of Ehud Olmert, publicly threatened to "flatten" Lebanese villages.<sup>20</sup>

Several leading figures in Israel's security establishment confirmed Israel's pursuit of an iron wall strategy, but questioned its effectiveness. Yossi Alpher, a former deputy chief of Mossad (Israel's national intelligence agency), director of the Jaffee Center for Strategic Studies, and senior adviser to Ehud Barak, argued that the humanitarian suffering in both Gaza and Lebanon "is a delib-

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17. The literature on the Israeli attacks on the civilian population of Lebanon and on Palestinian residents and refugee camps in that country is extensive. On the 1993 Israeli attack, Shlaim writes that "the ruthless targeting" of the civilian population was designed to induce them to pressure the governments of Lebanon and Syria to end their support of the Hezbollah movement and militias, as well as to give Israel a free hand in southern Lebanon. Shlaim, *The Iron Wall*, pp. 560–561. On the 1982 attacks on civilians, see Michael Jansen, *The Battle of Beirut: Why Israel Invaded Lebanon* (London: Zed, 1982); Jonathan Randal, *Going All the Way: Christian Warlords, Israeli Adventurers, and the War in Lebanon* (New York: Viking, 1983); and, especially, the devastating account by two leading Israeli centrist journalists, Zeev Schiff and Ehud Yaari, *Israel's Lebanon War* (New York: Simon and Schuster, 1984). On the 2006 attack, see Human Rights Watch, "Why They Died: Civilian Casualties in Lebanon during the 2006 War," Vol. 19, No. 5 (Human Rights Watch, September 2007), <http://www.hrw.org/reports/2007/09/05/why-they-died>; and Amnesty International, "Lebanon: Deliberate Destruction or 'Collateral Damage?' Israeli Attacks on Civilian Infrastructure" (Amnesty International, August 2006), <http://www.amnesty.org/en/library/info/MDE18/007/2006>. Avi Shlaim summed up the evidence on all of the major Israeli attacks on Lebanon: "[T]he massacre of innocent civilians [is] a recurrent feature of Israeli military intervention," including the 2006 attack, which "involved the deliberate targeting of civilians in flagrant violation of the laws of war." First quote in Shlaim, "Israel's Error, Then and Now," *International Herald Tribune*, August 4, 2006; and second quote in Shlaim, "The Iron Wall Revisited," p. 94.

18. John Kifner, "Human Rights Group Accuses Israel of War Crimes," *New York Times*, August 24, 2006.

19. Quoted in Amos Harel, "Israel Prepares for Widespread Escalation," *Haaretz*, July 12, 2006.

20. Quoted in Tom Segev, "Ten Theses for the Committee's Examination," *Haaretz*, August 18, 2006.

erate act on Israel's part . . . intended to generate mass public pressure on the respective governments."<sup>21</sup> Alpher noted, however, that the strategy "hasn't worked" and concluded that Israel should "reconsider whether the cumulative humanitarian and political damage doesn't outweigh the military benefit of reducing terrorist freedom of maneuver and strengthening Israel's deterrence."<sup>22</sup> Similarly, Zeev Schiff argued that "by encouraging large numbers of civilians to flee . . . to serve as a source of pressure," Israel was making "a strategic mistake," because such methods had led to the creation of Hezbollah in Lebanon and Hamas in the Palestinian occupied territories.<sup>23</sup>

Even more remarkably, several years later Moshe Arens—a well-known rightist, a former ambassador to the United States in the Begin government, the foreign minister in the Shamir government, and a three-time defense minister in Likud governments since the 1980s—wrote, "The 'leverage' theory—which holds that the destruction of enemy infrastructure and attacks on the enemy's civilian population will produce pressure on decision makers to cease their attacks against Israeli civilians . . . did not work in Lebanon, and it certainly does not work in Gaza. Quite the contrary, it only increases the support that the terrorists receive from the civilian population. . . . Cutting off fuel, cutting off electricity, preventing food from reaching them is both counterproductive and immoral."<sup>24</sup>

After the 2006 Israeli attack on Lebanon, Human Rights Watch and Amnesty International released the results of their on-the-ground investigations of the war. Human Rights Watch found that, in carrying out indiscriminate and deliberate attacks that killed hundreds of civilians, Israel had committed "war crimes."<sup>25</sup> In a second investigation, it concluded, "In critical respects, Israel conducted the war with reckless indifference to the fate of Lebanese civilians and violated the laws of war . . . [reflecting] Israeli policy and not just the behavior of individual IDF members [as] is evident from statements by Israeli government officials and military leaders that intentionally blurred the distinction between civilian and combatants. . . . Israel conducted numerous attacks that were indiscriminate, disproportionate, and otherwise unjustified. . . . [These attacks were] war crimes as defined by international humanitarian law."<sup>26</sup> An investigation and report by Amnesty International reached

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21. Yossi Alpher, "An Integral Part of This Conflict," *Bitterlemons.org*, July 17, 2006, <http://www.bitterlemons.org/previous/bl170706ed28.html#isr1>.

22. *Ibid.*

23. Zeev Schiff, "A Strategic Mistake," *Haaretz*, July 20, 2006.

24. Moshe Arens, "Too Much to Expect," *Haaretz*, March 5, 2008.

25. Human Rights Watch Report, "Fatal Strikes: Israel's Indiscriminate Attacks against Civilians in Lebanon," Vol. 18, No. 3(E) (New York: Human Rights Watch, August 2006), <http://www.hrw.org/en/node/11265/section/5>.

26. Human Rights Watch, "Why They Died."

the same conclusion: “The evidence strongly suggests that [the] extensive destruction was deliberate and an integral part of the military strategy, rather than ‘collateral damage’. . . . Statements by Israeli military officials seem to confirm that the destruction of the infrastructure was indeed a goal of the military campaign. . . . Many of the violations examined in this report are war crimes.”<sup>27</sup>

The concept of “war crimes” derives from just war moral philosophy; it is to that subject that I now turn.

### *Just War Philosophy*

For more than 2,500 years, the central framework for the moral analysis of warfare has been, broadly speaking, just war philosophy. The ancient Greeks, including Plato, Aristotle, and Thucydides, and later a number of Roman philosophers, most notably Cicero, wrote in moral terms about the problem of war, generally arguing that only defensive wars were justified and that even those must observe certain moral restrictions—most importantly, that civilians or noncombatants should not be attacked.

Just war moral theory later became a central component of Catholic thought on the problem of war, especially after the Greek and Roman just war principles were developed and incorporated into Catholic philosophy and theology, particularly by Saint Augustine in the fourth century and Thomas Aquinas in the thirteenth century.<sup>28</sup> In the seventeenth and eighteenth centuries, the classical tradition of just war was further developed by a number of philosophers, especially by the Dutch jurist and philosopher Hugo Grotius, who elaborated on the principles of just cause and on the moral need to fight just wars using the right methods.

Today just war moral theory, whether derived from religious principles or not, has become the central framework for moral analysis of war throughout the West and, to a considerable degree, in non-Western cultures as well. In that sense, just war theory has become central to what philosophers call “the common morality of mankind.”<sup>29</sup>

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27. Amnesty International, “Deliberate Destruction or ‘Collateral Damage?’” pp. 3, 6.

28. Catholic just war moral doctrine was further explicated and applied to the problem of nuclear weapons in the U.S. Catholic Bishops’ “Pastoral Letter on War and Peace,” published as “The Challenge of Peace: God’s Promise and Our Response” (Washington, D.C.: National Catholic News Service, May 1983).

29. The most important and influential analysis of “common morality” is Alan Donagan, *The Theory of Morality* (Chicago: University of Chicago Press, 1977). Michael Walzer is widely regarded as the leading just war theorist; his most important works are *Just and Unjust Wars*; and *Arguing about War* (New Haven, Conn.: Yale University Press, 2004). Other major works include James Turner Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton, N.J.: Princeton University Press, 1981); Douglas Lackey, *The Ethics of War and Peace* (Englewood Cliffs,



The central moral principles of just war theory are those of *jus ad bellum*—the justice of going to war—and *jus in bello*, or just methods of fighting war. The two most important principles within *jus ad bellum* are “just cause” and “last resort.” “Just cause” means that war must have a moral purpose; self-defense is nearly universally recognized as the most important just cause. “Last resort” means that war is morally allowable only after all diplomatic or nonviolent means of achieving a just cause have been tried and failed.

Even states that meet these *jus ad bellum* criteria must also adhere to the principles of *jus in bello* in the conduct of war. *Jus in bello* includes two main principles. The first is discrimination, meaning to discriminate or distinguish between soldiers and civilians, and to avoid excessive civilian casualties that are an unintended but a foreseeable by-product of an attack on a legitimate military target. The second principle, noncombatant immunity, categorically prohibits deliberate attacks on civilians, regardless of the cause, and regardless of whether attacking civilians helps to attain that cause.<sup>30</sup>

### *Operation Cast Lead*

In the 1967 Arab-Israeli war, Israel occupied the Gaza Strip—populated mostly by Palestinians, although under Egyptian jurisdiction and control—where it established a number of Jewish settlements. Over time these settlements, many of them in the midst of densely populated areas, became the target of Palestinian militant attacks and needed to be defended by thousands of Israeli soldiers. By 2004 Prime Minister Ariel Sharon had become convinced that the economic and military costs of continuing to defend the settlements were too high—unlike the case of the West Bank and Jerusalem, Israel had little or no religious or nationalist claims on Gaza—so in August 2005 he ordered their withdrawal.

Even after the withdrawal, Israel continued to wield overwhelming power over Gaza’s economy and external trade; it maintained control of Gaza’s water,

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N.J.: Prentice Hall, 1989); Larry May, ed., *War: Essays in Political Philosophy* (Cambridge: Cambridge University Press, 2008); Jeffrey McMahan, *Killing in War* (Oxford: Clarendon, 2009); Jeffrey McMahan, “Just Cause for War,” *Ethics and International Affairs*, Vol. 19, No. 3 (Fall, 2005), pp. 1–21; Terry Nardin, ed., *The Ethics of War and Peace: Religious and Secular Perspectives* (Princeton, N.J.: Princeton University Press, 1995); and William V. O’Brien, *The Conduct of Just and Limited War* (New York: Praeger, 1981).

