Dynamics of Law, Organisation and Morality in Contemporary Warfare:

The right to life in the case of the Israeli military International Law Department

By

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Declaration Form:

The work I have submitted is my own effort. I certify that all the material in the Dissertation which is not my own work has been identified and acknowledged. No materials are included for which a degree has been previously conferred upon me.

Signed:……………………………   **Date: 29.5.11**

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Abstract:

This thesis places at the centre of its attention the members of the International Law Department (ILD) of the Israeli military. Its point of departure is the 2008/2009 Israeli offensive in the Gaza strip, a military operation which caused extensive loss of lives. During this offensive, the Israeli military made unprecedented use of the ILD.

This dissertation sets out to examine the dynamic processes through which extreme violations of human rights, and most fundamentally, the right to life, are negotiated and authorized by these expert practitioners of international law. This exploration is methodologically based on interviews with ILD members and discourse analysis and is grounded in concepts and tools of critical legal theory, organisation studies and debates of morality. The findings of the thesis reveal that, in the case of the ILD team, International Humanitarian Law, organisational structures of the military and perceptions of morality play a role in enabling the execution of extreme violence and extensive violation of the right to life. Moreover, these same structures and conditions hinder the possibility of assigning responsibility for lives lost.

Building on the case study of the ILD of the Israeli military, the dissertation seeks to further understanding of the dynamics between law, organisational structures and morality as they relate to the legal work of practitioners in contemporary warfare. Ultimately, the thesis demonstrates that existing tools are insufficient in protecting the right to life, and aspires to contribute to the assignment of legal and moral responsibility for loss of lives.

Contents

Introduction

Background

In December 2008, following an extended period of tension and mutual violence, Israel launched a massive offensive in the Gaza Strip; the attack lasted three weeks and, according to estimates, resulted in the death of 1,389 Palestinians, among these 759 civilians (B'Tselem, 2011). Thousands more were injured, and there was considerable damage to buildings and infrastructure.

Israel's offensive drew extensive criticism in light of extreme violations of human rights law; it was also argued that the military operation severely violated international humanitarian law (IHL). During the operation, as well as in its aftermath, official Israeli spokespersons made extensive reference to IHL principles, claiming that Israel had, in fact, abided by these principles in its actions. Within the military, the chief body responsible for the application of IHL is the International Law Department (ILD), which is composed of legal experts, specialists in International Law. During the offensive and throughout the preparations for it, the military made unprecedented use of this department (Blau and Feldman, 2009).

As information about the extensive involvement of the ILD team in the military operation began to spread, questions were raised in regard to the affect IHL had over military decision making in this case. Public, journalistic and academic discussions aimed to evaluate and examine the role of law in relation to warfare. Questions debated in this regard were, for instance, whether legal rhetoric was simply used as lip-service; to what extent does political power shaped military legal interpretation; whether law actually contributed to the proliferation of violence, and, of course, whether Israel violated law in its actions. While these are indeed crucial questions, these existing accounts still leave many questions unanswered.

The aim of this research

This thesis places at the centre of its attention the group of individual members of the ILD team. It sets out to examine the dynamic processes through which extreme violations of human rights, and most fundamentally, the right to life, are negotiated and authorized by

these expert practitioners of international law. Based on this case, I seek to further understanding of the dynamics between law, organisational structures and morality as they relate to the legal practice of the team members. Finally, this thesis aims to investigate the issue of legal and moral responsibility for loss of lives.

Research questions:

All questions pertain to the work of the ILD team - in and around the 2008/9 offensive in Gaza, and in more general terms:

1. How are IHL principles of distinction and proportionality interpreted and applied by the ILD team?
2. In terms of the extreme violations of human rights negotiated and authorized by members of the ILD team, the most fundamental violation is of the right to life, and in light of this it is necessary to examine:

a. How do ILD team members perceive their position, as legal advisors and employees in the military organization?
b. How do ILD team members perceive the role of moral and ethical considerations to their work?

3. How can the conclusions of my particular investigation of the intersection of law, organizational aspects and morality be understood in relation to legal notions of responsibility?

This paper examines ILD practitioners' work in avenues of critical legal theory, organisation studies and morality. Grounded in findings and theory, it will show how IHL, organisational structures of the military and perceptions of morality play a role in enabling the execution of extreme violence and extensive violation of the right to life. Moreover, these same structures and conditions hinder the possibility of assigning responsibility for lives lost.

Chapter overview:

This thesis begins with a section describing the analytical framework I will employ. This includes review and debate of the three theoretical paths which this thesis will use. Following this, I include a section describing methodology, which reviews my main methods of research, and explains the link between my method and research questions. The first chapter will describe and examine the ILD team's interpretation and application of two pillars of

IHL, the principles of distinction and proportionality. It will then discuss the complex ways in which law interacts with war. The second chapter will apply tools of organisation theory to the team, and attempt to provide insight into how decision making processes correspond with the violation of the right to life. The third chapter will revisit previous chapters' discussions and conclusions regarding law and organisation in order to consider the issue of responsibility, and will, additionally, incorporate the concept of morality into this debate.

Analytical Framework

This thesis seeks to further understanding and analysis of the dynamics between law, organisation and morality in the legal practice of a team military, grounded in perceptions of individuals who are members of the team. In accordance with these aims, this research is based on three main theoretical paths:

a. *Review and analysis of IHL*: as this law provides tools for the work of the ILD team, a legal discussion will provide basis for an evaluation of decisions made by team members. Critical perspectives on law point out its limits and shortcomings in protections it lends to lives.

b. *Organisation theory*: conceptualisation of the team as part of an organisation (the military) sheds light on the ways in which legal advice is formulated and decided upon. In this frame, emphasis is given to theory which aims to understand how perceptions of individuals are created and maintained within an organisational structure. I also use theory discussing the dynamics between employees and encompassing organisational structure.

c. *Morality, law and war*: theoretical accounts regarding the relations of morality to law, and those of morality to war will clarify how these interconnections in the work of the ILD practitioners. A main question debated in this regard is whether morality can further protection of lives.

a. <u>International Humanitarian Law, its interpretation and influence on war</u>

International Humanitarian Law

The principles of IHL were mostly codified in the 1907 Hague Convention and regulations, the 1949 Geneva Conventions and its 1977 additional Protocols. Most fundamentally, this law, rather than addressing matters regarding the infliction of war and conflict (*Jus ad bellum*) regulates state conduct in times of war (*Jus in bello*):

Making no claim that it can put an end to the scourge of war, humanitarian law aims to attenuate the unnecessary harshness of war. The reciprocal interests of the belligerents also impel them to observe certain 'rules of the game' in the conduct of hostilities (Pictet, 1985: 61)

One of the fundamental critical debates on IHL revolves around the implications of an established legal frame for war *per se*; whether this law, in fact, legitimizes war and counters efforts to abolish it. In regard to this claim, Pictet (ibid) presents a common-sense argument: wars occur and therefore law is needed:

...as long as governments maintain vast armies, even for defensive purposes, and thereby demonstrate that they do not believe war to be impossible, people attenuating the evils of war cannot shirk the duty of encouraging the adoption of safeguards while there is still time (82)

Differently from Pictet's 'defence' for IHL, researchers such as David Kennedy (2006) and Eyal Weizman (2009) critically reflect on the implications of a legal frame to war. In this context, one of the main critiques is that this law, in practice, does not simply provide 'set rules,' hence limiting the use of force. Rather, it shapes and designs 'allowed' and acceptable violence

While IHL covers a wide range of topics, this thesis will focus on two fundamental legal principles, most crucial for the debate on the right to life in war:

- The distinction between civilian population and combatants, one of the pillars of IHL, wherein civilians are to be protected from war, and combatants are legitimate target of hostilities:

The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations; the civilian population as such, as well as individual civilians, shall not be the object of attack. (Article 51, of the additional Protocol I of 1977)

In reflecting on the categories of combatant and civilian, Geoffrey Best (1984) argues that while 'the civilian' in the law of war is a product of seventeenth and eighteenth century European perceptions of war, it has nevertheless remained analytically fixed in legal research, regardless of vast changes in realities of war. Best continues by illustrating various complications to the application of this concept which arise in combat. Best, however, neglects to address the power dynamics involved in drawing the line which separates civilians from combatants. Hugo Slim (2003) further develops analysis of the civilian as a contested concept in social, historical, theological and political contexts. In elaborately discussing rejections of the civilian category, Slim debates various discourses negating this concept, and in this sense complements Best's writing.

As Karma Nablusi (2001) points out, the legal distinction between civilians and combatants should be viewed in historical context; the earlier Hague Conventions were mainly concerned with the regulation of violence between states' combatants. In this, the aim of legal differentiation between categories of combatants and civilians was a distinction between lawful combatants, to which the law would apply, from unlawful ones, who were not meant to be covered by this law. Differently, the later Geneva Conventions, in particular the fourth of these, largely dealt with a distinction aimed to promote the protection of civilians in war. This account is analytically significant for this thesis because in historicizing the combatant and civilian it reveals the ambiguous character of these categories. This perspective, in turn, sheds light on the 'battle' legal practitioners undertake in this regard.

In legal terms, an exception to the civilian protection occurs in specific temporal and combat-related circumstances: *at a time* in which a civilian *directly* participates in hostilities. In these instances, s/he becomes a legitimate target of attack. Questions regarding the application of this exception, i.e. the time frame in which protection is lost and what constitutes 'direct participation' are, unsurprisingly, highly controversial.

- Based on the distinction between combatants and civilians, the law forbids attacks which do not discriminate between these two categories of persons. In outlining indiscriminate attacks, law creates an equation of proportion: an attack is illegal if its expected incidental damage to civilians is *excessive* in relation to its predicted military gain:

Indiscriminate attacks are prohibited; Among others, the following types of attacks are to be considered as indiscriminate [...] an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. (Article 51, of the additional Protocol I of 1977)

The protections of civilian lives in International Humanitarian Law and Human Rights Law

IHL and human rights are similar in that both these legal systems share the goal of safeguarding lives; however, the nature and extent of these protections are substantially different. While in human rights the right to life is paramount, within the frame of IHL, in accordance with the principles of distinction and proportionality, harm to people, even those uninvolved in combat, and even their killing are not necessarily illegal.

