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## OPERATION "CAST LEAD": HOW THE MILITARY PROSECUTION GAVE THE IDF VICTORY

IDF officers were accompanied by legal advice, from the planning stages up to and including the military actions of the Gaza operation. Bombing the graduation ceremony of the police course? Legitimate. There were many civilian casualties? Legal. Bombing government buildings? Kosher. Legal experts, including the former commander of the Military Prosecutor's International Law Department (ILD), maintain that the IDF harnessed the law to validate harm to civilians. This is how it really worked.

By Yotam Feldman and Uri Blau

Dozens of Palestinian police, who took part in the graduation ceremony of the police course which they had taken, were killed by bombing by IAF planes on the first day of the IDF action in Gaza. It has now become clear that this bombing was at the focus of a legal and operational debate which took place during the months preceding the action. A military source who was involved in the planning of the operation told us, that the attack on the site where the ceremony took place was authorised without any problem, however the intent to attack the course graduates caused deliberation. Military Intelligence personnel were convinced that the attack was justified, and applied pressure to authorise it. The ILD representatives were at first opposed to the attack, from the fear that it might allegedly be contrary to international law. "We are talking about a large group of people who were at the time allegedly civilians who became the next moment legitimate military targets" says an operational source. "You take those dozens of police and make them into a target. That certainly was present in all the discussions and deliberations."

For a number of months, until the ILD gave their answer to the operations planners, the operational personnel, especially the intelligence people, applied pressure on the military prosecutors. In the end the ILD gave its authorization to the operation as it was executed. The "incrimination" of the police (that is the justification to strike at them) was based on defining their status as one of a resistance force in the case that Israel would enter the Gaza Strip, and not on the basis of specific information regarding each and every one of them. That is to say, the execution of the attack changed the definition of the intended victims. As a result of this, according to the jurists, the role of the police changed from that of civilian law enforcement to that of potential combat participants, whom it is permitted to harm.

"Behind our consideration was the way in which the Hamas activates its defense forces", says a senior IDL person. "In fact we can look on the whole complex as parallel to that of the enemy's armed forces, so that we it isn't perceived as a police

force. In our eyes, all of Hamas' armed forces are parallel to the army; just as to an enemy army every soldier is a legitimate target."

International law experts defined the justification for the attack as "problematic". In an organised state attacking police as soldiers, is forbidden", says Prof. Yuval Shani, an international law expert from the Hebrew University. "When talking about rule such as that of Hamas, the boundaries between the various forces are unclear, so the police might have a combat role. However, if we adopt this line of thinking, then there isn't much difference between them and reservists, or even sixteen year old children who will drafted into the army in another two years. You have to draw a line, attacking people only when they're in active service. This wasn't the only case in which the IDF interpreted the law in a flexible way. They attacked Hamas' government infrastructure, attacking government buildings; unless it can be shown that there was combat equipment in the buildings, an attack on buildings that don't serve a military purpose is a violation of the rules of war. It is a civilian target which it is forbidden to attack."

However, in the end the ILD personnel authorised targeting Hamas government sites, after they overcame their initial doubts. "The way in which Hamas operates", states a senior ILD officer, "to our understanding is to use the entire ruling infrastructure for the terrorist purposes of the organisation, so that the distinctions are slightly different. We are fitting the targets to the reality of the rule of terror".

### **A civilian on the roof**

The ILD offices can be found in a neglected building within the army headquarters complex (Hakiryah) in Tel Aviv, and about twenty officers with legal training serve there. The department exists in its current form since the beginning of the nineties.

The ILD personnel are now very proud of their influence upon the combat in Gaza. For example: The ILD brought about the fact that the IDF warned civilians before their houses were bombed, by the "knock on the roof" procedure – firing non-damaging ammunition at the roof corners. The IDL personnel say that they tried to learn lessons from the warnings given during the war in Lebanon. According to human rights groups, the residents weren't advised then as to which places were safe, and the roads by which they fled were bombed and turned into death traps.