30. Perhaps it should be emphasized that I do not intend my analysis to be a theoretical contribution to just war philosophy, but rather an application of its central and most commonly accepted principles to an important case study. For that reason, I do not enter into the debate among just war theorists over nuanced differences within each principle, and I make only a few additional citations of the general literature in the sections in which I apply the principles to the Israeli case study.

electricity, and telecommunication networks; refused to allow Gaza a functioning airport, seaport, or commercial crossing on its border with Egypt, thus radically cutting Gazan trade and commerce with the outside world; restricted the movement of people and goods in and out of Gaza; prevented farmers from tending to and harvesting their fields and crops; placed severe restrictions on the importation of water for drinking as well as irrigation purposes; and reserved the “right” to launch military incursions at will, periodically bombing and shelling Gaza’s electrical generating system, roads, bridges, farms, and olive orchards.

Consequently, even before Cast Lead, the Gazan economy was on the verge of collapse; nearly 95 percent of all factories operating in Gaza had closed down; unemployment ranged from 45 to 60 percent; and 80 percent of Gazans were estimated to be below international poverty lines.<sup>31</sup> Outright starvation was averted by outside assistance, but malnutrition was rampant; the minimal imports of food supplies allowed by Israel were carefully calibrated to prevent a famine, but not more than that.<sup>32</sup>

The continued Israeli de facto or, as it was sometimes called, “indirect occupation” of Gaza was so repressive that it was common for Israeli journalists, academicians, human rights organizations, and even former high government officials such as Shlomo Ben-Ami to describe Gaza as “an open air prison”

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31. This discussion is based on a number of detailed reports on the economic effects of the Israeli siege of Gaza by the Goldstone Commission, the United Nations, the World Bank, and Israel, as well as international human rights organizations. See, for example, a combined study by eight human rights organizations in 2008, summarized in Associated Press, “Gaza: Humanitarian Situation Worst since 1967,” *Haaretz*, March 6, 2008; and UNRRA, “UN Report: At 45%, Gaza Unemployment Is Highest in the World,” *Haaretz*, July 28, 2008. For an earlier study of the effects of the Israeli siege on the Gazan economy and people, see Sara Roy, “A Dubai on the Mediterranean,” *London Review of Books*, Vol. 27, No. 21 (November 2005), pp. 15–18. Roy cites a World Bank report stating that as early as 2005 the Gazans were experiencing the worst economic depression in modern history. In its 2009 report, the Goldstone Commission summed up the effects of the Israeli blockade, even before Cast Lead: “The Gaza Strip had been for almost three years under a severe regime of closures and restrictions on the movement of people, goods and services . . . [including] basic life necessities such as food and medical supplies . . . [and] fuel, electricity, school items, and repair and construction material. . . . The economy had been depleted, the health sector beleaguered [and] . . . the population had been made dependent on [international] humanitarian assistance for survival and the conduct of daily life.” United Nations Human Rights Council, “Report of the United Nations Fact Finding Mission on the Gaza Conflict” (hereafter Goldstone report), September 15, 2009, p. 521 par. 1675.

32. After Hamas’s electoral victory in early 2006, Dov Weisglass, a prominent friend of Sharon and member of his inner circle of advisers, “joked” that Israel was going to “put the Palestinians on a diet.” Quoted in Gideon Levy, “As the Hamas Team Laughs,” *Haaretz*, February 19, 2006. Similarly, secret U.S. cables published by Wikileaks in early 2010 revealed that, in late 2008, U.S. embassy officials in Israel told the State Department that “Israeli officials have confirmed that they intend to keep the Gazan economy on the brink of collapse without quite pushing it over the edge . . . functioning at the lowest level possible consistent with avoiding a humanitarian crisis.” Reuters, “WikiLeaks: Israel Aimed to Keep Gaza Economy on Brink of Collapse,” *Haaretz*, January 5, 2010.

whose population is subject to “collective punishment” and “strangulation.”<sup>33</sup> Jessica Montell, the executive director of B’Tselem, explained Israel’s overall purpose in repressing the Gazan population: “The suffering of the civilian population is not merely a byproduct of Israel’s attacks against militants. . . . It is an intentional part of Israeli policy. . . . The clear intention of the practice is to pressure the Palestinian Authority and the armed Palestinian organizations by harming the entire civilian population.”<sup>34</sup>

The Israeli strategy, however, failed: the repression produced a rise in Gazan popular support for the militant Islamic Hamas movement. In early 2006 Hamas won Gaza’s legislative elections, and in June 2007 it forcibly took full control of Gaza. In response, Israel imposed an economic blockade over the area, which in turn led to an escalating pattern of Hamas or Islamic Jihad rocket and mortar attacks aimed at nearby Israeli towns, followed by Israeli military raids into Gaza, precipitating further Palestinian attacks, and so on. Each side claimed that it was retaliating for the other’s transgressions (although the number of Palestinians, including innocent bystanders, who were killed by the Israelis far exceeded the number of Israelis killed by the Palestinians), but the ongoing tit-for-tat process made such claims meaningless.

Israel launched Operation Cast Lead on December 27, 2008, claiming that it was a necessary response to unprovoked Hamas terrorism. The attack included heavy air and artillery attacks on densely populated areas; from the outset, extensive reports in the Israeli, European, and U.S. media described heavy civilian destruction. Since the attack, international, European, and Israeli human rights organizations have investigated Israel’s actions and issued numerous critical reports.

The most extensive and significant investigation was carried out by the Goldstone Commission, headed by Richard Goldstone, a prominent South African jurist and an experienced war crimes prosecutor who had served in the Balkans in the mid-1990s. The Commission’s mandate was to evaluate Cast Lead “within the framework of general international law, in particular IHRL (international human rights law) and IHL (international humanitarian law.)”<sup>35</sup> Although the mandate focused on the international laws governing war rather than on the morality of the war within the context of just war theory, the differences between them have little significance in this case, because the most important just war principles are incorporated into international law. Regard-

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33. Shlomo Ben-Ami interview with Akiva Eldar, “Hammer Blows,” *Haaretz*, April 28, 2006.

34. Jessica Montell, “A Form of Collective Punishment,” *Bitterlemons.org*, July 17, 2006, <http://www.bitterlemons.org/previous/bl170706ed28.html#isr2>.

35. Goldstone report, p. 82 par. 268.

less, the Commission's conclusions were couched in moral as well as legal language.

In September 2009, the Goldstone Commission issued a highly detailed and extensively documented report in which it made a number of crucial findings of fact. Relying on various sources, including B'Tselem, the Commission stated that 1,300 to 1,450 Palestinians had been killed during the operation—most of them civilians, and up to 40 percent of them women and children. B'Tselem later provided more precise numbers: "Israeli security forces killed 1,391 Palestinians, at least 759 of whom (including 318 minors under age 18) were civilians who had not been taking part in the hostilities. More than 5,300 Palestinians were injured, at least 350 of them seriously."<sup>36</sup> The Goldstone Commission found that the civilian casualties were the result of Israeli bombing, missile attacks, tank fire, and the employment of white phosphorous and other indiscriminate antipersonnel weapons whose use in populated areas is banned by international law.

The Goldstone Commission and other major investigations demonstrated that, beyond the direct killings, Israel intentionally 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—all for "the specific purpose of denying their use for the sustenance of the civilian population of the Gaza Strip."<sup>37</sup> B'Tselem provided additional details: "Israel destroyed over 3,500 homes, leaving approximately 20,000 persons homeless. . . . [It also attacked] the health infrastructure that had already been on the brink of collapse due to Israel's siege on Gaza."<sup>38</sup>

Since the release of the Goldstone report in September 2009, all of its major factual findings have been confirmed and new details have emerged as a result of other extensive investigations and public reports by human rights organizations—including Amnesty International, Human Rights Watch, the Red Cross, CARE, Oxfam, and especially the Israeli human rights organizations B'Tselem, Israeli Physicians for Human Rights, and Breaking the Silence (an Israeli military veterans organization formed after the Gaza attack).<sup>39</sup>

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36. B'Tselem, "Three Years since Operation Cast Lead: Israeli Military Utterly Failed to Investigate Itself," January 18, 2012, [http://www.btselem.org/gaza\\_strip/20120118\\_3\\_years\\_after\\_cast\\_lead](http://www.btselem.org/gaza_strip/20120118_3_years_after_cast_lead).

37. Goldstone report, p. 366 par. 316.

38. B'Tselem, *2010 Annual Report*, p. 6; and *ibid.*, "Three Years since Operation Cast Lead," p. 1.

39. In December 2010, Breaking the Silence published a book consisting of more than 100 interviews with Israeli soldiers who witnessed or participated in repeated unnecessary shootings and

In sum, the Goldstone Commission found that “the conditions of life, resulting from deliberate actions of the Israeli forces and the declared policies of the Government of Israel. . . . cumulatively indicate the intention to inflict collective punishment on the people of the Gaza Strip in violation of international humanitarian law.”<sup>40</sup> Those actions, of course, also violated just war morality, as the next section of this article demonstrates.

### *Did Israel Have a Just Cause?*

Israel claimed that because it ended its occupation of Gaza in 2005 by withdrawing the Jewish settlements, continued attacks against it demonstrated Hamas’s true purpose: the destruction of the State of Israel. Therefore, the argument goes, the Jewish state had no other choice but to defend itself. Most of the critics of Cast Lead have not challenged this argument, focusing instead on the moral unacceptability of Israel’s methods.

Nonetheless, the Israeli claim to have had a just cause is unconvincing. First, as already described, Israel maintained both direct and indirect control over Gaza after its 2005 “withdrawal” and continued to inflict severe suffering on its inhabitants. Consequently, the inference that Hamas’s goal of destroying Israel was the only explanation for its attacks is baseless.<sup>41</sup> Second, even if Israel had genuinely ended its occupation of Gaza, its inhabitants would have retained their right to continue the Palestinian struggle against the Israeli occupation and repression of the other Palestinian territories. As the 1992 Oslo agreement states, the West Bank and Gaza Strip are “a single territorial unit.”<sup>42</sup> To believe otherwise is the equivalent of believing that, if in the 1770s, the British had withdrawn from New Jersey but continued to occupy the other twelve colonies, the residents of New Jersey would no longer have had the right to take up arms in support of American independence.