A fundamental difference between the legal systems lies in the subjects of law:

...there exists a real and meaningful difference between the normative frameworks of human rights law and humanitarian law. The difference rests on the fact that human rights law is centred, indeed built, on the granting of rights to the individual, while humanitarian law is focused on the direct imposition of obligations on the individual (Provost, 2002, 13)

Provost's distinction is interesting in the gap it dismisses, namely, the individual assumed in each legal frame. In relating to human rights, the 'individual' is a wide category, but in the context of IHL, this concept is clearly different. This 'individual' then is seemingly a combatant or policy-maker. Indeed, this gap demonstrates a more general matter: while human rights aim to define entitlements and protections of persons, IHL largely seeks to regulate the actions of entities waging war.

An additional central comparative aspect between legal systems lies in the circumstances of their application. In this, some regard human rights as a regulating system for relationships between individuals and states of jurisdiction only in times of peace and IHL, on the other hand, law regulating relations between sides to war, and the exclusive applicable law at these times (Provost, 2002). However, this mutually exclusive application is certainly not agreed upon (Scobbie, 2010).

b. <u>Organisation theory</u>

Organisational theory is a relatively new yet diverse social-scientific field, its changes and developments reflecting shifts which emerged in the wider area of social science over the last few decades (Tsoukas and Knudsen, 2003).

Edward Rubin (2005) divides organisation theory into four types: a. that which views organisation as a nexus of contracts; b. that which sees organisations as complex decision-making hierarchies; c. that which analyses organisations as organisms or complex systems and d. that which emphasizes broader social impact on organisations.

The first type of theory, focused on a nexus of contracts, is grounded in contractual obligations of individuals and entities, and in essence assumes rationality. Rationality is crucial in this because contracts provide a sound ground for analysis only as far as they coherently reflect choice and course of action among relevant actors. This theory is limited, as in its emphasis of contracts it does not sufficiently consider the impact of individuals on the organisational picture. Additionally, this type of theory is inadequate for the purposes of

this thesis because in its focus on contractual relations, it de-facto disregards the organisation as an entity which may affect or shape dynamics.

The second theoretical type in Rubin's division is decision theory, a perspective focused on decision-making processes, and in these, factors which hinder rationality. This approach is more complex than theory based exclusively on contracts, because while it is similarly based on rational assumptions, it also takes into account additional elements of human behaviour and structural obstacles. But this theory is nevertheless inadequate for the purposes of this dissertation; firstly, because in its emphasis on contracts and obstacles to these it fails to take into account the organisation itself as a substantial analytical factor. Furthermore, and crucially for the context of this thesis, this theory does not account for the complex ways in which organisational structure interrelates with the thought, opinions, and ideologies of individuals.

The third theory type, which uses the metaphor of an organism or system to describe the organisation, is fundamentally different from the first two types of theory in that it places the organisation itself as a central factor in its analysis. A central attribute of this theory is that it assumes organisational processes occur mostly in coordination of different 'organs'. This theoretical approach is embedded in functionalist assumptions, which are problematic in that a given situation is seen as 'natural' or necessary. This does not account for conflict and struggle within the organisation. Additionally, this theory, similarly to the other theory types mentioned thus far, does not construct a frame useful for organisational analysis which seeks to understand the complex dynamics between individuals and structure.

The fourth theory type in Rubin's division focuses on broader social context and culture, in two possible ways: one is an emphasis of the organisation's broader societal and environmental contexts. This view, even if important in bringing 'the world' into the analysis, does not provide much insight regarding the organisation as such. In this sense, this theory brings in society, but takes out the organisation. A second possible research path focused on society and culture would analyze the organisation itself as an entity which encompasses and produces culture, in broad social and political contexts. In the frame of this theory, both society and the organisation are analytically significant factors. This approach, in its emphasis on the production of meaning in the organisation, is most useful in analyzing this concept as a field composed of interaction between individuals and structure, and for this reason it will serve as the theoretical basis for this research.

Organisation and the construction of meaning

Czarniawska-Joerges (1992) proposes a definition to the organisation which explains how meaning and decision are constructed, based on both individual action and structure (net):

Organisations are nets of collective action, undertaken in an effort to shape the world and human lives. The contents of the action are meanings and things (artifacts). One net of collective action is distinguishable from one another by the kind of meaning and products socially attributed to a given organisation. (32)

And so, the fourth type of theory in Rubin's division and the organisation in Czarniawska-Joerges' definition pave the way for discussions analyzing the dynamics between the individual and organisation as a process which produces meaning and action. These theoretical paths link to the field of interpretive research in organisational theory. Interpretive approaches examine the ways in which groups and the individuals within them develop, as well as express and communicate meaning within an organisational context (Hatch and Yanow, 2005).

Gareth Morgan (1997) suggests an explanation for the ways in which meanings are created and assigned in an organisational context:

Organisational structure, rules, policies, goals, missions, job-descriptions, and standardized operating procedures (…) act as primary points of reference for the way people think about and make sense of the contexts in which they work (…) they are cultural artifacts shaping the ongoing reality (139-140)

Thus, contracts and other written objects and verbal interactions, *as these are used by members of the organisation*, play a central part in the construction of meaning.

Karl Weick (1995) further explores this theoretical path and examines *a process* of meaning production, which he calls "sense-making". In this light, Weick describes the course in which situations are socially negotiated, constructed and reconstructed. The process of sense-making, Weick argues, is practiced in any social interaction, but is different in the context of the organisation. Difference lies in that on one hand, organisations, by definition, facilitate coordinated action and in this impose, surface-level influence, and also by an "invisible hand" of sense-making. However, and unlike many other social interactions which are often taken for granted (such as the state, the family), organisational frames are generally questioned and debated. Organisations as workplaces, in this sense, bring forth many occasions which invoke explanation, justification and rationalization. To illustrate, within

workplaces it is quite common that employees question, criticize and negotiate the definition of their positions and corresponding fields of responsibility.

Hence, sense-making is a significant theoretical tool, because in conceptualising the *construction* of meaning it lays the ground for a discussion in the complex relations between individuals, members of the organisation, and the organisational structure. Individuals relate to the organisational structure, its rules, regulations and goals in complex ways as they formulate meaning and perceptions. What this theory is lacking, however, is a more thorough consideration of the possibility that the individual and structure are not entirely distinct and separable in the process of sense-making. Weick indeed considers the organisation's "invisible hand" in creating meaning, but even this image demonstrates separateness: the organisation's 'hand' reaches and shapes perceptions; the 'organisation', then, is external to individuals, whom each hold independent views of the organisations and its actions.

The individual and the system

The dynamics between individual and organisation also referred to as agency and structure, are of great importance in the field of organisation theory. This matter is pertinent because different definitions of these relations encompass significant assumptions as to humanity and society and concepts such as identity, freedom of thought and responsibility (Reed, 1995).

Based on the work of Herbert Marcuse, David Held (1980) explores the position of individuals within systems. He enquires who is a 'good employee', and how he is different from a 'good person'. Held suggests that the employee is measured and evaluated on the basis of rules and agenda of the organisation. These alternative frames, he argues, repress critical thinking:

Propositions concerning production, effective organisation, the rules of the game, business methods, use of science and technique, are judged true of false according to whether or not the 'means' to which they refer are suitable or applicable (for an end which remains, of course, unquestioned) (67)

In discussing the interplay between structure and individual, Morgan (1997) presents the metaphor of a psychic prison. This notion, based on Plato's allegory of the cave, describes a situation in which perceptions of reality are distorted: looking outwards from within the cave, false apprehensions are regarded and maintained as truth and fact. The cave allegory is illuminating in explaining the way in which position affects perspective and action, but this insight as applied to the organisation is imperfect. Imperfection is clear if recalling Weick's

argument in regard to employees in an organisation: they commonly tend to question and criticize their roles, positions and the goals of the organisation. In this sense, the cave allegory provides only a partial explanation of the positions and actions of individuals working for an organisation.

Reed (1995) argues that while some approaches in organisational theory reduce one end of the structure/agency equation, it is pertinent to understand these concepts *in relation* to one another: both significant components which are interrelated yet separable and constitute interplay of social action and structural constraint.

Organisational theory applied to a military legal team

Laura Dickinson (2010), in her innovative research, applies the framework of organisational theory to explore battlefield compliance with international law in the case of the U.S. military lawyers in the Judge Advocate General's Corps (JAG). In this context, Dickinson seeks to isolate and examine organisational features which influence adherence to, or violation of, law. As Dickinson points out, compliance with domestic law is researched in varied avenues and frames such as psychology, sociology, legitimacy and social acceptance. Studies on compliance with international law, however, tend to remain in the realm of 'the state' as an actor, and avoid closer, more complex accounts of individuals, networks and circumstances.

Despite its potential, Dickinson's research is limited, mainly in that it does not adequately address the broadness of legal codes of war. In its account of practitioners' legal work, the research largely debates compliance vs. non compliance rather than examining the *nature* of legal decisions made. Consequently, the research, unfortunately, does not use organisation theory to understand the precise nature of effect this context has over legal work.

c. <u>Morality, law and war</u>

The naturalist and positivist traditions

An examination of law and morality necessarily relates to the origins of law, the traditions of naturalism and positivism. The naturalist school assumes that the origin of law is outside of the will of mankind, whether it lies in 'nature', 'divine law' or morality. This theoretical path is grounded in the legal model of Aristotle, which links social organisation with human capacities, needs and, ultimately, the will to survive. Aristotle, however, does not assume that 'nature' provides a full explanation for legal systems, and this is because the element of

'justice' also plays a part in shaping law. This perception evolved to various schools of thought, but a main tradition within this theoretical school assumes that the authority of law is ultimately based on its connection to morality (Feinberg and Coleman, 2003).

Positivism, differently, assumes human discretion as the source of legal systems. In this, morality is a part of law insofar as it had been incorporated into law by political authority; hence, there is no inherent connection between these concepts. In contemporary legal systems, however, it is common that legal argumentation relies on some combination of these two schools of thought (Rubin, 1997).

Law and morality in war

Richard Norman (1995) makes a key contribution to the field of ethics and war in criticizing accepted codes and practices of combat, primarily regarding killing. His critique relies on an analysis of what he considers an irreconcilable tension between every-day understandings of moral codes and those applied during war. Norman's fundamental challenge is simple yet convincing: how can the frame of war, he asks, justify killing, an utterly unacceptable act in everyday life, and make it morally defensible? While this stand is indeed illuminating, its weakness lies in limited correlation with the realities of contemporary war patterns.