From the moment that the warnings were given, claim the department's senior staff, it's possible to legally legitimise harm done to civilians who shielded the building with their bodies, as if they were involved in the combat. Other jurists disagree about this, including the former head of the department until six years ago, Colonel (Res.) Daniel Reisner, who said this week that as he sees it those civilians maintain their civilian status. "I don't think you can incriminate a man who stood on a roof just because he was there", said Reisner. "Perhaps the harm done to him will be considered legitimate collateral damage, but he was not the target".

A senior ILD officer clarifies: "Those people who come to a house despite the warning, I don't have to account them among harmed civilians, rather they are people who took part in the combat, if this is a case where people returned to the house in order to defend it".

What about a civilian that stands in front of a tank?

"If a person stands in front of a tank in order to block its way, then he's participating in combat". With that, he said, the IDF refrains in practice from harming civilians in such cases.

The ILD's permissive positions don't surprise jurists who follow its legal opinions. According to one of them the department is considered "more militant than any other legal agency in Israel, and willing to adopt the most flexible interpretations of the law in order to justify the IDF's actions." A person who formerly served in the department defined it as "more liberal than the Attorney-General or the State Attorney's HCJ department". In his words, at a time when the other agencies can "watch from the sidelines and express their reservations", it is not very usual that the department expresses a more cautious stand on a case than that of the Ministry of Justice.

It seems that the pressure put on by the operational echelons and the ILD jurists understanding of those considerations affect their legal opinions. "The army knows what it wants, to the operational agency things are very clear", says an IDF operational source. "When the legal advisors think something is invalid or problematic, pressure was definitely put on them to render a positive bottom line".

Our object isn't to shackle the army, but rather to give them the tools to win, in a legal way", says an ILD officer. The former department head, Daniel Reisner, understands why it has got a permissive image: "We defended policies which were on the edge of legality - the neighbour procedure, house demolitions, expulsions, targeted preemptive assassinations; we defended all the magical solutions in the war on terror. In this respect the ILD is a restraining force, but not a preventative force. If the army says 'here's a magical solution, is it in the realm of the possible?', then I'll say, 'I'll try to defend it, but I'm not sure I'll succeed'. When something's in the white zone, I'll let it be done, if it's in the black I'll forbid it, but if it's in the grey zone then I'll take part in the dilemma, I won't stop it if it's grey."

The grey dilemmas and the attempts by ILD officers to discover the uncharted territories of international law perhaps explain their great enthusiasm for giving legal advice to the army, and the glow in their eyes as they roll their tongues over such phrases as "proportionality balance", "legitimate military target" or "illegal combatants".

"What is being done today is a revision of international law", says Reisner, "and if you do something long enough, the world will accept it. All of international law is built on that an act which is forbidden today can become permissible, if enough states do it. If this would happen in domestic law, then the speed limit would be 115 KMH and income tax would be 4 percent. So there's no connection between the question 'Can we get away with it?' and if the act is legal. After we attacked the reactor in Ossiraq, the Security Council condemned Israel and stated that this was an IHL violation, the atmosphere was one in which Israel had committed a crime. Today everyone says that it is preventative self-defense. IHL progresses through violations, we invented the doctrine of the preemptive pinpoint strike, we had to promote it, and

in the beginning there were protrusions which made it difficult to fit it easily into the mold of legality. Eight years later, it's in the middle of the realm of legitimacy".

Did the 9/11 terrorist attacks affect your legal situation?

"Definitely. When we began to define the conflict with the Palestinians as an armed conflict, it was a dramatic switch and we started to defend it at the Supreme Court. In April 2001 I met the American envoy George Mitchell and I explained to him that beyond a certain threshold fighting terror is combat and not law enforcement. The commission (The Mitchell Commission of Inquiry into the circumstances of the conflict in the Occupied Territories) rejected this, and in its report they called on Israel to abandon the armed conflict definition, and to return to the definition of law enforcement. It took four months and four planes for the United States to change its opinion on the matter, and if not for those four planes I'm not sure that we could have developed the war on terror thesis to the dimensions that we developed until then."