The right of resistance against aggression, occupation, or repression is inherent in just war morality and, for that matter, in the common morality of mankind. In principle, then, the Palestinians have the right to resist the Israeli

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other uses of force against the Palestinians, including a wide range of deliberate abuses and humiliations routinely visited on the Palestinians by the Israeli occupying forces. *Breaking the Silence, Occupation of the Territories: Israeli Soldier Testimonies, 2000–2010* (Jerusalem: Breaking the Silence, December 16, 2010).

40. Goldstone report, p. 24 par. 74. The Goldstone Commission added that such actions might be considered “crimes against humanity” (par. 75).

41. To be sure, the issue is further complicated by the fact that the Hamas charter, and some of its rhetoric, did say that its goal was to “liberate” all of Palestine, meaning the destruction of Israel. The weight of the evidence, however, is that Hamas had recognized that this was an impossible goal and, in practice, had abandoned it.

42. Goldstone report, pp. 63–64 par. 205.

occupation even, if all else fails, through armed resistance. To be sure, this right is subject to two qualifications. First, in practice the exercise of the right may be unwise and even morally wrong if it has little chance of success; the Palestinian predicament is that both armed and nonviolent resistance has failed. Second, the right of armed resistance does not allow for the use of terrorism.

The terrorism issue creates a difficult moral dilemma: Can a state (in this case, Israel) justly claim the right of self-defense when the terrorism directed against it is a consequence of its occupation and repression of another people? My view is that a state that occupies and represses another people has forfeited its claim to self-defense when its victims turn to armed resistance, even when their means, terrorism, is also morally wrong—at least so long as there is good reason to believe that the terrorism would end if the repression that engendered it ended.<sup>43</sup> Still, the Palestinian use of terrorism certainly creates a morally vexing issue, but this should not obscure the larger point: Israel's underlying purpose in Cast Lead was not self-defense but the maintenance of control over Gaza through economic and military warfare, warfare that repeatedly provoked resistance and retaliation.

Just war theory includes the principle of last resort: every reasonable effort to seek a political solution must be tried before the use of force is allowable, even in a just cause. To be sure, as a number of writers on just war theory have observed, it is not always easy to determine if the last resort principle has been met in the lead-up to war. Michael Walzer, for example, has expressed skepticism regarding the utility of this principle on the grounds that, if taken literally, there is no such thing as last resort: "There is always something else to do: another diplomatic note, another United Nations resolution, another meeting."<sup>44</sup> Although the application of the last resort principle may sometimes be problematic, this is not the case with Israel and the Palestinians: instead of exhausting all reasonable alternatives to war, Israel has deliberately ignored or even sabotaged them. In the next two sections, I argue that Israel failed to meet the last resort principle because of its frequent refusals to negotiate cease-fires with Hamas or to abide by those that were negotiated, as well as because of its

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43. Although he is not addressing the admittedly more difficult problem of terrorism, Jeffrey McMahan has made a similar argument: "A person can have no right of defense against a threatened harm to which he has made himself liable. . . . that those who are liable to attack have no right of defense is true not only in relations among individuals in civil society but also in war." McMahan, *Killing in War*, p. 14. The political philosopher David Luban, citing McMahan, paraphrases his argument: "The aggressor has no moral right to be in the defender's homeland in the first place. . . . A burglar cannot plead self-defense if he kills the homeowner, even if the homeowner attacks him." Luban, "War Crimes," in Larry May, ed., *War: Essays in Political Philosophy* (Cambridge: Cambridge University Press, 2008), p. 272.

44. Walzer, *Arguing about War*, p. 88.

refusal to seek an increasingly attainable negotiated political settlement with that organization.

#### CEASE-FIRES

At the least, extended cease-fires or long-range truces that would have ended the Hamas attacks were readily attainable. Such measures, however, would have necessitated negotiations with Hamas and left it in power in Gaza, which Israel was unwilling to accept. Consequently, it ignored a number of Hamas cease-fire proposals and violated others that were either negotiated with, or unilaterally proclaimed by, Hamas. Thus, contrary to the widespread view in Israel and the United States that unprovoked Hamas rocket attacks gave Israel no choice but to attack Gaza, the chronological evidence establishes that Israel was primarily responsible for the continuation of the violence.

According to Matti Steinberg, former head adviser on Palestinian affairs to the Israeli security organization Shin Bet, Hamas had refrained from attacking civilians inside Israel until Baruch Goldstein's February 1994 murder of twenty-nine Palestinians in a Hebron mosque. When Prime Minister Rabin, fearing violent conflict with Jewish settlers, refused to withdraw them from Hebron in the aftermath of the massacre, Hamas retaliated with suicide bombings in Israel. Hamas's subsequent turn toward terrorism, argues Steinberg, "stemmed directly from the Goldstein massacre."<sup>45</sup> Even so, three years later Khaled Meshal, then the chief Hamas leader, conveyed an offer to Israel, through King Hussein of Jordan, to reach an understanding on a cease-fire to last thirty years. Israel not only ignored the offer but, a few days later, Israeli operatives tried to assassinate Meshal in Amman by poisoning him.<sup>46</sup>

From the mid-1990s through 2005, Israel experienced sporadic terrorist attacks, but these typically followed Israeli undercover operations that killed Hamas or other militants as well as civilian bystanders. Following the Israeli withdrawal of its Gaza settlements in August–September 2005, a de facto truce went into effect. After a few months, however, Israel resumed its assassinations of radical Palestinian leaders, which set off a new action-retaliation cycle. An Israeli columnist left no doubt about which side bore primary responsibility for the breakdown of the truce: "We are told that we have withdrawn from Gaza and for some reason they are still shooting. Immediately after the withdrawal, quiet was in fact maintained. . . . Qassams were not fired and the truce was honored. But then Israel said that . . . in the West Bank it would continue

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45. Quoted in Akiva Eldar, "Evacuate Jewish Hebron," *Haaretz*, November 3, 2008.

46. The offer and the Israeli response were made public by ex-Mossad Chief Ephraim Halevy, in an interview with Zeev Schiff, "Ex-Mossad Chief: Hamas Offered 30-Year Cease-fire in 1997," *Haaretz*, March 30, 2006. The assassination attempt failed because King Hussein was furious and threatened to break relations with Israel unless it immediately sent an antidote, which Israel did.

to pursue Islamic Jihad activists. The IDF embarked on extensive assassination operations in the West Bank, and then the Jihad in Gaza declared it would not abandon its people there and would retaliate. . . . The firing on Sderot was renewed . . . and the IDF responded with assassinations in Gaza."<sup>47</sup>

In early 2006, following its electoral victory in Gaza's parliamentary elections, Hamas secretly conveyed a message to the Israeli government that it "would pledge not to carry out any violent actions against Israel and would even prevent other Palestinian organizations from doing so," provided Israel stopped its undercover assassination program and ended its military attacks in Gaza and the West Bank.<sup>48</sup> Israel ignored the message; according to B'Tselem and Israeli Physicians for Human Rights, Israeli raids killed 660 Palestinians in 2006, most of them unarmed noncombatants and up to a third of them minors.<sup>49</sup> For the first ten months, Hamas did not respond, although Islamic Jihad did launch a few rocket attacks despite stringent Hamas restrictions against its doing so.

Then, in November 2006, following an Israeli artillery attack in which a shell struck several homes in a Gaza town, killing 19 Palestinians, most of them women and children, Hamas retaliated with an attempted suicide bombing in Israel, its first such attack in nearly two years.<sup>50</sup> Throughout 2007 Israel stepped up its targeted assassinations and other attacks on militants in Gaza and the West Bank, using indiscriminate methods that resulted in the killing of civilians: an independent investigation by *Haaretz* concluded that in 2007 and 2008, Israel killed 816 Palestinians in Gaza alone, 360 of whom were civilians and 152 minors—even Shin Bet reported to the cabinet that some 200 Palestinians killed by Israeli forces "were not clearly linked to terrorist organizations."<sup>51</sup> It is impossible to know whether the few attacks launched by Hamas or the Islamic Jihad attacks during this period precipitated the Israeli attacks or were responses to them. According to Israel's official records, these attacks killed a total of 7 Israeli civilians.<sup>52</sup>

In January 2008, Israel closed the border crossing points into Gaza, drasti-

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47. Nehemia Shtrasler, "So What Have We Done to Them?" *Haaretz*, December 18, 2007. Sderot is an Israeli city less than a mile from the Gaza border. Qassams are short-range rockets.

48. Barak Ravid, "In 2006 Letter to Bush, Haniyeh Offered Compromise with Israel," *Haaretz*, November 10, 2008.

49. *Haaretz* Service, "B'Tselem: Israeli Security Forces Killed 660 Palestinians in 2006," *Haaretz*, December 31, 2006; and Avi Issacharoff, "57 Unarmed Palestinian Minors Killed by IDF since June," *Haaretz*, November 8, 2006.

50. Steven Erlanger, "Grandmother Blows Self Up in Suicide Attack on Israeli Forces," *New York Times*, November 25, 2006.

51. Barak Ravid, "*Haaretz* Probe: Half of Gazans Killed by IDF Not Involved in Terror," *Haaretz*, January 14, 2008.

52. Taghreed El-Khodary and Israel Kershner, "Gaza Is Tense as It Tallies Casualties," *New York Times*, January 2, 2008.



cally reducing the availability of fuel, electricity, and other crucial goods. Hamas responded by briefly resuming its rocket attacks into Israel, killing several civilians. A *Haaretz* military correspondent explained the purpose of these attacks: "Hamas has been trying for some time to create a balance of deterrence with Israel. . . . For every large-scale strike on its people, it has responded in recent months with massive rocket barrages. The organization especially wants to see targeted assassinations taken out of the equation."<sup>53</sup>

Nonetheless, Israel again escalated the conflict, attacking crowded refugee camps in Gaza and killing 130 Palestinians, more than half of them civilians, including many women and children.<sup>54</sup> To break the cycle, in April 2008 Khalid Meshal stated that Hamas was ready to stop attacking civilians if Israel did the same.<sup>55</sup> Israel accepted these terms, and in early June, a negotiated six-month truce went into effect.