As Martin Shaw (2005) demonstrates in his 'Risk-Transfer' analysis in regard to contemporary Western warfare, in realities of war, not only is killing acceptable, it even violates the principle of prioritizing the lives of those not involved in combat. In this war, much of the risk is transferred to the 'enemy': while the lives of Western soldiers are to be defended, the other side of the conflict is left to pay an even higher price, in the form of civilian casualties. Shaw then argues that it would be extremely difficult to morally defend these combat patterns.

In the Israeli context, Amos Yadlin and Asa Kasher (2005) indeed took upon themselves to deal with these exact difficulties. The writers published a highly controversial legal doctrine for war, which they defined as an ethical revision of IHL, adapted to the context of terror and a-symmetrical warfare. In the frame of this doctrine, the immorality of terror is ultimately a justification for the reformulation of legal codes. One of the core elements of this doctrine, in essence, dissembles the legal principle of distinction between civilians and combatants.

Gabriella Blum (2010), former member of the Israeli ILD, further discusses tension between morality and IHL. Blum suggests that there are situations in which legal instructions are immoral to an extent which calls for a fundamental re-examination of this law. A 'lesser-evil' solution to some war-related dilemmas, she argues, lies in violation of the codes of this law. Blum's suggestion is dangerous if taking into account the inherent flexibility of IHL, moreover, this position entrusts exaggerated faith in the moral judgment of parties to war (Diamond, 2010).

Methodology

This chapter will explain and debate methodological choices made in this research; it will explain the compatibility of methodology to research questions, describe data collection and analysis carried out and discuss the limitations of choices made. Main methodologies used in this research are interviews and discourse analysis. Throughout the research, these paths are used both separately and intertwined with one another.

a. Interviews with ILD team members: advantages and challenges

As the aim of this research is to further understanding of violations to the right to life based on the case study of the Israeli ILD team, interviews with individuals who are present or past members of this team are the optimal methodological choice. These provide new first-hand knowledge and perspectives on the practice of law in relation to violent events. Interviews also allow access to the decision-making processes leading to legal decisions, by discussing real-time considerations and dynamics which underlie the practice of law.

This research area is highly sensitive, due to the general nature of military decision-making as well as the specific case of the Israeli offensive in Gaza, which is of particular interest in this paper; the debate on alleged violations of IHL in Gaza still continues, as do campaigns aimed to promote international legal proceedings. As can be expected in light of this sensitivity, obtaining consent of team members to give interviews was challenging. Both formal and informal channels were used to reach informants: I obtained contact details of legal advisors with the help of a journalist and then contacted several people, past and present members of the team; I had also filed an official request for interviews through the military spokesperson's office. Initially only one person responded to my request and agreed to be interviewed, while others refused or postponed their reply. The situation somewhat changed after I met with Israeli academics who research similar fields. Academics gave me contact details for more potential informants, and I then succeeded to schedule additional interviews. Finally I also received a positive response from official military channels, which led to another interview.

Overall I held five interviews for the purpose of this thesis, lasting between one and 3.5 hours (the interview guide appears in an appendix). Four interviews were held in person, during a

visit to Israel, and one via phone, as I was then in the UK. Informants were both past and present members of the team, three were part of the team during the offensive in Gaza and two were not. Four of these interviews were recorded, and one was not, due to the preference of the informant.

Notably, the interview process contributed to the final focus of the research. During this process, while I had been encouraged by the consent of team members to be interviewed, I also realised both the limitations and possibilities of this methodological choice. Firstly, my initial research was designed to exclusively explore legal advice concerning the offensive in Gaza, but this research goal proved to be unfeasible. This was mainly due to the mentioned sensitivity of the offensive. Additionally, in interviews, recent and present members of the team tended to express limited views and perspectives as compared to past team members and the latter did not take part in work revolving the offensive in Gaza.

In light of these circumstances I decided to shift from an initial focus on Gaza to a broader review of the team and its work, thereby exploring the broader *context* within which the offensive in Gaza took place. As the interviews progressed, material gathered assisted me to develop the research in new directions. I was intrigued by team members' positions on law, morality and their own role in war; I was also fascinated by organisational aspects of their work- for example, what are the implications of composing legal advice as *employees* in the military organisation? Do advisors consider morality a part of their job?; based on these newly generated interests, which arose from field-work, I modified the research questions, so that these will better correspond with directions of inquiry. I did not devise a new interview guide, because interviews were open-ended; as I aimed to best grasp perceptions of informants and gain insight into their discourse, I chose to raise open questions, and then allow them to express their thoughts, opinions and positions.

Czarniawska-Joerges (1992) suggests conceptualization for research focused on perceptions and understandings of the actors who compose the field of inquiry:

*When approaching a cultural setting we are confronted with two alternatives only: One is to approach it through our own set of representations; another is to try to reach the representations held by the natives. Each has its advantages and disadvantages. The first is often regarded as more objective, because it is supposedly free from involvement. But it is free from involvement of one type only- the one that the actors have. (…) Nevertheless, the actors involved act upon **their** [Emphasis in original] representations, and not ours, however biased the former and correct the latter may be. In order to understand their actions we must understand their representations. (195)*

Of course, informants left much unsaid. At times I could glance at the unrevealed; during one interview I had asked an informant if he was ever in the position of advocating the legality of a military action which he, in 'real-time', had advised against and regarded illegal. He smiled quirkily and said he could not answer my question. As the interview ended, however, he walked with me outside the building in which the interview took place, and then said "About what you asked before… sometimes we have to defend actions to which we objected" I asked if he could provide an example, and in this I, again, hit a wall. He replied "Let's say…with Hassidic Jews. The state position is that they are not to be drafted to the army. I work for the state, so that is the position I have to advocate for, even if I my legal position is different…" Clearly, he was not talking about Hassidic Jews. This is an illustration, however, of the obstacles present in such sensitive research fields. A more general difficulty in this regard is in assessing the influence law has over warfare in practice; the thesis attempted to handle this obstacle, as others, in a careful manner.

Analysis and interpretation of interviews aims to consider the varied perspectives of informants, rather than creating a single narrative that would allow for simpler argumentation. This is in accordance with an ethical obligation to present informants' takes in a cautious manner. This approach follows Czarniawska-Joerges' (ibid) research model: 1. Obtain actors' accounts, which are elaborated enough to provide a basis for the understanding of standpoints. 2. Look at similarities between accounts, attempt to grasp the core of similarity; based on these similarities, try to understand ways of seeing the world, rather than a particular view. 3. Build a similar account for differences. 4. Attempt at building a story of phenomena and tie together varied versions and situations, even if they contradict one another. The result should be multifaceted, sharp, yet incomplete. 5. Avoid any one version of situations and events, or 'leading' accounts to fit a particular claim.

Notably, choice of the ILD team members as informants and research focus, beyond exciting possibilities, also set limitations. Namely, this team is only a section within the state and military legal systems, and as such does not fully represent law within these bodies. In this sense, the shift from micro-level analysis of the team to macro conclusions in regard to law in war is limited, but this is not different than in any case study-based research.

b. Critical discourse analysis (CDA) as a research method of law and the ILD team

Discourse analysis is, by definition, a diverse research method, as it seeks to constantly re-examine and re-evaluate realities and power relations. What is common to research of this school, however, is an interest in language as it 'naturally occurs', the extension of linguistics to action and interaction and the social, cultural, situational and cognitive context of language use (Wodak and Meyer, 2009):

CDA sees discourse - language use in speech and writing - as a form of 'social practice'. Describing discourse as social practice implies a dialectical relationship between a particular discursive event and the situation(s), institution(s) and social structure(s), which frame it: the discursive event is shaped by them, but it also shapes them. That is, discourse is socially constitutive as well as socially conditioned- it constitutes situations, objects of knowledge, and the social identities of and relationships between people and groups of people. (...) Since discourse is so socially consequential, it gives rise to important issues of power. (258)

The contribution of this research method to my own field of enquiry is pertinent because, in the case of the team, language and discourse interrelate with violence in a dialectical manner; violence shapes language, but language also shapes violence. The case study at hand provides a straightforward example as to the effect language has over political-social conditions, because the design of legal language shapes acts of warfare. The interpretive path which explores dialectics of language and social conditions is based on the work of Fairclough and Wodak (1997).

Discourse analysis applied in this paper is also based on the analytical framework of Norman Fairclough (2001). This framework suggests that the first stage of research should be a focus on a social problem with a semiotic aspect. The social problem addressed by this research is the violation of the right to life, and semiotic aspect is the discursive formation of legal concepts and military structure and positions, which in turn provide an explanatory frame (of potential justification) for violence. Materials explored in this regard are interview texts and additional materials such as media releases, varied publications and recorded conferences.

The thesis will make use of materials originated from sources different to the team, such as the report produced by the United Nations Fact Finding Mission on the Gaza Conflict (UNHRC, 2009), known as the Goldstone Report, as well as publications produced by human rights NGOs and journalistic accounts. The intention in this is not to thoroughly explore different narratives of the offensive in Gaza, but to position the team's account in relation to others, in order to better comprehend and explain its positions.

The second stage in Fairclough's framework is a discussion of obstacles which prevent 'the problem from being tackled and resolved. In this, Fairclough suggests considering structures and networks of practices in which this problem is situated. In this paper, a main structure which creates an 'obstacle' is the legitimizing power of law. Another significant network is the military organisation. As this paper will further discuss, both military logic and the theory and practice of IHL provide frames in which legal language that justifies killing 'makes sense'.

Fairclough further suggests considering the relationship between semiotics and other elements of the practice debated. In this case, the correspondence of legal terms with the realities of war is intriguing. For example, as this paper will argue, the legal criteria of 'proportionality', a balance between military goal and harm to civilians, entails a 'calculation' that defies translation to language external to this legal discourse.

In debating the semiosis of the discourse itself, an important feature in this is the way in which members of the team define their own position within the military structure. This position will be further debated, but an example to this is a semiotic feature which appeared in interviews: a tendency of team members to create a lingual division between "us", referring to the team, and "them" referring to the military.

Lastly, Fairclough's framework is focused on the question of whether the social order 'needs' the problem at hand. As this paper will argue, IHL and the military contribute to the legitimacy of the violation of the right to life. This legal engagement, in broader terms, serves to maximize military freedom of action, crucial within the logic of war.

In conclusion, this research is methodologically based on interviews and critical discourse analysis, and utilizes secondary sources in the form of official documents, NGO reports and journalistic accounts. As this chapter had shown, these methodological choices are well grounded in research aims; furthermore, these choices assumed their final form as result of a research process and in relation to their potential and limitations.