### **Specific Consideration**

It's likely that one of the reasons for the ILD's permissive stands can be found in that it wishes to retain a measure of relevance and influence even when the atmosphere in the General staff and the regional commands is particularly militant. A former senior commander remarked that when Daniel Reisner, who was an eloquent and charismatic officer, commanded the department, his people, and especially Reisner himself, succeeded in attaining an esteemed position amongst the IDF commanders, but that the influence of the current department personnel, under the command of Col. Pnina Sharvit-Baruch, is not always self-evident. Sources that are involved in the work of the Southern Command note that Gen. Yoav Galant, the CO, maintains a suspicious attitude towards the advisors, and he has earned nicknames such as "wild man" or "cowboy" and "sheriff" regarding taking into account, that is to say not taking into account, legal advice. Before the attack on Gaza, the Southern Command legal counselor wasn't even invited to the Command situation evaluations, and was excluded from the restricted planning forums.

In fact during the operation in Gaza, the relations between the ILD representative and the Southern Command CO slightly improved. At the beginning of the attack the forces in the field gave the impression that they were allowing themselves a great deal of freedom when it came to house demolitions and uprooting plants. Soldiers reported that they were destroying roads and entire areas. This was despite the guideline in the legal addendum to the General Staff's operation order for "Cast Lead": "In a place where there is an operational alternative which provides an answer to the military needs which minimizes the damage to non-involved property, this alternative should be chosen".

The ILD people got the impression that some of the field commanders didn't understand that they were subject to critique within the IDF, and applied pressure to create a more structured system of rules for getting permission to demolish or "expose". In other cases, the department expressed its concern regarding the tardiness with which the forces evacuated injured Palestinians, including those who had been trapped for a number of days in their homes. When looking at the facts, their positions didn't always influence the forces in the field.

The legal addendum which was attached to the operation order detailed the principles of international law, clarified what are war crimes and demanded to investigate every case that aroused the suspicion that such crimes had been committed. This document directed the commanders to take special caution regarding cluster bombs, with "incendiary weapons" (such as those containing phosphorus), with anti-personnel land mines and booby traps: "before using such weapons you must refer them for specific consideration from the JAG/ILD.

The operational counsel that the ILD people gave at the General-Staff in the planning stages of the attack and during its execution were quite extensive. ILD personnel were present on a permanent basis at the Operations and Sorties meetings which were held on Wednesdays by either the commander of the Operations Division or the commander of the Operations Branch. Before the meetings they would receive the targets and the intelligence material, would prepare their comments on a PowerPoint presentation, and would raise them at the meeting in which about five to fifteen minutes was allocated to each target.

During the combat itself, there were more frequent discussions regarding the targets, as well as situation assessments and discussions at the Operations Division and at the Supreme Command Observation unit. The department's representation at the Southern Command was reinforced and it also sent jurists to the Gaza division. The jurists took part in approving "incidental" targets (for example a missile launching squad), where the decision to attack during the combat was taken at the regional command level, approved the various orders, and tried to assist the commanders in their deliberations about various operational matters. This format of operational counsel appears to be in contradiction to the recommendations from Chapter 14 from the Winograd Report, where it was written that the use of legal advice during combat should be minimized. "It is clear to us – from the point of personal responsibility – that there is also a natural tendency to be aided by legal counsel, principally, during real time", states the report. "That being said, we are concerned that enlarged reliance on legal counsel during the military action is likely to divert the responsibility from the elected officials and the commanders to the legal counselors, and is likely to disrupt the essential quality of the of the decisions and the operational actions." Despite the explicit words relating to the "elected officials and the commanders", the ILD chiefs maintain that to their best understanding that this recommendation in the report relates to legal advice at the field rank. Professor Ruth Gavizon, to whom this part of the report is related, refused to comment.