According to Hamas, the truce included an understanding that Israel would open the crossings into Gaza and ease its economic sanctions and blockade. Israel initially did allow some increase of goods into Gaza but far less than Hamas had expected—or, more to point, far from sufficient to truly lift the economic siege.<sup>56</sup> Islamic Jihad again said that it would abide by the truce, provided Israel refrained from military actions against its militants in the West Bank. Israel, however, continued its attacks on the militants, which in turn resulted in several Islamic Jihad rocket attacks on Israel—though none by Hamas, which continued to "scrupulously observe the cease-fire."<sup>57</sup>

Although the Hamas and Islamic Jihad attacks inflicted few casualties—and no deaths—Israel continued its killing of Islamic Jihad militants in the West Bank in September and October 2008 and greatly tightened its siege of Gaza; consequently, food supplies, medicines, fuel, and repair parts for water sewage systems grew scarcer. Even so, Hamas continued to crack down on the Islamic Jihad attacks: "Hamas leaders have spoken out vehemently and unequivocally against the rocket fire," wrote Alexander Yakobson, "[and] have even threatened those who violate the lull with arrest."<sup>58</sup> In December 2008, a *New York Times* reporter concluded that Hamas had "imposed its will and even impris-

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53. Amos Harel, "Hamas Response: Calculated Escalation," *Haaretz*, February 27, 2008.

54. News Agencies, "Rights Group: Close to Half of Palestinian Fatalities in IDF Operation Were Civilians," *Haaretz*, March 4, 2008.

55. Jack Khoury, "Meshal: Shalit Still Alive," *Haaretz*, April 1, 2008.

56. Ethan Bronner, "Truce in Gaza Ends but May Be Revived by Necessity," *New York Times*, December 19, 2008.

57. Shlaim, "The Iron Wall Revisited," p. 95. See also Isabel Kershner, "Rockets Hit Israel, Breaking Hamas Truce," *New York Times*, June 25, 2008.

58. Alexander Yakobson, "Not Israel's Policemen," *Haaretz*, July 14, 2008.

oned some of those who were firing rockets,” in a “largely successful” effort to halt all attacks.<sup>59</sup>

Nonetheless, on November 4, Israel broke the cease-fire with Hamas in Gaza, attacking a tunnel and killing 6 members of Hamas.<sup>60</sup> Hamas retaliated on November 14, firing rockets into southern Israel and announcing that it would not abide by the latest cease-fire agreement when it expired in December—but would be prepared to negotiate a new agreement if Israel agreed to stop its attacks and ease its siege.<sup>61</sup> In fact, according to Israeli newspapers, on December 23, 2008—just four days before the start of Cast Lead—Yuval Diskin, the head of Shin Bet, told the Israeli cabinet that Hamas wanted to continue the truce if Israel accepted a cease-fire in both Gaza and the West Bank and ended its blockade.<sup>62</sup> Israel refused these terms.

Two years after Cast Lead, Gen. Shmuel Zakai, a former commander of Israel’s forces in Gaza, stated that the Israeli government had made a “central error” during the truce by failing “to take advantage of the calm to improve, rather than markedly worsen, the economic plight of the Palestinians of the Strip. . . . When you create a tahdiyeh [cease-fire], and the economic pressure on the Strip continues, it is obvious that Hamas will try to reach an improved tahdiyeh, and that their way to achieve this is resumed Qassam fire. . . . You cannot just land blows, leave the Palestinians in Gaza in the economic distress they’re in, and expect that Hamas will just sit around and do nothing.”<sup>63</sup>

On February 7, 2011, Wikileaks released a cable that shed new light on why Israel was uninterested in maintaining the truce or cease-fire. Quoting David Hacham, an Israeli adviser to Defense Minister Ehud Barak, the August 29, 2008, cable reported that Barak had told other high-level Israeli officials that Hamas was maintaining the cease-fire; that it was making a serious effort to convince more radical Gazan groups not to launch rockets or mortars into Israel; and that, as a result, there was now “a large measure of peace and quiet to Israeli communities near Gaza.” The real problem, Barak went on, was that the truce provided an opportunity for Hamas to build up its military arsenal and further consolidate its political power in Gaza. Consequently, “at some

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59. Bronner, “Truce in Gaza Ends but May Be Revived by Necessity.”

60. Israel claimed that the tunnel was intended to facilitate Hamas attacks inside Israel; however, the tunnels served a number of purposes, especially to bring food and other goods into Gaza that were prohibited by the continuing Israeli blockade.

61. Ethan Bronner and Taghreed El-Khodary, “Hamas Fires Rockets into Israel,” *New York Times*, November 15, 2008; and Shay Fogelmann “Shock and Awe,” *Haaretz*, December 31, 2010.

62. Johann Hari, “The True Story behind This War Is Not the One Israel Is Telling,” *Independent*, December 2, 2008.

63. Interview with Gen. Shmuel Zakai, quoted in Bradley Burston, “Can the First Gaza War Be Stopped before It Starts?” *Haaretz*, December 22, 2010.

point, military action will have to be put back on the table.”<sup>64</sup> Ten weeks later, following a December 24 barrage of Hamas rocket and mortar attacks that were part of the renewed tit-for-tat pattern, Israel launched Operation Cast Lead.

#### POLITICAL SETTLEMENT

As discussed earlier, a willingness to pursue the possibility of a reasonable political settlement before resorting to war is a major principle of just war theory. Indeed, it was supposed to have been the goal of Jabotinsky’s iron wall strategy, which in his conception did not require endless war and the total defeat of the Palestinians and other Arabs, but only their being brought to the point at which negotiations could produce a political settlement resulting in the realization of the core goals of Zionism. As Shlaim argues, however, although the military component of the iron wall “became the cornerstone of Israeli government strategy from 1948 onward,”<sup>65</sup> almost all of Israel’s political leaders ignored the political side, which had “encompassed a theory of change in Jewish-Palestinian relations leading to reconciliation and peaceful coexistence . . . [rather than] a bulwark against change and . . . an instrument for keeping the Palestinians in a permanent state of subservience to Israel.”<sup>66</sup>

By the end of 2008, there were substantial reasons to believe that Hamas was ready to go beyond cease-fires and join with the Palestinian Authority in the West Bank in supporting a political settlement to end the Israeli-Palestinian conflict. As had been the case with Yasser Arafat’s PLO, which gradually became more moderate (especially once it had a de facto government and a potential state to run in the West Bank), there were growing indications that Hamas was moving toward a pragmatic, if reluctant, acceptance of the realities of Israeli power and was becoming increasingly amenable to a de facto if not de jure two-state political settlement.

The record makes clear that Israel made no attempt to explore the possibility of a negotiated settlement. First, shortly after winning the January 2006 Gazan

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64. Wikileaks, “Defense Minister Barak’s Discussions in Egypt Focus on Shalit, Tahdiya, Anti-Smuggling, and Iran,” *Telegraph*, February 7, 2011, <http://www.telegraph.co.uk/news/wikileaks-files/egypt-wikileaks-cables/8309338/DEFENSE-MINISTER-BARAKS-DISCUSSIONS-IN-EGYPT-FOCUS-ON-SHALIT-TAHDIIYA-ANTI-SMUGGLING-AND-IRAN.html>.

65. Shlaim, “The Iron Wall Revisited,” p. 87.

66. Shlaim, *The Iron Wall*, p. 599. In his updating of *The Iron Wall*, Shlaim put it this way: “For Jabotinsky, the iron wall was not an end but a means to an end. Once Arab resistance had been broken . . . the moderates [would come] to the fore. Then and only then could serious negotiations begin” (p. 83). As well, Shaul Arieli, a retired IDF colonel who has written widely on both the political and military aspects of the Israeli-Palestinian conflict, argues that Israel has ignored Jabotinsky’s support for negotiations with Israel’s enemies on the basis of “mutual concessions,” once the iron wall had been established. Arieli, “1949 in Exchange for 1967,” *Haaretz*, March 7, 2012.

elections, Hamas sent a message to President George W. Bush, offering Israel a truce for “many years,” in exchange for a compromise political settlement; neither the Bush administration nor Israel replied.<sup>67</sup> Soon afterward, Hamas began to go public with its new position. In February 2006, Khaled Meshal said that Hamas would not oppose the unified Arab stance expressed in an Arab League summit conference, which offered Israel full recognition and normalized relations in exchange for full Israeli withdrawal from the occupied territories and a solution to the refugee problem.<sup>68</sup> In April 2006, a senior Hamas official stated that Hamas was ready to discuss a possible two-state solution with Israel.<sup>69</sup> In May 2006, senior Hamas members imprisoned in Israel joined with Fatah leaders and issued the “Prisoner’s Declaration,” which went further than the earlier Hamas overtures. It called for the establishment of a Palestinian state “in all the lands occupied in 1967” and reserved the use of armed resistance only in those territories.<sup>70</sup> In August 2006, Gaza’s prime minister, Ismail Haniyeh, in effect accepted and incorporated the Prisoner’s Declaration into the Hamas position, especially its crucial distinction between the occupied territories and Israel within its 1967 borders, telling an American scholar: “We have no problem with a sovereign Palestinian state over all of our lands within the 1967 borders, living in calm.”<sup>71</sup> In January 2007, Meshal stated that Hamas would consider recognizing Israel once a Palestinian state was established; a *Haaretz* story noted that “this is the first time that a Hamas official has raised the possibility of full and official recognition of Israel in the future.” Prime Minister Olmert of Israel “shrugged off” Meshal’s statement.<sup>72</sup> Throughout 2008 Hamas’s political position, including that of its hard-liners, continued to evolve. In particular, Meshal publicly reiterated in April 2008 that Hamas would accept a Palestinian state within the 1967 borders—meaning Gaza, the West Bank, and East Jerusalem.<sup>73</sup>

Israel ignored all of these overtures, terming them “verbal gymnastics.”<sup>74</sup> Without doubt, Hamas’s position prior to Cast Lead contained many ambiguities and inconsistencies. First, Hamas had not—and still has not—repudiated its anti-Semitic founding ideology and 1988 charter, which explicitly states that

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67. Ravid, “In 2006 Letter to Bush, Haniyeh Offered Compromise with Israel.”