Chapter 1: International Humanitarian Law, its interpretation and influence on war in the case of the International Law Department

Background and structural position of the ILD

The ILD, in its current form, was founded in the beginning of the 1990's. The department team operates in offices located in 'Ha'kirya' military base in Tel Aviv, and includes approximately twenty officers. The team is subject to the authority of the IDF Military Advocate General Corps (MAG), the military legal system. The MAG is in charge of all legal inner-military matters, such as the incorporation of legal norms to the military and law enforcement among soldiers. Within the military structure it is separate from operational branches. For this reason, legal officers who are members of the ILD team are not hierarchically subordinate to decision-making commanders. The team has an advisory role, not that of command. As has been made public in journalistic accounts, and confirmed in interviews, the department is undergoing a continuing process of expansion and increasing involvement in military decision making. With this in mind, the 2008/2009 offensive in Gaza, in which legal advisors were more involved as compared to past operations, was not an exception, but a demonstration of a wider trend.

Legal advisors' interpretation and application of the IHL principles of distinction and proportionality

One would never even contemplate or imagine not acting in accordance with law (...) everyone understands that [they must, M.G.] operate according to law (Judge Advocate General Avihai Mandelblit in Turkel Committee, 2010: 7)

The principle of distinction in practice

The distinction between civilians and combatants, one of the pillars of IHL, provides a basis for this legal frame and for the protection of civilians. For this reason, the nature of differentiation between civilians and combatants as applied by members of the legal team is crucial. Most significant for the perspective of this paper are the characteristics of this 'civilian', entitled to the protections which this definition encompasses, and consequently, characteristics of persons excluded from the civilian category. Therefore, I will assess legal interpretations of ILD team members as compared to analytical debate focused on the content of the civilian category.

Case study: the 'police line-up' in view of the principle of distinction

In the morning of Saturday, December 27 2008, Israel launched its offensive in Gaza. The first target of this military campaign had later become known as the 'policemen line-up'. In this attack, Israeli air forces fired three missiles at the Arafat City Police Station yard, in the city Gaza; According to the Goldstone Report [1](2009: 121), forty eight policemen died on the spot, five more were injured, two of whom subsequently died. A few seconds later, either one or two more missiles were fired at a second nearby yard, causing the death of twenty eight additional people.

The line-up policemen: civilians or combatants?

In order to conclude whether or not the 'police line-up' attack was legal in view of IHL, the status of police officers in Gaza must be considered. In this context, a senior member of the ILD team argued in a newspaper article, first, that Gazan police personnel are legitimate targets for an attack since, given an opportunity (for instance, following an Israeli offensive), they would fight against the Israeli military (Blau and Feldman, 2009). The Goldstone Report rejected this line of argument, stressing that as this is a theoretical assumption, it does not justify the police personnel's loss of civilian protection. A second line of argument employed by ILD team members according to a media report (Fogelman, 2010) was based on more concrete allegations: that specific police officers, who were present in the line-up, were involved in Hamas military activity. To this argument, the Goldstone Report replies by stating that even a publication sponsored by the Israeli government only accuses some of the policemen with involvement in terrorist activity, while thirty four of the dead policemen are not linked to any such activity. If this is the case, the Goldstone Report argues, even if some of the policemen were to be rightly considered combatants, i.e. a legitimate target for attack, the action still fails the test of proportionality. A third and more general argument, which was made public in an official state publication (State of Israel, 2010), is that there is no division between police and military work in Gaza, and for this reason all policemen are to be

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[1] The report produced by the United Nations Fact Finding Mission on the Gaza Conflict, i.e. the Goldstone Report, has stirred lively debates in Israel. Debates arose again as Judge Goldstone published an article in which he described some change in his stand regarding Israel's compliance with law as compared to the report. This publication (available at: http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html [accessed 29.5.11]), however, provided no new information as to concurrencies during the military operation.

considered combatants. In this regard, the Goldstone Report states that although it may be that some policemen were involved in military activity, the police force as a whole is not to be considered a military entity.

The status of policemen in Gaza: police or "police"?

According to media reports (Fogelman, 2010), out of a hundred targets attacked by Israeli artillery during the first day of the military operation, twenty four were police stations. By the time the operation's artillery attacks were stopped, all sixty Gazan police stations had been struck. Subsequent official publications produced by the ILD team (State of Israel, 2009) argue that the Gaza police is to be considered a combatant entity, hence a legitimate target for military attack. In these official publications, Gazan police is repeatedly referred to as "police", with quotation marks. These quotation marks do not signify any specific police squads; rather, in this account, Gaza has only a "police" and no police.

The NGO B'Tselem- the Israeli information centre for human rights in the occupied territories chose, in essence, a mid-way classification of Gaza police personnel. While the organisation clearly states on its website that the police line-up attack should be investigated with regard to its adherence with the principle of distinction, the list of fatalities published on the organisation's website positioned the names of police men and women on a separate list, distinguished from both civilians and combatants. This division follows an ICRC publication (2009), which elaborately debates "direct participation," i.e. the instances in which civilians lose their status as protected from being targeted in hostilities. Palestinian human rights NGO Al-Haq (2009) stated that based on its own research, police in Gaza is separate to military forces, and therefore police personnel were not a legitimate target for attack. The organisation further stressed that, while some police officers were indeed active members of armed groups, these were only a few.

Controversy with regard to the appropriate application of the principle of distinction in the context of contemporary warfare is by no means unique to the Israeli-Palestinian case (for example see Dinstein 2004, Kanstroom 2003, Sassoli 2003). As suggested by Best's (1984) account of difficulties in application of the civilian-combatant distinction, the translation of legal code into practice may not be straightforward at all times. Moreover, analytical debate shifts beyond practical difficulties in the prescriptions for the application of legal codes. Nablusi's (2001) historical review of the development of the civilian and combatant legal

categories reveals the ongoing negotiation of definitions, a process that does not allow a static understanding of these terms.

Two members of the ILD team gave accounts of the team's application of the principle of distinction. When compared, the accounts demonstrate different approaches to this legal code. The first account describes a straightforward application of the code:

The question is- were they [the line-up policemen, M.G.] combatants or not? This is very much a factual question (...) had they come to me with this question I would say: here are the factual questions I need to look at- show me the role of these policemen, are they combatants who are also policemen? Then they are a legal target. Or are they helpless secular transport policemen, as then maybe they are not [a legitimate military target, M.G.] (Interview, 9.12.10)

The second account is very different, and demonstrates a "forward leaning" approach to legal advice. Notably, it is by the head of the team at the time of the Gaza offensive, who states:

The principle of distinction is, by definition, flexible. It requires that you make a distinction between a military target that is legitimate for attack, and a civilian object, that is illegal for you to set as a target. Now, what is a military target? (...) this is very flexible. A civilian object, when it is used [for military purpose, M.G.], or because of its location, or even because of its potential use (...) becomes a legitimate target of attack (Pnina Sharvit-Baruch in the Jerusalem Center for Public Affairs Conference, 2009)

The position articulated by Sharvit-Baruch sheds light on the guiding interpretive principles of the civilian category applied by members of the team during the offensive in Gaza, and the negotiation of this definition. The word 'potential' is of crucial importance here, and demonstrates legal flexibility in an extreme form: an understanding of the 'civilian' so broad that it blurs the borderline between the categories of civilian and combatant, and entails, in effect, a rejection of the civilian category (Slim, 2003). As became evident in military actions carried out in Gaza, extensive flexibility assigned to the civilian category undermines its integral capacity and potential for protection of the right to life.

And so, the case of the police line-up as well as more general debates regarding the classification of Gazan police forces as either combatants or civilians provides an illustration of the negotiation of these categories. Positions held by team members, the Goldstone Report, NGOs and analytical accounts all diverge and provide different perspectives on this matter. Of course, the final verdict was that of the aggressor, and in this the ILD team's view must be regarded as significant. The verdict of the aggressor, indeed, negotiated the civilian and combatant categories in a way which narrowed down the notion of 'the civilian' to an extent that almost eliminates this category altogether.

The principle of proportionality in practice

The principle of proportionality, the weighing of military advantage against harm to civilians, is fundamental to IHL. An attack is illegal if its expected collateral damage to civilians is *excessive* in relation to predicted military gain. This section examines, through a case study, how proportion was measured and evaluated in the case of the Gaza offensive, and what was seen (not) to constitute "excessive collateral damage".

Case study: The killing of Nizar Rayan and his family in view of the principle of proportionality

On January 1 2009, the Israeli air forces bombed the house of Hamas senior Nizar Rayan in Jabalya refugee camp. The blast killed Rayan, four women (Rayan's wives), and their eleven children, aged one to twelve years old. In an official statement, the military spokesperson said: "the house served as a large munitions warehouse and as a war room. Under the house was an escape tunnel for terrorist members of Hamas's military wing" (IDF, 2009). In a verbal statement, the army spokesperson said that the Rayan family had been warned of the coming attack, but despite this warning, family members did not leave their home.

Following this incident, the Israeli NGO B'Tselem published a statement arguing that this case raises suspicion as to violation of the principle of proportionality (B'Tselem, 2010). The underlying assumptions of the NGO, discussed in its statement, were that while Nizar Rayan, a senior Hamas military official, was likely a legitimate target for attack, the family women and children were not. In the circumstances of the ongoing military campaign, the organisation stated, it is not clear how this attack was supposed to secure military advantage that was proportional to the loss of civilian lives.

A newspaper article published after the attack (Blau and Feldman, 2009) revealed a rather unexpected legal position held by the ILD team in regard to this matter. An ILD team member was quoted as saying that in cases such as the case of Nizar Rayan, where warning of an intended attack had been given, people who chose not to leave the place of assault lost their civilian protection and became legitimate military targets. In this light, women and children of the Rayan family were not regarded as 'collateral damage', because they were no longer considered to be entitled to civilian protection. This legal interpretation is partially based on a ruling made by the Israeli High Court of Justice (HCJ, 2005), which in a decision regarding "targeted killing" distinguishes between "voluntary" human shields and those not voluntary. The former, the ruling asserts, are to be considered a legitimate military target; it is

not clear in this ruling, however, what constitutes this 'voluntarism', and how it should be identified.