### **To the extent that it's possible**

In the legal addendum which was attached to the operation order it was written that "to the extent that the circumstances allow it the civilian population proximate to a legitimate target should be warned before the attack". However, right after that came the permit: "It is possible to refrain from this if this might endanger the action or the forces". The ILD personnel also permitted easing the policies on the IDF rules of engagement in Gaza. The results of these policies were apparent in the large number of Palestinian civilians who were injured, and it possibly explains the use of a mortar, which is considered a "statistical weapon" (one which strikes imprecisely), to fire at a target next to the UNRWA school. According to the IDF debriefing, the mortar

missed the target by thirty metres, and struck the people within the building; about 40 people were killed, according to the Palestinian reports. After that the IDF struck two additional UNRWA complexes. The UN General-Secretary Ban Ki Moon, who inspected in Gaza this week, defined the attack on the organisation's institutions as "scandalous" and called for the opening of an investigation.

In the opinion of senior department officers, the large number of Palestinians killed, amongst them hundreds of children, the widespread destruction in populated areas and the testimonies about indiscriminate attacks, do not necessarily diminish the extent of the operation's legality. "If there's intensive combat" says a senior department member, "and you call for air cover, then a lot of civilians may be harmed, so the numbers don't abrogate the action's legality if you did what you are required to do...if we give warning and they fire from within a house, a least from a legal perspective, it is not illegitimate to return fire because more civilians may be harmed."

When you hear officers saying that "caution is aggression", or the call by the CO of the Regional Command to turn the clock back twenty years in Gaza, you don't see a gap between IHL and what's being done in the field?

"The forces are located in areas which are very complicated for combat. Not only is the entire area densely built up, but the terrorists are located in the most populated areas, and in addition to this it's full of explosive charges, tunnels and traps. In such a situation, where the type of combat against them isn't like that against an enemy army that stands face-to-face with you, the way forward requires using force which leads to these results: if a house is booby-trapped, and you fire on it, the effect is greater.

If you knew that 11 people would be killed along with the senior Hamas activist Nizar Ri'an, would you approve the action?

From what I know, an early warning was given and the people left. Apparently they returned to the building despite the warning, at a point where it was impossible to stop the attack. If I had been asked beforehand, and the result was known, I would have said not to attack, since the target was the house itself, which was used as a headquarters and a weapons warehouse, and not the man himself.

### **Legitimacy to Use Force**

Beyond the general claim of the ILD people, that the Southern Command respected IHL, it seems that Pnina Sharvit-Baruch and here people are not enthusiastic about volunteering basic information about the legal advice that they gave and how they did this. Repeated requests to interview the Southern Command legal advisor, Lt. Col. Avi Kalo, and the divisional advisors, were refused. In answer to a request for a clarification from "*Ha'aretz*", regarding the advice given by the department in matters such as providing access for evacuating the injured, the use of phosphorus in civilian areas and attacks on hospitals and mosques, one of the ILD officers answered: "We examined the list of questions that you sent, and I am sorry, but at this time, we can't elaborate on these matters beyond what has been already given to you.

The dean of the legal faculty at the College of Administration, Prof. Orna Ben-Naftali, is convinced that international law, the field in which she specializes, has gone bankrupt, and the results of the IDF action in Gaza just reinforces her opinion. "Today, the discipline only serves as a justification for the use of force" she says. "It has ceased to exist, because there is a clear discrepancy between the rules and the reality in which they are applied: distinctions between the types of conflicts, between civilians and combatants - none of these exist in the field any more, and it's possible to raise serious arguments to justify just about any action. The meaning of this is the approval of the use of almost unlimited force, in a way that totally contradicts the basic goal of the humanitarian law. Instead of limiting suffering, the legal advice and the IHL provide legitimacy for all uses of force."

Prof. Ben Naftali says, that the way in which international law is implemented in the territories, especially in the Gaza Strip, enables war crimes, to which the legal advisors themselves are accomplices in her opinion. "It is likely that the legal advice authorises violations, while ignoring the context within which they are carried out", she says. "A situation is created where one can relate to most of the men and most of the buildings in Gaza, as legitimate targets. In fact, the law has been stood on its head. It has stopped fulfilling its function so we must admit that it has reached the stage of insolvency before bankruptcy".