68. Danny Rubinstein, “Don’t Boycott the Palestinians,” *Haaretz*, February 13, 2006.

69. Zeev Schiff, “Hamas Says Ready for Two-State Solution,” *Haaretz*, April 7, 2006.

70. Arnon Regular, “Hamas, Fatah Prisoners Agree to Two-State Solution in Joint Draft,” *Haaretz*, May 11, 2006.

71. Quoted in Scott Atran, “Is Hamas Ready to Deal?” *New York Times*, August 17, 2006.

72. Avi Issacharoff, “PM Dismisses Meshal Comments That Israel’s Existence Is a Reality,” *Haaretz*, January 7, 2007.

73. Avi Issacharoff, “Meshal: Hamas Backs a Palestinian State in ‘67 Borders,” *Haaretz*, April 2, 2008.

74. Quoted in Schiff, “Hamas Says Ready for Two-State Solution.”

Muslims have a religious obligation to eliminate the State of Israel and expel the Jews from the Islamic holy land. Second, Hamas called only for a truce rather than a permanent settlement; at various times, however, Hamas officials had suggested that the truce “would be renewed automatically” and extended indefinitely.<sup>75</sup> Third, Hamas officials sometimes said that they would accept Israel as a “fact” but would not recognize its legitimacy; on other occasions, however, they strongly implied that their formal position had no practical importance and could eventually change.<sup>76</sup> One day a Hamas official would sound particularly conciliatory, but other officials would then back away. Sometimes Hamas stressed its commitment to the return of all Palestinian refugees to Israel—one of the most difficult obstacles to a permanent settlement—but at other times it downplayed the issue. And so on.

Yet well before Cast Lead, the direction in which Hamas was moving was clear; and in historic terms, the evolution had been rapid, as some former high-level Israeli government officials acknowledged. For example, in late 2006 Yossi Alpher, a former deputy head of the Mossad and a pillar of the Israeli establishment, wrote: “Hamas’ conditions for a long-term hudna or ceasefire . . . are almost too good to be true. Refugees and right of return and Jerusalem can wait for some other process; Hamas will suffice with the 1967 borders, more or less, and in return will guarantee peace and quiet for ten, 25 or 30 years of good neighborly relations and confidence-building.”<sup>77</sup>

Ami Ayalon, a former head of Shin Bet, and Ephraim Halevy, a former head of Mossad and national security adviser in Ariel Sharon’s 2002–03 government, also argued strongly for negotiations with Hamas. In particular, in several Israeli newspaper articles before Cast Lead, Halevy argued that it was absurd to think of Hamas as if it were an ally of, or even modeled on, al-Qaida: Hamas militants, he wrote, have recognized that “[their] ideological goal is not attainable and will not be in the foreseeable future.” Instead, they are ready and willing to see the establishment of a Palestinian state in the temporary borders of 1967, and “they know that the moment a Palestinian state is established with their cooperation, they will be obligated to change the rules of the game:

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75. Danny Rubinstein, “Hamas PM Haniyeh: Retreat to 1967 Borders Will Bring Peace,” *Haaretz*, May 23, 2006.

76. An assessment in the *Economist* put it this way: “Some of the religious zealots may well believe in the obnoxious charter. Others, including Meshal and Haniyeh, try to brush it off and then, if pressed, dangle it as an item for negotiation, much as Fatah used the dropping of the PLO’s charter, which equally rejected Israel’s existence, as a bargaining tool.” “Will the Relationship Change? Yes It Can,” *Economist*, February 12, 2009.

77. Alpher is the coeditor of the Israeli online publication *Bitterlemons.org*; the quote is from Alpher, “Problematic Option,” *Bitterlemons.org*, November 20, 2006, <http://www.bitterlemons.org/previous/bl201106ed43.html#isrl>.

they will have to adopt a path that could lead them far from their original ideological goals.”<sup>78</sup> Halevy concluded, dryly, that “Israel, for reasons of its own, did not want to turn the ceasefire into the start of a diplomatic process with Hamas.”<sup>79</sup>

A number of factors accounted for the ongoing evolution of Hamas’s thinking. These included the realities of governing, especially when polls showed that most Gazans continued to favor an end to the conflict and a two-state solution; the fear of Islamic terrorism and the support of most Arab governments—particularly Egypt, Jordan, Saudi Arabia, and Syria—for a compromise settlement solution; the economic sanctions imposed by Israel, the United States, and a number of European states after the 2007 Hamas takeover of Gaza; and, no doubt, the unending Israeli assassinations and other military pressures and attacks.

In sum, the key point is that the only way to have resolved the ambiguities in Hamas’s position and to have explored and tested its operational policies would have been for Israel to enter into direct discussions with Hamas.

### *Did Israel Meet the Jus in Bello Requirements?*

Because Israel had no just cause (*jus ad bellum*) to attack Gaza, in a sense it would not matter if it had met all of the requirements and criteria of just methods—although surely its behavior would have been judged less harshly if it had, especially by those who have argued that Israel did have a legitimate right of self-defense. Given the widespread support of Israel’s self-defense position, even among many who otherwise are strong critics of Israeli policies toward the Palestinians, it is useful to review Cast Lead’s methods, or *jus in bello*.

#### DISCRIMINATION

As already noted, the most important principles governing *jus in bello* are discrimination and noncombatant immunity. The principle of discrimination requires soldiers to make every effort to distinguish between civilian and military targets, as well as to avoid massive attacks even on military targets if heavy civilian casualties will inevitably occur. In some carefully defined circumstances, discrimination allows “collateral damage”—meaning a limited number of civilian deaths or level of destruction that is a foreseeable but unintended and unwanted consequence or side effect of an attack on legitimate and

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78. The paraphrase of Halevy’s argument and the direct quotes are from Henry Siegman, “Israel’s Lies,” *London Review of Books*, Vol. 31, No. 2 (January 2009).

79. Quoted in Hari, “The True Story behind This War Is Not the One Israel Is Telling.”

important military targets.<sup>80</sup> A moral philosopher puts it this way: “The discrimination condition forbids intending the deaths of noncombatants as an end or means, as in terror bombing that aims to demoralize an enemy by killing its civilians, but does not forbid acts that merely foresee the deaths of non-combatants, as when one bombs an arms factory knowing that some civilians nearby will be killed.”<sup>81</sup>

In practice, there are close cases in which the question will be whether the “good” effect of damage to a legitimate military target outweighs the “bad” effect of (unintended but foreseeable) harm to civilians and their infrastructures. In some circumstances, the level of collateral damage may be morally defensible, but only if four conditions are met: the war must be an otherwise just one; the military value of the target must be high; the unintended but foreseeable harm to civilians and their infrastructures must be relatively low; and the attacking military forces must be willing to accept casualties of their own to keep that collateral damage as low as possible. Among other things, the principle of discrimination requires that when enemy combatants are located within densely populated areas, they may be justly attacked only by direct engagement, not by long-range and inherently indiscriminate weaponry, such as artillery, offshore shelling, or air bombardment. Thus, the collateral damage exception to the rule of discrimination does not legitimize, say, the bombing of apartment houses thought to contain enemy leaders, the inevitable result of which is likely to be the killing of large numbers of innocent people.

Operation Cast Lead is a clear case of the wholesale violation of the discrimination principle. Indeed, Israel openly admitted to paying no attention to that principle during Cast Lead. Several months before the operation, a leading general, Gadi Eisenkot, revealed what was purported to be a new military doctrine; but as the history of previous attacks on Palestinian or other Arab civilian populations demonstrates, it was not at all new. According to Eisenkot, in future wars Israel “will wield disproportionate power against every village from which shots are fired on Israel, and cause immense damage and destruction. . . . From our perspective, these are military bases.” Similar statements, emphasizing the “deterrent” value of such attacks, were attributed to other Israeli officers.<sup>82</sup> In Prime Minister Olmert’s words, “The Government’s po-

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80. This principle is sometimes referred to as that of the “double effect,” meaning that a military attack may have two effects: the intended effects on the intended target and the unintended effects on civilian targets. In carefully described and circumscribed situations, the second effect may not constitute a violation of the principle of discrimination.

81. Thomas Hurka, “Proportionality in the Morality of War,” *Philosophy and Public Affairs*, Vol. 33, No. 1 (January 2005), p. 36.

82. For example, see Amos Harel, “IDF Plans to Use Disproportionate Force in Next War,” *Haaretz*, October 5, 2008.

sition was from the outset that if there is shooting at the residents of the south, there will be a harsh Israeli response that will be disproportionate,” a threat that, in the language of Richard Falk, the special rapporteur to the UN Human Rights Council, was “a novel and blatant repudiation of one of the most fundamental aspects of international law governing the use of force.”<sup>83</sup>

The threats were not empty. During the Cast Lead operation, a number of news reports described the Israeli strategy of using massive firepower—or in the words of another Israeli officer, “any method,” no matter how violent<sup>84</sup>—to minimize Israeli casualties, regardless of the effect on civilians and their infrastructures.<sup>85</sup> “When we suspect that a fighter is hiding in a house,” said an Israeli general, “we shoot it with a missile and then with two tank shells, and then a bulldozer hits the wall. It causes damage but it prevents the loss of life among soldiers.”<sup>86</sup> Note the double violation of the discrimination principle: mere suspicion is sufficient to destroy homes containing civilians, including women and children—even if only a single fighter is the object of that suspicion.

After the conclusion of Cast Lead, some Israeli soldiers who participated in the attack, appalled at the way it was carried out and by what they were ordered to do, told Breaking the Silence (a dissident Israeli veterans organization formed in 2004) about their experiences. The thread running through most of their accounts—and one that was confirmed by Israeli military correspondents—was that repeated orders were given to prevent Israeli casualties, whatever the cost in Palestinian lives.<sup>87</sup>

The Goldstone Commission and other international human rights groups provided many examples of Israeli attacks that employed excessive force and caused civilian casualties. The Goldstone report examined a number of cases in great detail in a section entitled “Indiscriminate Attacks by Israeli Forces Resulting in the Loss of Life and Injury to Civilians.” It found that on several occasions Israel deliberately bombed or shelled civilian apartment buildings,

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83. “Israel Threatens Disproportionate Response to Rockets,” *New York Times*, February 1, 2009; and UN Human Rights Council, “Human Rights Situation in Palestine and Other Occupied Arab Territories” (New York: UN Human Rights Council, February 11, 2009).

84. Quoted in Amos Harel, “IDF Officer: ‘It Will Take Many Years to Restore Bomb-Wracked Gaza,’” *Haaretz*, January 7, 2009.