The legal shift from the issue of proportionality to that of the civilian category further demonstrates the elastic application of law. But we shall return to the discussion of proportion in order to understand how proportionality is perceived, calculated and decided by the ILD team. Team members' accounts of proportionality reveal first, the subjective nature of the interpretation which it entails and with which it is applied and second, the uncertainties embedded in these decision-making situations:

There is no legal answer to the question of what proportionality is. It's not that I can say: this is proportional, this is not. You have to take into account considerations A, B, C and D, look at this and that, and then consider the whole question (Interview, 21.12.10)

There are many difficult decisions (…) when I can't say if the decisions are proportional or not. I can ask questions: did you think of that? Do you have information about X? (…) do you know of sensitive objects that are near to the place of attack? (Interview, 20.2.11)

In planned operations we have mathematicians who calculate the hit radius of every bomb, and they give you a numeric estimation of the odds that the windows of the neighboring house will be shattered, and then the odds that this broken glass will hit the next room…with unbelievable details (…) and still - you don't know. I mean, when they say that there's an 80% chance of serious injuries in the house next door, you still don't know who is in the other house. The variables always have a lot of holes in them. And then you say, okay, based on the information we have right now, and we've done our best to gather information as we reasonably can, what do we know about danger to innocent people, and what is the expected military advantage? Now, let's decide if this is worthwhile (Interview, 9.12.10)

Considering the confidential nature of military decision making, the exact components and 'weight' assigned to variables in calculations will probably never be fully known. But this exact calculation, evaluating known information and expected results, is the only way to decide whether or not this principle had been applied appropriately. For this reason, in practical terms it is almost impossible for actors external to state agencies to prove a violation of this legal code.

But even beyond limitations of access to information, military considerations are formed within a specific frame and context, which can predetermine the results of these 'calculations'. Michael Walzer (1977) discusses the concept of military necessity in a way which illuminates the 'holes' in military discourse:

*In fact, it is not about necessity at all; it is a way of speaking in code, or a hyperbolical way of speaking, about probability and risk. Even if one grants the right of states and armies and individual soldiers to reduce their risks, a particular course of action will be **necessary***

[Emphasis in original] to that end only if no other course improved the odds of battle at all. But there will always be a range of tactical strategic options that conceivably could improve the odds (144)

In this light, David Kennedy (2006) points out that the equation of "proportionality" or limitation of civilian death becomes, through an interpretive legal process, a pragmatic consideration: the legal limit is no more civilians than is 'necessary'; but this calculation of 'proportion' by definition relativizes civilians as compared to combatants, and in this negates the importance of the distinction between these two categories. In this view, IHL codes per-se offer a highly compromised protection of civilian lives. Kennedy provides an illuminating example for his argument when he applies the principle of proportion to the bombings of Hiroshima and Nagasaki. This application reveals the inherent limitation of the law in question, in that it demonstrates its *limitless* nature, an ability to transform *any* act of war, regardless of magnitude or consequence, to a calculation of military advantage and collateral damage.

Therefore, different opinions with regard to the case of the Rayan family and general discussions about the principle of proportionality reveal the weakness of this principle in safeguarding life, namely, they expose its inherent subjectivity and its unbounded nature. In the specific case of the Rayan family, as in any other instance, the confidential nature of military decision making renders close scrutiny of this 'calculation' almost impossible. Moreover, the arguments of Walzer and Kennedy on the discourse of legal principles shed light on the circularity of military logic. In this sense, an external perspective to that of military discourse reveals that 'calculations' defy translation to non-military language and perception, as it loses its logic of justification.

Life in IHL and Human Rights Law

"People don't understand that dead civilians are not a breach of law" (Interview, 21.12.10)

As accounts of law in theory and practice have demonstrated, the legal corpuses of IHL and human rights provide starkly different protections to people. While in the frame of human rights, the right to life is paramount, IHL allows for a negotiation of life. Reviews of the legal principles of distinction and proportion explored the nature of this negotiation and the inability to translate 'calculations' to language that is not that of military discourse. The result of this negotiation was, in the case of Gaza, extensive violations of the right to life.

An important question in this regard concerns the application of the human rights legal system. It is commonly argued that human rights are inapplicable in times of war (Provost, 2002), although there is opposition to this opinion (Scobbie, 2010). Unsurprisingly, the official Israeli stand in regard to Gaza does not accept human rights as an applicable legal system.

But a crucial question is, then, what constitutes war. As David Kennedy (2006) convincingly argues and demonstrates with reference to the "War on Terror", within the contemporary global political system, the distinction between war and peace tends to be a matter of extent or emphasis. An exclusion from the human rights system is highly problematic, both on theoretical levels (who are excluded from these protections? Who is, then, the 'human' entitled to rights?), and most certainly in practical terms, because of the limited protection provided by the alternative IHL frame.

The implications of law on war-making: the interplay of open-ended interpretation and legitimacy

Much of international law is not about giving the correct legal advice; it's about having good arguments. In most cases, there is no one result. You cannot be in the position of not having arguments, that's the point. (Interview, 21.12.10)

Grounded in legal codes that have become broadened and somewhat blurred, team members formulate advice and arguments. In this context, a "good argument" may result in initial approval or retroactive justification of extensive violations of the right to life. It is extremely important to consider the broader consequences of legal system and "good arguments" for the realities of war and law. Pictet (1985) defends IHL by arguing that it is needed as long as war is possible, because it provides people with some measure of protection. While it is not possible to determine whether and how war would have been different if law had not existed, it is certain that this law cannot be argued to simply safeguard people's lives. More precisely, while law offers some protection of lives, it also plays a part in the design of violence, and the manner in which violence is inflicted and perceived. In this light, law creates a structural paradox, as by setting prohibitions it implicitly authorizes everything which is excluded from its prohibitions (Weizman, 2009). This topic will be further addressed in the next chapter, in relation to the organisational position of law.

Conclusion

This chapter considered the application of IHL principles of distinction and proportionality by the ILD team, based on case studies of military actions carried out during the offensive in Gaza, in which the right to life was violated. Legal interpretation was placed in an analytical context, focused on the definition of the 'civilian' category and the calculation of 'proportion' as part of military legal discourse. As the critiques made by Michael Walzer and David Kennedy stress, the discourse of law is contradictory and circular. In this sense, "necessity", has little to do with what is necessary, and "proportionality", which relies on the core distinction between civilians and combatants, in essence negates the importance of this same division. In this context I hope to have shown that Pictet's defence of IHL as a shield for civilian lives does not account for all the implications of this law in times of war. As this thesis claims, in Israel's Gaza offensive, many people lost their lives while they were in their homes, at their place of work or in the street, simply because they 'slipped' over to the wrong side of a contradictory and blurry interpretation of International Law produced at the not-so-far-away city of Tel Aviv.

Chapter 2: The International Law Department as an organisation

This chapter describes and analyzes the work of the ILD team in light of perspectives and tools derived from organisation theory. Within this theoretical field, the focus of this paper lies in interpretive approaches that look to the views and understandings of individuals in order to construct an analysis of a larger organisation in which these individuals participate. Following this theory, the chapter will draw on team members' perceptions of their role and position within the military system in an attempt to better comprehend the decision-making processes that shape legal advice and military conduct. I will connect these insights to conclusions regarding law which resulted from the discussion of the previous chapter in order to formulate a broader analysis of wartime law as it operates within an organisational context.

As stated previously, the field of organisation theory is diverse (Tsoukas and Knudsen, 2005) and offers many different theoretical approaches (Edward Rubin 2005). This paper will show that the ILD team's legal work requires an analysis grounded in a broad contextual social frame, as well as an understanding of the complex dynamics between structure and individual. In order to understand and evaluate the ways in which social, political and cultural contexts shape organisational dynamics, this paper turns to interpretive approaches derived from organisation theory. These approaches examine the ways in which groups and individuals within them develop and communicate meaning (Hatch and Yanow, 2005). In considering legal interpretation, 'the world' of broader contextual frameworks enters the analysis since interpretation, by definition, is based on context.

ILD team members' perceptions of their work and position

Interpretive theory understands an organisation as grounded in a network of objects such as policies, job descriptions and procedures. Analytical emphasis is placed on the ways in which these objects are understood and utilized (Morgan, 1997); thus, for example, different written procedures which are formally equal will be evaluated on the basis of weight and importance assigned to them in practice by employees. In the case of the ILD team, the central objects are military goals and procedures, international law conventions, past court rulings, and so forth. All these provide primary points of reference for members in their own understanding of the nature of their work.

Based on interpretive theory, then, a main question is just how these objects are understood and weighed by team members. During interviews, members described tension between law and military goals. A common situation described in this context was an instance when a commanding officer requests legal opinion and then pressures team members to provide the advice that is most suited to military goals:

Commanding officers get upset sometimes [with legal advisors, M.G.], *certainly this is the case in stressful situations, when they say 'let us win'. These are issues that are inherent to this kind of interaction. [...] the closer you get* [to the battlefield, M.G.]*, the greater the pressure gets.* (Interview, 20.12.10)

Another legal advisor described similar difficulties related to an additional factor, military rank. Rank further complicates the tension between military regulations and law by adding the 'object' of hierarchical organisational structure to the picture:

There is a problem, because lawyers are commonly of lower rank [as compared to the commanding officer, M.G.]*, and then, in a hierarchical army, a lot depends on the commanding officer… in many cases, officers regard military rank as an indication of the importance of what is being said, but that depends on the officer.* (Interview, 9.12.10)

Perceptions of roles: independence vs. pressure

Moving beyond 'objects' to team members' broader perceptions of their role and position, Karl Weick (1995) suggests to examine the way that individuals make-sense and construct the meaning of their work. As Weick explains, while people construct meaning to any social interaction, the process of sense-making within an organisation is unique in that: a. an organisation facilitates joint action, hence influences thought and work both in visible ways and with its "invisible hand" and b. it invokes relatively many occasions in which members of the organisation question and criticize work, procedures and so on.

This description of "tension" with the military hierarchy offers a critical reflection on team members' position within the system. But ILD team members also gave meaning to their role by discussing their independent status in formulating legal advice, a description that contradicts, in spirit, their account of tension with the system. One team member said "The military legal system is independent. (…) No commanding officer can give orders to an officer who is a member of the MAG" (Interview, 20.12.10), and another: "The ILD team are a completely independent body, and that is a powerful thing (…) you even slightly intimidate the system as an independent body" (Interview, 9.12.10).

A semiotic feature which repeated in interviews is that legal advisors tended to use language which distanced themselves from the military. Some referred to the army in the third tense while using the word "us" to refer to the team. In this, advisors discursively positioned themselves as external to the military.