Gaby Bloom, a legal expert from Harvard who was formerly an officer at the ILD, presents a different position. "As long as you accept the paradigm of the rules of war" she says in a telephone call from the United States, "the division between participants and non-participants is correct in the war on terror, and also in a war against a state. The question is how you translate this for a specific case. Is a power plant a legitimate target if you fight Syria? Apparently so. Under certain circumstances you have to ascertain how much it contributes to the military effort, and how much to the civilians, and the same calculation has to be applied in the case of Hamas... that it's possible to cynically exploit all sorts of distinctions in the way that you implement them, doesn't mean that you have to throw the distinction into the garbage, you have to adapt it. The question is you do that".

### **How Many Bachelors will Die?**

In 2002 a task force headed by Gen. Amos Yadlin convened, and tried to formulate the rules of war pertaining to the assassination wanted activists ("preemptive strikes"). The task force, which included amongst others the then ILD commander, Daniel Resiner, and the IDF's in house philosopher, Asa Kasher, were asked to cope with the following situation: "Assume there's a terrorist from the Gaza Strip, and you know that the terrorist is a Palestinian bachelor between 18-45 years old, and tomorrow he will certainly kill an Israeli man between 18-45 years old, and there's only one opportunity to kill him with a missile which will definitely accomplish this. How many 18-45 year old Palestinian bachelors do you agree to kill (certainly) with that missile?"

The strange wording of the question was meant to neutralise the uncertainties regarding decisions in such cases, and to examine the raw moral positions of the participants. The members of the task force jotted down their answers, which varied between zero and "as many as necessary" (unlimited). Upon checking the results, the

average number of permitted killed, was Pi: 3.14. Perhaps it is unsurprising that the question rendered a result which is an irrational number.

Reisner tells that in his own answer he wrote two people. "If you would phrase the question differently and ask if I would be willing to sacrifice one Israeli man for three Palestinians, perhaps the answer would be different, but eight for example doesn't seem right to me. I learnt a few things from this – that younger people tend to give higher numbers than elders, that those with families tend to give higher numbers than bachelors, and that there's a correlation between political views and the number. In the GSS, by the way, there were those who said zero. I don't know what the proper answer is, but I know you have to ask the question before every attack. If the commander asked the question, and answered it, by examining the reasonableness, then the jurists has fulfilled his role".

Reisner, the department's founder and the father of operational advice, is today the head of the international legal department at the Herzog, Fuchs and Ne'eman legal firm. This story demonstrates in his opinion the great flexibility allowed by the rules of war and especially tests of proportionality, in regards to damage to military targets as opposed to indirect damage to civilians. Reisner cautions against cases where the jurists judgment will replace the commander's moral judgment, who, in any event, must bear responsibility for his actions. He tells about a case where, for example, he was required to make a decision within fifteen minutes whether to carry out an action which would have rendered damage to civilians: "when a senior military figure entered the room, the first thing he did was to point at me and ask 'Did he authorise it yet?' That was one of the only cases where I gave them a speech about the fact that the decision is theirs, as is the responsibility. Despite the fact that I also told them which way I was leaning then".

Reisner joined the ILD in 1985, and was the head of the department for ten years. He says that he became convinced of the necessity of operative advice (during a military action) in 1988, when the commander of the Naval Commandos asked him to accompany them on operation that was intended to prevent the sailing of the "Returnees' Boat" on which the PLO planned to man with Palestinians who had been expelled from the occupied territories. "Israel prepared to intercept the ship" relates Reisner. "In the war room in which the COS was present and on the sea, they were always asking 'What's permitted? When is it permissible to fire?'"