85. In addition to numerous reports in *Haaretz*, two *New York Times* correspondents confirmed that “the guiding principle for a number of the operations [was] to avoid Israeli casualties at all cost.” Ethan Bronner and Sabrina Tavernise, “In Shattered Gaza Town, Roots of Seething Split,” *New York Times*, February 4, 2009.

86. Quoted in Harel, “IDF Officer.”

87. A number of Israeli news stories discuss the findings of Breaking the Silence. See, for example, Gideon Levy, “Man Responsible for Cruel Wars Only Attracts Praise,” *Haaretz*, July 16, 2009; and Amira Hass, “The IDF Price Tag,” *Haaretz*, July 24, 2009.



supposedly because they were harboring “terrorists” or their weapons. In one such attack, Israeli forces destroyed a four-story family home, killing twenty-two members of the extended family inside.<sup>88</sup>

Similarly, Amnesty International found that “hundreds of civilians were killed by Israeli attacks using long-range high-precision missiles fired from combat aircraft, helicopters and drones, or from tanks stationed several kilometers from their target. Victims were not caught in the crossfire or when shielding militants, but killed in their homes while sleeping, carrying out daily tasks or playing. . . . Scores of civilians were killed and injured by less precise weapons, such as artillery shells and mortars, and flechette tank shells.” By carrying out such “indiscriminate and disproportionate attacks against civilians,” and because “much of Gaza was razed to the ground, leaving vital infrastructure destroyed, the economy in ruins and thousands of Palestinians homeless,” Israel had “committed war crimes and other serious breaches of international law.”<sup>89</sup>

Human Rights Watch also carried out an investigation of Cast Lead. In a highly detailed report, it concluded that Israel’s destruction of civilian infrastructure during the operation was “unlawful,” “extensive,” “deliberate,” and “punitive” and therefore “can be prosecuted as a war crime.”<sup>90</sup>

#### NONCOMBATANT IMMUNITY

The just war principle of noncombatant immunity is not limited to prohibiting deliberate attacks on civilians per se, but also on their crucial economic, civil, and societal infrastructures. Failure to observe this principle is considered a war crime in both moral theory and international law.<sup>91</sup> As has been described, when homes, hospitals, electrical systems, sewage treatment facilities, farms and orchards, roads and bridges, and so on are attacked, people suffer and die, even though it takes a little longer than when they are bombed and shelled.

The only remaining issue, then, is whether Israel went beyond infrastructure attacks, as it had done in the past—including the quite recent past, in Lebanon—to directly and intentionally target civilians. That is essentially what

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88. Goldstone report, p. 238 par. 841–846.

89. “Amnesty International Report 2010: Israel and the Occupied Territories” (Geneva: Amnesty International, May 2010), par. 1, [http://www.unhcr.org/refworld/country,,,ANNUALREPORT\\_ISR,,4c03a821c,0.html](http://www.unhcr.org/refworld/country,,,ANNUALREPORT_ISR,,4c03a821c,0.html).

90. Human Rights Watch, “I Lost Everything: Israel’s Unlawful Destruction of Property during Operation Cast Lead” (New York: Human Rights Watch, May 2010), <http://www.hrw.org/node/90317/section/2>.

91. Articles 51 and 52 of the 1977 Additional Protocol 1 to the Geneva Conventions, widely cited throughout the Goldstone report, prohibit “indiscriminate attacks against civilians or civilian objects.”

the Goldstone Commission concluded. First, it found that on a number of occasions Israeli soldiers had directly attacked Gazan civilians: “The Israeli armed forces repeatedly opened fire on civilians who were not taking part in the hostilities and who posed no threat to them.”<sup>92</sup> The report detailed eleven such attacks in which hundreds of Palestinian civilians were killed, including on a mosque crowded with worshippers, on families’ homes, and on groups of “civilians who were trying to leave their homes to walk to a safer place waving white flags and, in some of the cases, following an injunction from the Israeli armed forces to do so.”<sup>93</sup>

Individual atrocities and war crimes, however, undoubtedly happen in all wars, just and unjust alike, so by themselves they do not necessarily reflect the policy or intentions of governments.<sup>94</sup> Even so, how governments portray their enemies is relevant: if they are constantly described simply as “terrorists,” the likelihood of individual atrocities will surely increase. The Goldstone report put it this way: “Since Israel claims there is no real division between civilian and military activities and it considers Hamas to be a terrorist organization, it would appear that anyone who supports Hamas in any way may be considered as promoting its terrorist activity. Hamas was the clear winner of the latest elections in Gaza. It is not far-fetched for the Mission to consider that Israel regards very large sections of the Gazan civilian population as part of the ‘supporting infrastructure.’”<sup>95</sup>

In support of its overall conclusion that Israel deliberately attacked civilians during Cast Lead, the Goldstone Commission made a number of arguments and cited a wide range of evidence. First, it considered past Israeli behavior to be relevant to understanding Israel’s intentions and strategies in Cast Lead. In its consideration of the historical context, however, the Commission went back only to the 2006 Israeli attack on Lebanon; its argument would have been even stronger if it had reviewed the entire history of the iron wall strategy, which included attacks not only on civilian infrastructures but directly on civilians.

Second, the report quoted what Israeli leaders had explicitly said about their intentions. For example, it pointed to a number of pre-attack statements by leading Israeli military and political figures that publicly announced a revised military doctrine that, as the Commission put it, “explicitly admits the inten-

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92. Goldstone report, p. 228 par. 800.

93. *Ibid.*, p. 198 par. 703.

94. For example, during the Vietnam War U.S. soldiers deliberately killed many Vietnamese non-combatants, most notoriously in the My Lai massacre, but U.S. government policies and military strategies did not include the intentional killing of civilians, and in a number of cases—unlike the IDF after Cast Lead—the army court-martialed soldiers for doing so.

95. Goldstone report, p. 334 par. 1206

tional targeting of civilian targets as part of the Israeli strategy. . . . [leaving] little doubt that disproportionate destruction and violence against civilians was part of a deliberate policy."<sup>96</sup> For example, the report cited several ominous statements by high-level government officials such as Foreign Minister Tzipi Livni, who said: "We have proven to Hamas that we have changed the equation. Israel is not a country upon which you fire missiles and it does not respond. It is a country that when you fire on its citizens it responds by going wild—and this is a good thing."<sup>97</sup> The report also quoted Eli Yishai, Israel's deputy prime minister during Cast Lead: "It [should be] possible to destroy Gaza, so they will understand not to mess with us. . . . Even if rockets fall in an open air or to the sea, we should hit their infrastructure, and destroy 100 homes for every rocket fired."<sup>98</sup> There were other statements by high-level Israeli officials that were not included in the Goldstone report. For example, in February 2008, Deputy Defense Minister Matan Vilnai warned that the Gazans were "bringing on themselves a bigger Shoah, because we will use all our strength in every way we deem appropriate."<sup>99</sup> During Cast Lead, President Shimon Peres said that Israel's goal was "to provide a strong blow to the people of Gaza so that they would lose their appetite for shooting at Israel."<sup>100</sup>

Third, the Commission noted that not only had Israel attacked the Gazan infrastructure, but that during those attacks, it had been "systematically reckless" in its use of indiscriminate weapons in densely populated areas.<sup>101</sup>

In its summary statements, the Goldstone Commission left no doubt that it considered Israel to have massively violated the noncombatant immunity principle during Cast Lead: "Deeds by Israeli forces and words of military and political leaders prior to and during the operations, indicate that as a whole they were premised on a deliberate policy of disproportionate force aimed not at the enemy but at the 'supporting infrastructure.' In practice, this appears to have meant the civilian population."<sup>102</sup> Similarly, the report concluded, Cast Lead "was a deliberately disproportionate attack designed to punish, humili-

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96. *Ibid.*, p. 335 par. 1208, par. 1211.

97. *Ibid.*, quoted on p. 332 par. 1202.

98. *Ibid.*, p. 332 par. 1200, par. 1201.

99. Haaretz Service, "MKs Call for Gaza Invasion in Wake of Escalation," *Haaretz*, February 29, 2008. Shoah is the Hebrew term for the Holocaust. Two years later, Vilnai (then deputy prime minister in the Netanyahu government) said that "Gaza is an abscess, troublesome pus." "What was he trying to convey," asked a leading Israeli journalist, "that now Israel needs to use radical surgery to fully remove the localized infection?" Amira Hass, "Israel's Qassam Strikes on Gaza," *Haaretz*, December 29, 2010.

100. Quoted in Greer Gay Cashman, "Solidarity during War Is Israel's Finest Hour," *Jerusalem Post*, January 14, 2009.

101. Goldstone report, p. 16 par. 48; and p. 249 par. 890.

102. *Ibid.*, p. 524 par. 1683.

ate and terrorize a civilian population, radically diminish its local economic capacity both to work and to provide for itself, and to force upon it an ever increasing sense of dependency and vulnerability.”<sup>103</sup> Such behavior, it pointedly noted, “might justify a competent court finding that crimes against humanity have been committed.”<sup>104</sup>

The conclusion of the Goldstone Commission, Amnesty International, Human Rights Watch, and other investigations that the methods used by Israel in Cast Lead constituted war crimes has not gone unchallenged. In the next session, I examine the main rebuttals.

### *Evaluation of Counterarguments*

The charge that Israel pursued a policy of killing civilians during Operation Cast Lead enraged the country and its supporters more than any other. The Israeli government and other critics of the Goldstone report offered a number of counterarguments.<sup>105</sup> In this section, I examine the Israeli government’s counterarguments and the most extensive and widely cited critique of the report, a *New Republic* article by Moshe Halbertal, a Hebrew University philosophy professor.<sup>106</sup> I group the counterarguments into six sections.

#### WE DIDN’T DO IT

According to the Israeli government, “Israel’s resort to force in Cast Lead was both a necessary and a proportionate response to Hamas attacks. . . . Israeli commanders and soldiers were guided by International Humanitarian Law . . . [which] required IDF forces to direct their attacks solely against military objectives and to try to ensure that civilians and civilian objects could not be harmed.”<sup>107</sup> Halbertal’s argument is only slightly more qualified: “It might

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103. *Ibid.*, p. 525 par. 1690.

104. *Ibid.*, p. 25 par. 75.