This double positioning reflected in language is not a matter of random choice of words. Indeed, team members are aware of their dual position of composing legal advice while serving in the military:

You wear a uniform, and you're a part of 'us', and if you would get some external lawyer into that field, lack of trust and hostility may be very substantial. The only reason why they can sit beside commanding officers and be listened to, and have their say taken into account, is because they are a part of the system. (Interview, 9.12.10)

The legal advisor has a double loyalty, and he will be treated with suspicion. There is no way around that (Interview, 21.12.10)

ILD Team interviewees made-sense of their work and position in an incoherent manner implying a level of ambivalence, as was reflected in their discussion of independence alongside tension and pressure, as well as in their discursive distinction between 'us' and 'them'. As I stated previously, within the military organisational structure, the legal system is formally separated from operational branches. For this reason, team members are not hierarchically subjected to the command of non-legal officers. This is the basis for the us/them distinction that officers repeatedly displayed in interviews. However, as advisors testified, their independence does not translate to freedom in drafting legal advice.

Recalling Weick's conceptualisation of sense-making in an organisation, the team members' conceptualization of their role has been shown to include an element of criticism towards their organisational structure. As I will attempt to examine the role of legal advice in the violation of the right to life, it is important to note the implication of the described dual affiliation to the formation of legal advice. In this context, I asked a team member whether military legal advisors formulate advice which other, civilian legal experts would not have endorsed. The team member replied:

Most certainly. I took part in the operation [Cast Lead, M.G.]*, I had to walk down unpleasant paths […] so that I could build a balance, and so that the commanding officer will understand that I am not copping out of trying understand his limitations […] some commanding officers don't understand our work well enough, so they're afraid to ask the legal advisor questions, because they think he would say no [to military actions, M.G.]* (Interview, 21.12.10)

This account of legal work that attempts to refrain from refusing the demands of commanding officers is similar to perspectives which appeared in Dickinson's (2010) research on the US military legal team:

As one judge advocate put it, "You can't be Dr. No" (...) another judge advocate put it thus: "[I] wanted to help my commander get to yes." Similarly, a third reported that his job was "finding a way to yes . . . . Your first response shouldn't be no." Instead, "you should think, 'How can I help my commander accomplish the objective? (20)

The team member's account of the need to 'understand' commanding officers, to walk down unpleasant paths and find a 'yes', is analytically important in two ways: first, it reveals an awareness of the limits of legal interpretation within the military organisation, and second, it emphasizes the complex dynamics between the organisational structure and the individual.

The dynamics between military structure and individuals, ILD team members

In examining the organisational dynamics which encompass legal advisors' work, it is pertinent to realise the nuances of the process through which advice is formulated. Interviewees described their legal work as grounded in the military system. Only a legal account which understands this system from within, they argued, will be taken seriously. But this is a circular mode of decision making: in order for legal advice to be "taken seriously", legal interpretation is constructed and formulated in a way which would be acceptable to commanders and military goals. Legal decision making which takes into account the assumed expectation and future reaction of officers seems, on one hand, like a common-sense and obvious policy. But on the other hand, the considerations that legal advisors adopt in their decision making portray a complex interplay of 'agency', the individual, and structure.

In further considering the relations between agency and structure, organisation theory takes discussion forward by critically examining the boundaries between these concepts. Most crucially, organisation theory asks whether one dominates the other, and if these concepts are at all separable from one another. As Michael Reed (2005) rightly argues, this matter is pertinent because definitions of this structure/agency dynamic carry broad assumptions as to humanity, society and consequently to notions of identity, freedom of thought and responsibility. Theories differ in their emphasis of either the agency or structure, as well as in their definition of the nature of relations between these concepts, considered as separable or as intertwined.

Thus, we might begin to unravel the dynamics of the organisation and individuals' perceptions. Reflecting on the issue of independent thought within an organisation, David Held (1980) argues that by establishing the definitions for 'good work' and 'good worker' the organisation shapes the construction of meaning in both visible and invisible ways. Gareth Morgan (1997) suggests the "psychic prison" as metaphor aimed to demonstrate organisational construction of meaning which occurs beyond surface level influence. This metaphor illustrates the way in which position affects thought; from a certain organisational perspective, false perceptions are regarded and maintained as truth and fact. Both Held and Morgan, develop theory which explains how the organisation suppresses alternative understandings and critical thinking. Approaches such as theirs emphasize structure and lessen the significance of the agency.

As military officers, legal advisors are part of the military system, and presumably support its goals and logic. It would be impossible to measure the extent of identification legal advisors maintain with this system in relation to the system's extensive violations of the right to life. In interviews, questions on the consequences of military violence were, unsurprisingly, left unanswered. However, it is important to note the manner in which team members contradicted Held and Morgan's positions by demonstrating that employees do tend to be reflexive in regard to their position and work. Thus, it cannot be argued that the 'agency' is passive or an insignificant factor within these dynamics. The fact that a workplace such as the military implies identifications related to nationalism and national identity, undoubtedly influences this tendency, but does not account for it fully.

An interesting addition to the discussion of agency and structure lies in the fact that advisors consider themselves to be agents of change in the military system. As accounts of team members demonstrate, they do not see themselves as mere interpreters of law; rather, they view their work as contributing to the creation of law:

The way in which international law evolves (...) is the way of practice. This means that the activities of states, the ways in which they act, including the ways in which they explain what they do, creates law. (...) When states are confronted with new kinds of threats (...) like terrorist organisations, in combat, they act and employ principles and rules with adaptations that are required by the new situations. Through these adaptations, they are, in fact, creating new law. (Pnina Sharvit-Baruch in the Jerusalem Center for Public Affairs Conference, 2009)

...If you're right, law shifts to your direction. Now, it takes time and practice, but when you understand that this is the way that international law works, you understand how hard it is to say 'illegal' and 'legal' in grey zones. (Interview, 9.12.10)

In further reflecting on the agency/structure dilemma, Reed (1995) suggests a mid-way approach to these dynamics, and titles his approach *relational.* He defines agency and structure in relation to one another. Both concepts are meaningful in analysis and practice; they are interrelated yet separable and constitute interplay of social action and structural constraint. Interview findings affirm Reed's analysis: advisors' description of their work account both for entanglement and separateness between themselves and their encompassing structure. Team members' reflexive views on their own position and work, as well as their perception of their own legal interpretation as law-making, are both evident of an extent of separateness. However, the detailed account of the decision making process revealed relations wherein the organisational structure plays a crucial part in shaping individuals' thoughts and decisions.

Conclusion

This chapter discussed the military ILD team by employing the tools of organisation theory. Theoretical tools and interpretive approaches were employed to analyse perceptions of team members. Based on interviewees' accounts, the paper conceptualised a wide view of advisors' roles. I found that team members make sense of their role in an incoherent manner: on one hand, they describe their independent status as legal advisors, and on the other, they accept and acknowledge the pressure placed on them to adapt advice to combat goals. Based on these insights, the chapter then debated the dynamics between individuals and structure in this case. Noting the complex and perhaps muddled perceptions team members have of their own positions, I concluded that agency/structure dynamics in this case are relational. Both the structure, the military, and agency, team members, are significant factors analytically and practically, concurrently interrelated yet separable. This chapter therefore added an important dimension to the understanding of legal decision-making processes in the military, as an ambivalently oriented process. It expanded the debate on International Law by examining its actual application in a concrete organisational setting.

Chapter 3: Responsibility: the interrelations of morality, law and the organisation in the case of the International Law Department

This research has shown that IHL codes, both in theoretical terms and as applied by the ILD team, provide limited protection for the right to life. It has further asserted that organisational dynamics negotiate the borderline between individual and structure, and that this process results in compromised legal interpretation. The limited protection of the right to life offered by legal codes, on the one hand, and advisors' compromising legal interpretation on the other, raise difficult questions vis-a-vis responsibility.

This chapter will re-approach legal and organisational aspects in the work of the ILD team, equipped with the frame of responsibility. For the purpose of this paper, responsibility is defined simply as the flip-side of power. In this sense, responsibility exists to the extent that power does. It is understood here as a compound construct, encompassing both structural (legal, organisational) and subjective-individual (moral, emotional) aspects. As part of this discussion, the paper will introduce the concept of morality, in relation to law and the organisation.

Main inquiries guiding this debate consider the meaning and significance of the term "morality" in the context of law, war and responsibility, and whether it can fill the existing gap in the legal safeguards of the right to life, as has been suggested by several theoretical contributors to this field. Other issues central to this discussion are the complex inter-relations between law and morality, and the implications of these dynamics to the notion of responsibility in an organisational context.

Law and morality

In legal theory, the traditions of naturalism and positivism have different assumptions as to the relations between law and morality. The naturalist school assumes that the origins of law are ultimately outside of the will of mankind, whether they lie in 'nature', 'divine law' or morality (Feinberg and Coleman, 2003). Positivism, however, assumes human discretion as the source of legal systems. In this sense, there is no inherent connection between these concepts. In contemporary legal theory and practice, however, it is common that legal argumentation relies on a combination of these two schools of thought (Rubin, 1997). This

dissertation does not seek to determine which of these schools is correct; rather, by relying on the perceptions of practitioners, it will examine how these perceptions affect legal work in this specific case. The paper does not provide a single definition for morality, and this is because it aims to scrutinize this concept as it is understood by practitioners, in comparison to theoretical debates of the term.

By examining debates regarding naturalism and positivism as they relate to practice, I seek to discover whether legal advisors assume that law and morality are separate, as accords with positivist assumptions, or whether they see an inherent connection between these terms, in a manner that affirms a naturalist conception of law. In other words, I wish to enquire whether or not advisors consider it their *job* and *responsibility* to practice morality in wartime, and how the answer to this question affects legal decision making.

ILD Team members expressed diverse opinions both regarding the relation between law and morality, and the consequent implications of this relation to their job and area of responsibility:

We are not responsible for morality. Morality is not relevant for the work of this team. (…) The question of whether or not the IDF is a moral military is of no concern to us. (Interview, 20.12.10)

We are experts in law. Everyone has moral judgment: commanders, soldiers, citizens and also us […] but of course, law itself is based on moral principles (Interview, 20.2.11)

In morality, as opposed to law, we have no monopoly […] but the legal expert, because of his position in the system…will be the one to raise the moral aspect…he makes sure that this issue is not forgotten, due to all the enthusiasm of achieving the goal (Interview, 21.12.10)

While the first informant draws a clear separation between morality and law, the others expressed less definite opinions on this matter, which could be theoretically positioned as a mid-way between naturalist and positivist traditions.