In the end the empty ship was blown up in the port of Limassol before it sailed, but Reisner remembers his conclusions, which were only strengthened when he learned about the legal accompaniment that U.S military officers received when they invaded Panama in 1989. By the end of the nineties, and especially since the beginning of the second Intifada, ILD officers began to take a permanent part in the meetings about targets and operational plans. According to Reisner, the willingness to incorporate them into the meetings stemmed from the change in the relation to the IDF's actions in the territories, from a police operation to a military action, and also from the change in international norms and the plans to establish an international criminal court. "The commanders hear about that and they think, there's a court where I can be put on trial. Where's my lawyer? So it becomes natural for the military to place a lawyer in a place where he hadn't been before", says Reisner. According to him, the most

dramatic turning point for operational advice came about since Israel began to openly assassinate Palestinians.

"Until then we could say 'We didn't do it, but he was a shit'. Could we ask who fired that missile, whose helicopter was it?" says Reisner, "but after the Thabet Thabet assassination (the Fatah Party Secretary for the Tul Karem region, who was shot to death in December 2000) there started to be assertions that 'you murdered a civilian in cold blood, that's a crime' so we were required to write if it's legal. In effect, the question was if I could relate to terrorists as I would an army. Could we openly use force against them. We wrote a revolutionary opinion, which said that combating terror beyond a certain level is analogous to war, and subject to certain rules we will authorise you to attack. This is the opinion which was challenged at the Supreme Court, and was authorised."

And how did this work in practice?

At the first discussions about the preemptive pinpoint strikes, there was a very strange feeling. The officers didn't understand why there were lawyers in the room, what they were doing there. I would have left myself, because I was senior enough that no one would tell me to go, but it's a bit like an enema, it had to be done with a lot of Vaseline, and we had to give them the feeling that we weren't there to replace them. As time passed interesting things started to happen, they came to know all the tests and would repeat our mantras, so much so that we felt superfluous. We coached them until they could make decisions without us".

How many times did you have to totally oppose the army's proposals?

"There was a case where I told to a senior officer: Beyond this point this is illegal, and if you do that it's very likely that I'll have to open criminal proceedings against you, we can't let you do this and he didn't. Generally the conception is that the lawyer defines the limits. He makes it clear to the commander what are the red lines that beyond them he's forbidden to act, and that everything he does with those limits is his responsibility. Because we are the army's attorneys, when some thing is in the grey zone we will try to defend it.

### **The Beauty of the Preemptive Pinpoint Strike**

Two weeks ago the Attorney-General, Menny Mazuz, said that his office is preparing to deal with the possible complaints abroad against Israeli figures, following the IDF actions in Gaza. In the case of a violation of the rules of war or a war crime, there is also the possibility that responsibility will also be cast on the jurists who advised the military commander. So contends, for example, the British jurist Philippe Sands in the book "Torture Team" which he wrote this year, that the legal advisors to the American Secretary of Defence, Donald Rumsfeld, bear responsibility for the torture which they authorised to be carried out in the Guantanamo detention camp and at the Abu Ghraib prison. Now they will have to be careful when traveling to any country which authorises the implementation of universal jurisdiction (which applies to crimes which were committed outside of their borders).

"There's no question that beyond a certain limit, everyone who takes part in making a decision, including the lawyer, is responsible", says Reisner. "Three years ago I went to Cambridge to give a lecture, and I received a telephone call from the Foreign Ministry's legal department. They told me, that they just wanted me to know that there's no threat that I will be put on trial in England. I asked them what gives that they are suddenly warning me; in general I'm the one that makes calls like that to other people. They said, 'You're high profile, so we decided to check if there's no threat to you'".

Are you still concerned by the possibility that someone will put you on trial?

The beauty of the preemptive pinpoint strike is that you kill who you really intended to, if you succeed, then the question is how careful were you not to kill anyone else. In contrast to the great precautions that are taken when executing a preemptive pinpoint strike, during the current operation in Gaza there were lots of preemptive non-pinpoint strikes. This operation can serve as the basis for more legal discussions than all the previous operations together. It seems to me, that from a legal standpoint, Pnina is in a totally different place from me".

Colonel Pnina Sharvit-Baruch is about to retire from the IDF and next semester she will teach international law at the Legal faculty of Tel Aviv University.\*