105. The Israeli Ministry of Foreign Affairs (IMFA) produced a number of publications defending Cast Lead. The most extensive was IMFA, “The Operation in Gaza: Factual and Legal Aspects,” IMFA, July 29, 2009, [http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Operation\\_in\\_Gaza-Factual\\_and\\_Legal\\_Aspects.htm](http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Operation_in_Gaza-Factual_and_Legal_Aspects.htm). Subsequently, two other official defenses were published after the appearance of the Goldstone report in September 2009. The first was IMFA, “Gaza Operations Investigations: An Update,” IMFA, January 2010, <http://www.mfa.gov.il/NR/rdonlyres/8E841A98-1755-413D-A1D2-8B30F64022BE/0/GazaOperationInvestigationsUpdate.pdf>; and the second was IMFA, “Gaza Operations Investigations: Second Update,” IMFA, July 2010, <http://www.mfa.gov.il/NR/rdonlyres/1483B296-7439-4217-933C-653CD19CE859/0/GazaUpdateJuly2010.pdf>.

106. Moshe Halbertal, “The Goldstone Illusion: What the U.N. Report Gets Wrong about Gaza—and War,” *New Republic.com*, November 9, 2009, <http://www.tnr.com/article/world/the-goldstone-illusion?page=0,5>.

107. IMFA, “The Operation in Gaza,” p. 1.

well be that Israel should have done more than it did to minimize collateral deaths. . . . But the claim that Israel intentionally targeted civilians as a policy of war is false and slanderous.”<sup>108</sup>

Both the Israeli government and Halbertal argue, in effect, that Israel did not deliberately attack civilian targets, because such attacks are prohibited by the Israeli army’s official Code of Ethics (Halbertal was one of the code’s authors), its rules of engagement, and its training procedures.<sup>109</sup> The argument that the existence of the IDF code proves that Israel did not violate the noncombatant immunity rule is absurd, given the established facts of actual Israeli military behavior not only in Cast Lead, but throughout the entire history of the Arab-Israeli conflict.

A year and a half after the Goldstone Commission reported its conclusion that Israel had deliberately attacked civilians in Cast Lead, Richard Goldstone issued what was widely seen as a retraction of that charge. The Goldstone Commission had sought to ascertain whether the Israeli government and armed forces had complied with their obligations to carry out investigations on allegations of war crimes and, when appropriate, to initiate judicial proceedings against those charged. The Israeli government refused to cooperate, the Commission reported, but it had nonetheless learned enough to conclude that the Israeli system is not effective in “uncovering the truth”; the system had “failed to open prompt, independent, and impartial criminal investigations”; and it had failed to comply with its obligations under international law “to prevent, investigate, and punish violations of human rights.”<sup>110</sup>

After the Goldstone Commission reported its findings to the UN Human Rights Council, the Council appointed a new fact-finding committee, headed by former New York State Supreme Court Justice Mary McGowan Davis, whose mandate was to review and update what Israel (and Hamas) had done to comply with the Goldstone Commission’s recommendation that both parties must first investigate their own conduct before the report was referred to the International Criminal Court for possible war crimes prosecutions.<sup>111</sup>

Following the Davis Committee’s report of its findings, Richard Goldstone essentially retracted—or “reconsidered,” as he put it—the findings of his own

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108. Halbertal, “The Goldstone Illusion,” p. 6.

109. IMFA, “The Operation in Gaza,” p. 1 par. 6; and Halbertal, “The Goldstone Illusion,” pp. 1, 2.

110. Goldstone report, pp. 504–506 par. 1613, 1620, 1621.

111. The full name of the Davis Committee report, as it came to be known, is UN Human Rights Council, *Report of the Committee of Independent Experts in International Humanitarian and Human Rights Law*, March 18, 2011. Page numbers are from the online version of the report, [http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.16.24\\_AUV.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.16.24_AUV.pdf).

commission that Israel had deliberately attacked noncombatants in Cast Lead. Although not explicitly repudiating his commission's findings that Israel had committed a number of war crimes during the operation, he came close: "We know a lot more today about what happened . . . than we did [before]. . . . If I had known then what I know now, the Goldstone Report would have been a different document. . . . The investigations published by the Israeli military and recognized in the U.N. committee's report. . . . indicate that civilians were not intentionally targeted as a matter of policy."<sup>112</sup>

Goldstone's new position was unconvincing. First, as I have argued, the Goldstone report's major findings have been confirmed by a number of investigations and reports of international and even Israeli human rights groups, many of which have added devastating new details on the nature of the Israeli attacks on civilians and crucial infrastructures.

Second, Goldstone referred only to the question of whether Israeli policy in Cast Lead was to deliberately attack civilians, rather than to the issue of whether it deliberately attacked civilian infrastructures—let alone to the question of whether there was any meaningful distinction between the two. As I have argued (and as all of the major human rights organizations have effectively concluded), even if the Israeli attacks had been "merely" indiscriminate, they still would have been war crimes.

Third, as a number of commentators quickly pointed out, nothing in the Davis Committee report warranted Goldstone's startling retraction. On the contrary, in all important respects the report essentially reached the opposite conclusion from that of the Goldstone retraction, for it noted that many important cases had not been investigated at all, and it expressed great skepticism about both the quality and seriousness of purpose of those "investigations" that Israel did carry out. Moreover, the Davis Committee observed that the Israeli investigations did not examine the overall policies of either the political or military leadership. Consequently, the Committee concluded its report with this pointed observation: "The Committee reiterates the conclusion of its previous report that there is no indication that Israel has opened investigations into the actions of those who designed, planned, ordered and oversaw Operation Cast Lead."<sup>113</sup>

On January 18, 2012, B'Tselem issued a devastating report on the failure of the Israeli government to investigate twenty cases in which the organization's

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112. Richard Goldstone, "Reconsidering the Goldstone Report on Israel and War Crimes," *Washington Post*, April 2, 2011.

113. Davis Committee report, p. 22.

research “indicated suspected breaches of international humanitarian law. . . . The military has completely failed to investigate itself, regarding both policy choices and the conduct of the forces in the field in particular cases.”<sup>114</sup>

Finally, it is important to remember that the Goldstone Commission consisted not only of Goldstone but also of three other internationally known human rights experts. Shortly after the Goldstone “retraction,” all three bluntly rebuked their colleague: “The signatories to this statement find it necessary to dispel any impression that subsequent developments have rendered any part of the Mission’s report unsubstantiated, erroneous or inaccurate. . . . Nothing of substance has appeared that would in any way change the context, findings or conclusions of that report with respect to any of the parties to the Gaza conflict.”<sup>115</sup>

#### WE TOLD THEM TO MOVE

Continuing with the counterarguments, Halbertal and the Israeli government asserted that the Israeli army sought to avoid even accidental civilian casualties by holding off attacks against legitimate military targets until after it had issued a series of warnings (via telephone messages, radio broadcasts, and leaflets) to civilians living nearby to evacuate the area.<sup>116</sup> Most critics of Operation Cast Lead have argued that the small size of Gaza, its population density, and the scale and intensity of the Israeli air, artillery, and tank attacks on homes, buildings, and entire areas left civilians no place to hide or flee; a UN report observed, moreover, that “all crossings from Israel were kept closed during the attacks, except for rare and minor exceptions,” making the Israeli attack “the only conflict in the world in which people are not even allowed to flee.”<sup>117</sup>

The Goldstone report carefully examined the nature of the Israel warnings and concluded that they did not meet the Geneva Convention’s requirement that effective advance warnings be given to civilians near military targets—a requirement that Israel had agreed to accept.<sup>118</sup> The report gave a number of reasons for this conclusion. First, sometimes Israel simply did not issue warnings before attacks that killed or wounded many civilians. Second, on other occasions, the warnings were too general and vague to be useful to those wishing to flee.<sup>119</sup> Third, many of the warnings urged civilians to move to city

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114. B’Tselem, “Three Years since Operation Cast Lead.”

115. Statement issued by Ms. Hina Jilani, Professor Christine Chinkin, and Col. Desmond Travers, members of the United Nations Fact Finding Mission to Gaza, May–September 2009, published in *Guardian*, April 14, 2011.

116. IMFA, “The Operation in Gaza,” p. 1 par. 8; and Halbertal, “The Goldstone Illusion,” p. 3.

117. Statement by UN High Commissioner for Refugees Antonio Guterres, January 6, 2009, <http://www.unhcr.org/496355082.html>.

118. Goldstone report, p. 13 par. 37.

119. *Ibid.*, p. 13 par. 37, 40.

centers that had been targets of intense air attacks, which, as far as they knew, were not over.<sup>120</sup> Finally, the report pointedly stressed that “the fact a warning was issued does not relieve a commander and his subordinates of taking all other feasible measures to distinguish between civilians and combatants.”<sup>121</sup>

#### THE DEATH RATIOS PROVE WE DID NOT DO IT

In another argument, Halbertal claims that the “death ratios” in Gaza prove that Israel did intentionally attack civilians. He writes that, according to some studies of civilian casualties in Gaza, for every militant who was killed, two or three noncombatants were killed: a ratio of 1:3, or perhaps 2:3. He writes, “There are 1.5 million people in Gaza and around 10,000 Hamas militants, so the ratio of militants to civilians is 1:150,” and concludes that “if Israel targeted civilians intentionally, how on earth did it reduce such a ratio to 1:3 or 2:3?”<sup>122</sup>

This argument has been cited by many supporters of Israel, but it is a non sequitur: neither the Goldstone Commission nor anyone else accused Israel of killing as many civilians as it could. Rather, the charge was that for reasons of revenge, punishment, or deterrence, Israel intended to inflict substantial civilian destruction—a war crime against which the argument that Israel could have killed a lot more is not a defense.

#### WE ATTACKED PROPERTY, NOT PEOPLE

Another Halbertal argument is that attacks on property are not the same as attacks on people, which the Goldstone Commission “lumped together.”<sup>123</sup> To be sure, Halbertal is uneasy about some of the Israeli attacks on Gaza’s economic infrastructure, but insists that there is a morally crucial distinction between deliberate attacks on civilian property and on civilians, *per se*. As I have argued, in light of the nature of the targets as well as the tremendous scale and intensity of Cast Lead, the distinction between attacks on people and attacks on “property”—better described as “civilian infrastructure”—is largely meaningless.

#### IF WE DID DO IT, IT WAS THEIR FAULT

Another argument of Halbertal and many other critics of the Goldstone Commission was that the Commission failed to understand Hamas’s suppos-

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120. Goldstone report, pp. 144, 145 par. 473.