The interrelations between morality and law, however, are not limited to the debate of origins. It is extremely important to consider in this context that law has normative and legitimizing power. With this in mind, it cannot be argued that law has nothing to do with morality, because in determining the border between the legal and illegal, law also constitutes right and wrong and by implication contributes to the social and cultural definitions of justice

and morality. Moreover, in determining these borders, law positions itself unreachable to scrutiny. David Kennedy (2006) convincingly presents this argument:

We no longer need to decide for ourselves whether law is civilized, whether killing this civilian is a good idea, whether attacking this town is ethically defensible. The law of armed conflict will do that for us (141)

Kennedy also provides a more field-related example for the crucial impact of legal codes on notions of right and just, and subsequently, on psycho-social norms:

I was struck that Iraq war reporting was filled with anecdotes about soldiers overcome by remorse at having slaughtered civilians- and being counselled back to duty by their officers, their chaplains, their mental health professionals, who explained that what they had done was necessary, proportional, and therefore just (146)

The account of the normative power of law adds a layer of meaning to legal advisors' views on the relations between morality and law, further strengthening the importance of the notion of responsibility in this debate. In terms of the views of legal advisors, perceptions of the relations of law and morality which are overly direct adoptions of either the naturalist or the positivist positions are most precarious. On one hand, a legal advisor that does not consider morality a part of his job is a cause for concern because law, de-facto, contributes to the constitution of 'justice'. On the other hand, the very idea of an official advisor "in charge" of morality seems either absurd or suggestive of a system which structurally lacks morality. In spite of this undeniable absurdity, it is equally impossible to deny that an emphasis on the link between morality and law may lead to such a perception of the role of advisors. Recalling the third quoted source, who said "the legal expert, because of his position in the system (…) will be the one to raise the moral aspect" provides an account that demonstrates this problem; although the source did explicitly state that he does not, as a lawyer, consider himself to be the sole bearer of responsibility for morality, he described *his position in the system* as one that makes him the agent responsible for morality.

Thus, as my discussion has pointed out, definitions of the morality-law relation which are closer to either extreme of the naturalist or positivist schools are highly problematic in translation to military legal work. Assumedly, different stands of legal advisors towards the relevance of morality to their work result in their assumption of varied degrees and forms of responsibility. But these perceptions are, as this paper showed, not the only component in

position of advisors vis-a-vis morality, and hence also, responsibility. The normative power of law implies that, Regardless of their own narrative, advisors bear moral responsibility in the sense that they have power in the process of shaping military moral agenda.

"Morality" in war

As Michael Walzer (1977) argues, the nature of morality as it applies to war is a compendium of diverse writing and activity:

...the moral reality of war is not fixed by the actual activities of soldiers, but by the opinions of mankind. That means, in part, that it is fixed by the activity of philosophers, lawyers, publicists of all sorts (15)

The paper will review several theoretical approaches to this issue prior to discussing the concept as it is addressed by the ILD team members.

Norman (1995) focuses his ethical account of war in killing, and is hence particularly relevant to this discussion on the right to life. Norman's critique relies on a fundamental claim regarding the irreconcilable tension between every-day understandings of moral codes and those applied in war. In this, he questions the ethical reliance on the context of war as justification for killing. The weakness of his argument is its irrelevance to the contemporary realities of war, as demonstrated for instance by the actions of the Israeli military in Gaza.

Martin Shaw (2005) demonstrates the limited relevance of Norman's perspective to the practice of war in his 'Risk-Transfer' analysis. Through this model Shaw points out that in contemporary wars involving Western powers, not only is killing acceptable, but the pattern of combat goes further and violates the principle of prioritizing the lives of those not involved in combat. In the case of the offensive in Gaza, massive use of artillery within the densely populated strip, a military option that was known to cause extensive loss of civilian lives, provides an example for a pattern of warfare which de facto prioritizes the lives of state soldiers over those of the 'enemy', both combatants and civilians (Levy, 2010). Shaw concludes his analysis by arguing that it would be very difficult to morally defend Risk-Transfer war.

In the Israeli context, Amos Yadlin and Asa Kasher (2005) formulated a document which they refer to as an alternative, more ethical IHL doctrine, adapted to the need to deal with terrorism and "a-symmetrical" warfare. This document approaches the prioritization of state

combatants over 'enemy' civilians, the same position which Shaw regarded as a moral failure. But in Yadlin and Kasher's doctrine, morality is employed to serve the counter argument; lives of the state's soldiers have a moral priority to those of enemy civilians, and this is justified in the context of the immoral nature of terror.

Interestingly, the prioritization of soldiers in Yadlin and Kasher's doctrine is phrased in a way which ironically follows Norman's argument in attempting to apply every-day standards of morality to war, hence making killing of a certain kind unacceptable: "A combatant is a citizen in uniform (…) His blood is as red and thick as that of citizens who are not in uniform" (16). The two writers departed from the legal codes of war and turned Israeli soldiers into citizens. Unfortunately, then, this argument provides only a selective protection for the right to life, and in this justifies severe consequences for the adversary in a war. Notably, the writers link this re-prioritization to responsibility, that of a state to its citizens. In this, then, the writers do not renounce responsibility; rather choose to apply it selectively: "The state ought to have a compelling reason for jeopardizing a citizen's life, whether or not he or she is in uniform" (16).

Gabriella Blum (2010) further discusses tension between morality and IHL and argues against the absolute application of IHL. A 'lesser-evil' solution to some war-related dilemmas, Blum suggests, lies in violation of this law. And so, morality here is prioritized over law, in a manner which relies on interpretations of what constitutes morality and what evil. Blum's position entrusts what seems to be exaggerated faith in the moral judgment or responsibility of parties to war (Diamond, 2010). Indeed, as critical examination reveals, such judgment inevitably tends to be highly subjective and dependant on ideologies and interests of conflicting parties.

The accounts of the ILD team express positions that consider military actions, including those that involve killing, as morally just, and view the mere employment of certain tools provided by IHL to be a moral achievement (a position which also shows an unclear conceptual distinction between law and morality):

It must be understood that the fact that people uninvolved [in combat, M.G.] are hurt does not mean that the action was illegal or even immoral (Pnina Sharvit-Baruch in Al-Peleg and Sarusi, 2009)

…it's very important that he [the soldier, M.G.] knows that he is representing something admirable, worth fighting for…this is why the moral-legal issue is so important…if the army

degrades to the level of terrorists or criminals…then we're through…the army will dissemble (Interview, 21.12.10)

While the second source stresses the contribution of morality to the organisational culture and sense of identity among military personnel, the first quote defines the concept of morality as allowing for injury and death of civilians uninvolved in combat. Considered in relation to one another, the quotes capture a complex yet convincing process of sense-making that allows for violation of the right to life, without compromising moral identity and a sense of honour and pride, on personal and collective levels. The next section will further examine this "production" of morality as a process built into the military system.

The IDF ethical code

The IDF Spirit (titled ha'kod ha'eti in Hebrew, or *the ethical code*), formulated by Asa Kasher, includes a set of values aimed to define and shape military attitude and identity. Among the values endorsed by this document are love of the homeland and discipline, as well as respect for human life and 'purity of arms', the appropriate use of weapon. Anat Matar (2006) argues that this document creates a set of norms that are so general and abstract as to be hollow, and in this sense, the document, in fact, creates no standards at all. The code and the criticism it has provoked provide further proof for the subjective, easily redefined nature of 'ethics' in war. The code also shows that the function of such documents is also in defining personal and collective identity in terms that seem to value human life, without providing any guidance as to its actual protection. Interestingly, ILD Team sources said that commanders consider this ethical code to be inherent to the military, as opposed to IHL, which is perceived as imposed from the outside. This positioning of law on the outside is parallel to the ILD team's own narrative of their status as outside of the military structure, a position which, as my project argued, leads to compromised legal interpretation. Regrettably, the "internalization" of the ethical code, also provides limited protections to the right to life of the 'enemy', as was evident in the case of Gaza.

Drawing on theoretical debates and findings of this research, it is evident that morality is a concept charged with varied meanings, perceived subjectively and employed in ways which serve both to strengthen and challenge law and the protection of lives. Norman's approach, in its indiscriminate prioritization of life, provides a clear cut account for morality- it cannot be reconciled with killing. Although this approach may be appealing in the search for protection

for lives, its understanding of morality as a concept of fixed meaning puts it at unfortunate distance from the realities of war and cannot be satisfactory in this debate.

Responsibility and legal work in the military

An inquiry into the nature of the responsibility of legal advisors must begin by recalling their official, structural position, namely, that of advisors rather than decision-makers. As such, team members generally do not bear any operational responsibility for military actions. This separation of military legal work from decision making and responsibility was supported by a government-appointed committee, which examined these matters in general terms (Winograd, 2008). The report produced by this committee recommended the involvement of legal advisors in preliminary and aftermath debates concerning military actions, but also endorsed their exclusion from real-time decision making. By adopting such a policy, the report explains, there will be no shifting of responsibility from commanding officers to advisors. The ILD team does provide real-time legal advice, but as the paper had shown, it does follow the normative, conceptual distinction of law and decision making which the report recommends.

Of course, a discussion of team members' responsibility lies beyond the official military structure and its division of roles. Although, as advisors, team members do not officially hold responsibility for decisions made and consequent military actions, their position as an authority in matters of law indeed entails inherent responsibility. This is due to a combination of factors, as the paper asserted in regard to morality: the legitimizing power embedded in law and the assumption of a moral role by the advisors themselves. The ILD team's position vis–a-vis responsibility is therefore ambiguous: they are officially excluded from responsibility, but the normative role of law makes their actual level of responsibility elusive. Furthermore, legal advice is formulated apart from responsibility, but the military officials who follow this advice rely on it to bestow legitimacy on decision making (due to the equation of legal and just). Thus, law appears to act independently, and the concept of responsibility loses its content (Kennedy, 2006).

Reed's account of a relational approach to structure and agency further complicates the discussion on responsibility. In application of Reed's relational approach to the ILD team, as this paper asserted, team members are not entirely separable from their encompassing

structure, the military. But these dynamics also complicate an account of responsibility, because if individual and structure are not entirely separable, it is unclear where responsibility lies in cases of wrongdoing. Moreover, given the subjective nature of moral judgement, it is unclear where responsibility lies concerning the identification of what constitutes wrongdoing.

Moreover, in law responsibility is directly linked to a violation of legal codes. But referring back to case studies debated in the first chapter of this dissertation, the bombing of police line-up and the Rayan family, these illustrate the inherent and structural difficulty of determining whether or not law had been violated. As the paper showed, this difficulty is not unique to these cases, because it is a result of: broadness of legal codes, and even more crucially, legal discursive realm, which lends legitimacy to killing, in accordance its internal 'logic'. This state of affairs in effect undermines the very notion of responsibility, by sustaining obstacles to its determination, while still assuming the loss of life.

In this context, even when wrongdoing is acknowledged, the position of attorneys in an organisation may raise questions as to the 'location' of responsibility. Debates regarding the responsibilities of state attorneys arose in the US following the exposure of the documents which became known as the "torture memos", in which state lawyers authorized torture of prisoners (Sands, 2008; Bilder and Vagts, 2004). In this context, Kathleen Clark (2005) suggests a distinction between legal work as advocacy, and legal work in an advising capacity. In advocacy, Clark argues, a lawyer seeks to adjust law to concrete situations by an act of interpretation, in order to build the best possible 'case' for a client's interest. If we apply this distinction to the work of the ILD team, the efforts of advisors to interpret law in a way which facilitates the desires of a 'client', in this case, a commanding officer is illuminated. Clark argues that, differently, when legal advisors are to formulate opinion which will shape military actions, they are responsible for providing reasonable legal interpretation, which doesn't necessarily fit the 'client's' wishes.

While Clark's suggestions are useful guidelines they, of course, cannot provide a clear definition as to what constitutes 'reasonable'. Moreover, if applied to the ILD team, in view of relational dynamics of agency and structure, including the intertwined aspect of these concepts, it may be difficult to draw the line between client and attorney, separation which would allow the distinction between an occasion of advocacy and that of advice-seeking.

However, it is important to recall that in this relational account of dynamics, both individual and structure are analytically significant concepts, and separable to a certain extent. In the case of team members, some aspects of advisory legal work attest to a degree of individual, independent thought and action. With this in mind, a certain extent of agency, hence responsibility is retained. This partial and fragmented assignment of responsibility strikes as insufficient when considering cases involving extensive violations of the right to life, but it is nevertheless a starting point.

Conclusion

This chapter used the frame of responsibility to debate issues of law, morality and the organisation regarding the ILD team. These different relations were examined both in theoretical terms, and as these are practiced in the work of the team. My account has asserted that all these junctions pose obstacles in the search for responsibility. Firstly, the character of IHL codes leads to difficulties in determining whether or not a violation of law had taken place in the first place, even if many lives had been lost. Morality is a term used in different ways and contexts regarding war, some of these, as advisors demonstrated, justify the violation of the right to life. Moreover, the relation of this concept to law is contested, a situation which, in an organisational context, contributes to the elusive nature of responsibility—as law de-facto does impact the perception, hence the content, of "morality". The organisational structure even further complicates questions of responsibility, in that the relations of structure and agency pose difficulty in tracing the flow of power in decision making, therefore deeming the assignment of responsibility even more complex. This elusive responsibility, which cannot be found in law, the organisation or in a moral account, is precisely the frame which enables individuals to take part in extensive violations of the right to life, and the overall picture which enables and sustains extreme state violence.

Conclusion

Absolute rules lead us to imagine we know what violence is just, what unjust, always and for everyone. But justice is not like that- it must be imagined, built by people, struggled for, redefined (Kennedy, 2006:104)

In the course of the 2008/2009 offensive in Gaza, a man went out of his home to pray in the village mosque, and as he left the mosque he learned that his home had been bombed, all his family members buried in the ruins. In a different location, nine other family members were killed in the front yard of their home in a military attack aimed at a nearby target. At this time I was working for B'Tselem- the Israeli Information Centre for Human Rights in the Occupied Territories. As part of my work I was receiving testimonies of horrid occurrences such as these. More and more stories of death and destruction were brought to my desk, as to the desks of my colleagues.

These accounts were unbearable, and I could not separate my reactions and feelings from the fact that as an Israeli citizen, this offensive was carried out in my name. Moreover, the offensive was backed with almost undisturbed public support. True, there were severe governmental restrictions on media coverage of what was happening in the strip, but even stories that were publicized did not change the overall public atmosphere. With this in mind, some of the questions which haunted me were: how was this made possible? How do individuals take part in the execution of such extreme violence, causing so many deaths of innocent people? Questions on the possibility of such violence could be asked in regard to any soldier or combatant. My own engagement in IHL and human rights, however, positioned my attention on military lawyers, those with whom I share a legal tool box. The questions I raised can be researched and analyzed from many different perspectives, among these varied psychological and sociological approaches. My theoretical basis, which was developed in the course of research and in correspondence with findings, was comprised of critical legal theory, organization theory and research regarding morality in war.

The first chapter of this thesis analyzed IHL: the character of this legal discourse, its possibilities and inherent limitations in protecting the right to life. This account explored law both in theory and in relation to its application by the ILD team. I had concluded that in the realm of this discourse, terms such as 'proportion' or 'civilian' constitute meaning which in translation to other language, lose grasp with their corresponding phrase. Legal work of the ILD further expanded and negotiated these legal principles. In this context, IHL, rather than

simply limiting the use of force and protecting lives, in fact designs and shapes the conceptual framework and the concrete acts of violence.

The second chapter added a layer of analysis as it researched and investigated team members' perceptions of their position in the organization, as both lawyers and soldiers, parallel to the discussion on the relation of law to war. Accounts of advisors revealed an incoherent picture of independence on the one hand, and collaboration with overall military agenda on the other. Moreover, further enquiry on the position of advisors in the military system showed that the nature of dynamics between individuals and structure blurs the borderline between these two concepts. In this, while both entities are significant and influential, they concurrently separate and intertwined. As the paper showed, these organizational dynamics lead to compromised legal work, which negotiates and stretches legal principles which by-definition allow for extensive violation of the right to life.

The thesis, in its third chapter, re-visited legal and organizational aspects in the work of the ILD team, equipped with the frame of responsibility. As part of this discussion, the paper debated the additional concept of "morality", and explored the meaning of this term in war and law. "Morality" was found to serve different agendas; some of these justify the violation of the right to life. Moreover, the relation of this concept to law is contested, a situation which, in an organizational context, contributes to the elusive nature of responsibility. Additionally, the vague borderline between structure and agency further complicates the attempt to assign responsibility regarding lost lives. Lastly, in legal terms, the frame of law legitimizes, hence contributes to the acceptance of violence, but renders account of wrongdoing and responsibility ambiguous and elusive.

And so, in light of these findings the paper concludes that the ILD team demonstrates how IHL, organisational structures of the military and perceptions of morality all play a role in enabling the execution of extreme violence and extensive violation of the right to life. Moreover, these same structures and conditions hinder the possibility of assigning responsibility for lives lost.

In a final account, my own analysis of IHL did not attempt to disqualify this frame, as it remains an acceptable and valuable tool for the defence of human rights at times of war. My account, however, in addressing the right to life, chose to critically review this law, rather than assuming its codes as definite borders of what is 'right' in war. Existing frames are clearly and beyond any doubt insufficient in protection the right to life, and there is an urgent

need to develop of new and effective tools for this purpose. Referring to Kennedy's words, indeed, legal tools and frames shape and limit thought, but the struggle for justice must not be confided to any frame and limitation. This was my contribution to this quest.

Recommendations:

This research has considered the actual practice of International Law in contemporary warfare, with the aspiration to contribute to its enforcement and to the respect of human rights in times of war. Based on the findings of the research, the following recommendations can be made:

Research:

1. Research of International Law mechanisms integrated in, or otherwise related to, military institutions of states other than Israel: case studies from countries other than Israel can contribute to the identification of obstacles to the protection of human rights that are particular to national context, and those that are universal and/or inherent to the limitations of International Law itself. It can hence assist law practitioners, nation-states, international and intra-national institutions in both designing legal principles and guidelines, and determining standards for responsibility and accountability in cases of human rights violations in warfare.

2. Research on the location of responsibility in particular study-cases of human rights violations in warfare: Due to the elusive nature of responsibility in cases of human rights violations in contemporary warfare, as discussed in this paper, further academic and theoretical discussion is required to produce knowledge on the location of responsibility. Micro-level examination of human rights violations can lay the foundations for in-depth discussion on various possibilities to locate responsibility. It can then be translated to specific legal norms and guidelines, ensuring that organisational structures and institutions do not allow for responsibility for human rights violations to be systematically waved.

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Appendix: Interview Guide

1. **Interpretation of IHL in the military, in general, and during Operation Cast Lead in particular:** (Recalling specific actions which were highly criticized in view of international law)

- Did you practice IHL in institutions other than the military? (If yes: which institution, was IHL understood differently in that context? If no: what are the differences between theoretical study of this law to its actual application? How would you describe the military application of IHL as compared to other institutions that employ this law in their work?)

- Describe decisions made in regard to the principle of distinction during the operation in Gaza. Could you compare the application of this principle during Operation Cast Lead to its application in previous military operations? How are these decisions made? Could you describe difficult decisions in this regard?

- Describe decisions made in regard to the principle of proportionality during the operation in Gaza. How is the 'calculation' for proportionality done? Is there a unified code for this calculation? Could you compare the application of this principle during Operation Cast Lead with its application in previous ones?

- Can you describe dilemmas in the work of the department? What were common issues of disagreement?

- Which parts of the work of the department do you consider more in the mainstream of legal interpretation, and which relatively less acceptable by legal commentators? Did other members of the department make decisions to which you objected? describe these

- Were there any decisions you regret, or that you would not have advised to perform, had you known their consequences in advance?

- Do you consider any parameter other than law to be relevant for the work of the department? Are moral arguments taken into account? What is morality in this contex, in your opinion?

2. **How does the team work?** How is it positioned within the military structure? What are its formal authorities? How much power does the team have in practice in military decision making?

- How does the process of real-time decision making process work?

- Was the team involved in all major decisions during the offensive in Gaza?

- In your opinion, is the team involved in decision making in a satisfactory extent?

- Were you able to veto specific actions? If yes, did you choose to do so?

- How do you see your role in relation to decision making? (Do team members act as advisors or advocates?)

- Do you think that you hold some responsibility for military actions on which you advised?