121. *Ibid.*, p. 13 par. 37.

122. Halbertal, “The Goldstone Illusion,” p. 6.

123. *Ibid.*



edly new methods of “asymmetrical warfare,”<sup>124</sup> the current jargon for age-old guerrilla warfare. In particular, the argument goes, the “human shields” strategy allegedly chosen by Hamas during Cast Lead made it extremely difficult for the Israeli attacks to avoid causing civilian casualties.

After investigating these charges, the Goldstone Commission concluded that, although armed Hamas militants sometimes “mixed with the civilian population” and “launched rockets from urban areas,” such actions “would be difficult to avoid in the small and overcrowded Gaza Strip.” Most important, it found “no evidence that they [Hamas fighters] did so with the intent of shielding themselves” from Israeli attack and “no indication that the civilian population was forced by Hamas or Palestinian armed groups to remain in areas under attack.” In particular, in its examination of several Israeli attacks on hospitals and ambulances, the Commission “did not find any evidence to support the [Israeli] allegations that [they] . . . were used to shield military activities.”<sup>125</sup>

Human Rights Watch also investigated the Israeli/Halbental allegations that Hamas followed a human shields strategy. It did find evidence that, on some occasions, Hamas “used civilian structures to engage Israeli forces and to store arms,” but it rejected the Israeli argument that such strategies explain the high civilian death toll and huge amount of property destruction. In particular, Human Rights Watch emphasized that its conclusion that Israel’s “wanton destruction” of civilian infrastructure could be prosecuted as war crimes was based solely on detailed examinations of cases in which Israel had continued its “extensive destruction of homes, factories, farms and green houses [even though] the fighting had ended prior to Israeli attacks, when Israeli forces were in control of the area, there was no active fighting there, and property was destroyed without any apparent lawful military justification.”<sup>126</sup> In other words, the destruction of Gazan infrastructure targets continued even when there were no longer any civilians around to act as human shields.

The “human shields” issue aside, it is true that Hamas at times has used guerrilla warfare tactics, although as I have indicated, the preferred term of Israel’s defenders is “asymmetrical warfare.” The language, of course, serves an obvious political purpose: because poorly armed and vastly outnumbered insurgents, rising up against much more powerful state armies, try to avoid making themselves easy targets, the term implies that the “asymmetries” somehow gave Hamas an unfair advantage.

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124. Halbental, “The Goldstone Illusion,” p. 1.

125. Goldstone report, pp. 1–13 par. 35, par. 36; p. 147 par. 480; p. 148 par. 485, par. 486.

126. Human Rights Watch, “I Lost Everything,” quotes on pp. 5, 17, 3, respectively.

In any case, there was a far better alternative available to Israel if it wished to avoid having to choose between two bad courses: indiscriminate warfare or increased casualties to its own forces if they had been sent to directly engage Hamas forces on the ground. It could and should have ended its economic blockade of Gaza and accepted Hamas's proposals for an extended truce and perhaps an overall political settlement. Had Israel chosen this course, the overwhelming weight of the evidence is that the terrorist attacks would have ended. And even if Hamas or more radical splinter groups continued to attack Israel after Palestinian independence, just war morality would still require Israel to make every effort to distinguish combatants from noncombatants, rather than using the difficulty of doing so as an excuse for violating the principles of discrimination and noncombatant immunity.

ANYWAY, OTHERS WERE MUCH WORSE

Halbertal also argues, in effect, that Israel is the victim of a moral double standard. The U.S./NATO bombing of Serbia in the 1990s and the military actions of the United States and its allies in Afghanistan today have killed far more civilians, he argues; yet it is only Israel, seeking to defend itself against a "terror organization," that faces charges of war crimes. Additionally, the Israeli government pointedly notes that the U.S. and NATO operations in Serbia and Afghanistan resulted in a number of civilian casualties.<sup>127</sup>

The double-standard argument is unconvincing for four reasons. First, it is a moral non sequitur: one is not absolved from war crimes even if one's crimes were not as bad as someone else's. Second, hardly anyone has suggested that, in the cases of Kosovo and Bosnia, the United States and NATO deliberately killed civilians. Third, in Afghanistan and in Iraq, U.S. military leaders have acknowledged that the unintended killing of civilians undermines the war effort, and they have taken steps to minimize them, including some that have resulted in greater U.S. casualties (e.g., restrictions on the use of airpower).<sup>128</sup> Fourth, in contrast to Israeli soldiers, U.S. soldiers have been put on trial for killing civilians.

The Israeli military has made clear that it intends to continue its announced strategy of minimizing its casualties through the massive use of firepower, regardless of the consequences for "enemy" civilians. Indeed, there have been

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127. Halbertal, "The Goldstone Illusion," p. 6; and IMFA, "The Operation in Gaza," par. 26.

128. Colin H. Kahl discusses measures that the U.S. military took to reduce civilian casualties in Iraq, including restrictions on the types of weapons that may be employed, changes in military doctrine and training practices, and careful target planning, including "no strike lists" designed to minimize civilian casualties. Kahl, "In the Crossfire or the Crosshairs? Norms, Civilian Casualties, and U.S. Conduct in Iraq," *International Security*, Vol. 32, No. 1 (Summer 2007), pp. 7–46.

reports that influential Israeli strategists believe that, in “the next round,” the only way to be successful “is to take much harsher actions.”<sup>129</sup>

### *Conclusion*

Since the 1930s, the Zionists and later Israel have employed the iron wall strategy in its conflict with the Palestinians and neighboring Arab states. In Vladimir Jabotinsky’s formulation, the strategy held that Israel must avoid compromises with its adversaries until its military advantage is so overwhelming and the costs of resistance so painful that they have no choice but to accept Israel and agree to a negotiated end to the conflict.

From the outset, a central component of the iron wall strategy has been to directly attack civilians, or their institutions, or both—partly as revenge or punishment for Arab attacks on Israelis, but more fundamentally for the purposes of what the Israelis see as “deterrence.” The premise is that the more the pain, the greater the likelihood that the Arab peoples will force their states or militant organizations to end their conflict with Israel.

The iron wall strategy, however, suffers from two crucial problems, at least as it has been interpreted by almost all Israeli leaders since the 1930s. First, Israel’s continuing reliance on overwhelming force rather than on political settlement amounts to a repudiation of what Jabotinsky argued should be the ultimate purpose of the iron wall: not an end in itself or a permanent condition, but a necessary means to create the conditions in which the Israeli-Palestinian conflict could be settled on terms entirely consistent with Israeli security and well-being. In that sense, the iron wall succeeded,<sup>130</sup> for not only most Palestinians but the Arab League states have unanimously and repeatedly formally stated that they will agree to accept a two-state end to the Arab-Israeli conflict, based on the creation of a small and lightly armed Palestinian state on the 22 to 23 percent of what is left of the land of Palestine before the 1947 UN partition plan. In effect, then, for all practical purposes Israel’s enemies have conceded defeat; Israel, however, continues its refusal to accept victory.

Second, the iron wall strategy in action—in particular, Operation Cast Lead—has violated all of the key principles not only of Western just war morality but also of the “common morality” or heritage of almost all cultures and traditions—that wars can be fought only for just causes, as a last resort after all reasonable efforts to solve a conflict have failed, and with major con-

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129. Isabel Kershner, “Tough Military Stance Stirs Little Debate in Israel,” *New York Times*, December 25, 2009.

130. Shlaim makes the same argument in “The Iron Wall Revisited,” p. 87.

straints on their methods. With regard to methods, the most important just war principles—or constraints—are those of discrimination, which prohibits massive attacks even on military targets if they will result in heavy civilian losses, and noncombatant immunity, which prohibits intentional attacks on civilians and their key economic and other crucial institutions.

In support of this argument, I first reviewed the history of the iron wall from the 1930s through the 2006 Israeli attack on Lebanon, a history that demonstrates that Israel repeatedly and deliberately attacked civilians and their institutions. I then examined the Israeli actions and policies in Gaza since 2005, especially Operation Cast Lead at the end of 2008, a three-week Israeli air and ground attack on Hamas, following a three-year period in which Israel engaged in economic warfare as well as repeated though smaller-scale military attacks on Gaza.

Cast Lead violated every major principle of just war morality. Israel did not have a just cause in Cast Lead, despite the (largely ineffective) Palestinian terrorist attacks on its territory, for one can hardly divorce those attacks from the context of more than forty years of Israeli occupation, repression, and killings; the destruction of governmental, economic, public health, educational, and other societal institutions and infrastructures; the deliberate impoverishment of the Gazan people; the drastic restrictions on the importation of food, coldly calculated by the Israeli government so that they would fall short of causing mass starvation but be highly punitive; and the various humiliations, often deliberate, inflicted on the civilian population as a matter of routine.

To be sure, because the Palestinian armed resistance to the Israeli occupation frequently has taken the form of terrorism, the argument that Israel still could not claim a just cause or a right of self-defense is necessarily morally complex. For example, some have argued that no state can ignore terrorist attacks on its territory, and this is undoubtedly true if understood as a statement of the facts of life. As a moral argument, however, it would be far more persuasive if Israel had no way to end terrorism other than the use of massive force.

As I have demonstrated, even if Israel had a genuine claim to the just cause principle of self-defense, Cast Lead would have violated another crucial just war requirement—that the use of force is allowable only as a last resort after all nonviolent alternatives have been exhausted. As the record shows, Israel broke a series of cease-fires with Hamas and refused even to explore Hamas's offers for a long-term truce and possibly even for a political settlement of the Israeli-Palestinian conflict.

Its methods aside, Operation Cast Lead was a war crime, the crime of international aggression. It also violated every principle governing morally acceptable methods of warfare, because Israel's deliberate destruction of Gazan

political, economic, and societal infrastructures and institutions was, at a minimum, grossly indiscriminate. The overwhelming evidence of how Israel has implemented the iron wall strategy throughout its history, as well as the unrefuted and detailed evidence of its behavior in Cast Lead, makes it difficult to avoid the conclusion that Israel's policies in Gaza constituted an intentional violation of the most important and widely accepted moral principle that seeks to minimize the destructiveness of warfare: that innocent civilians may never be the intended object of military attack whether directly or indirectly, as in attacks on civilian institutions and infrastructures.