‘ICC May Not Be Equipped to Rule on War Crimes’

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With a recent B’Tselem report declaring that the IDF legal division is whitewashing its soldiers’ war crimes, and with the International Criminal Court Prosecutor’s Office likely due to visit Israel soon, former IDF International Law Division Commander Col. (res.) Pnina Sharvit-Baruch has expressed deep concerns about the ICC.

Sharvit-Baruch is one of Israel’s most decorated military law experts, having served in the International Law Division from 1989 to 2003, and having headed it from 2003 to 2009, which included deciding the legality of targeting during the 2008-9 Gaza War (she was on maternity leave during the 2006 Second Lebanon War).

After retiring, she eventually moved on to head the INSS’s department dealing with national security and law.

She has been hosting conferences with top law of war experts from around the world and publishing influential articles and newsletters on some of the hottest dilemmas confronting the IDF – though she is wary of the press due to some past negative experiences.

ICC Prosecutor Fatou Bensouda has been preliminarily examining alleged 2014 Gaza war crimes by Israel and the Palestinians since January 2015, but has not decided yet whether to order a full criminal investigation.

Regarding Bensouda, Sharvit- Baruch told The Jerusalem Post in a rare and extended interview, “I am very concerned. You would expect...the ICC, which deals mainly with war crimes and crimes against humanity, to have expertise in international humanitarian law, but also to include people who have an understanding from a practical point of view – [military law] practitioners.

“If they do not have that – and I don’t think they have any, or they are very marginal – it is very worrying. It is like having someone decide medical negligence without any understanding [of operating] as a doctor,” she added.

“If they want to be considered professional and serious, they need to incorporate these experts into their system and be very careful,” she said.

Part of the dilemma for Bensouda, Sharvit-Baruch explained, is how different the Israeli-Palestinian conflict is from the Africa-style genocides which the ICC usually handles.

Describing the dilemma, she stated: “Until now, most of the war crimes dealt with by the ICC were: someone comes into a village and kills all the men and rapes all the women – there is no question about the legality of an operation.

“But in a more nuanced operation, where the question is what is more proportionate – I think a decision [on complex issues of proportionality], if they decide it is a war crime, would be devastating for their professional prestige,” she said.

Next, Sharvit-Baruch, who headed the International Law Division when the IDF’s roof-knocking tactic became more widely discussed during the 2008-9 Gaza war and who co-authored a major 2011 article defending it with current International Law Division head Col. Noam Neumann, explained some of the logic behind the tactic.

Roof-knocking refers to the firing of an unarmed missile at the roof of a building the IDF is about to strike to create a loud but non-dangerous boom to scare civilians into leaving who have not heeded prior warnings to evacuate.

She said that the tactic was used as early as the Second Lebanon War (and possibly during the second intifada).

Sharvit-Baruch stated that “it started as just another means of warning civilians....It started as an operational issue. The idea is you want to warn the people to leave the building before you... bomb it.”

The logic was, “Let’s give a warning shot. The alternatives are to refrain from bombing the building and miss the opportunity of destroying a military target or to kill civilians you do not want to kill – even if it’s proportionate. If we can minimize harm and spare civilians, we should do it. It’s the rule of precautions.”

Addressing criticism that the warning tactic is itself violent or ineffective and that there have been a few cases where civilians were harmed unintentionally, she said, “Why should precautions [warning civilians] be limited to verbal warnings? That seems like an ideological idea.

I do not remember a specific case that they claimed the warning shot... is harming people and there are many examples where people left and their lives were saved....It’s working.”

She rejected taking a “formalistic approach to say it’s an attack.... It’s a wrong reading of the law.... It’s not an attack; it’s a warning shot.”

Sharvit-Baruch admitted that there were some hard dilemmas with roof-knocking, but said they were policy problems, not legal questions.

“There are technical questions: what kind of weapons to use, how much time to wait, how to give people enough time to leave, but not too much for them to come back” while the attack is under way. “If you have visual coverage, then you wait to see – but that’s an operational dilemma, not a legal dilemma.”

She concluded her take on roof-knocking saying, “Some people think international humanitarian law’s purpose is to limit your ability to fight, but that is not the function. The law is neutral about fighting. It takes the fighting as the presumed starting point, and now it’s trying to regulate it.”

Honing in on one of the most controversial decisions from the December 2008-January 2009 Gaza War (Operation Cast Lead), she discussed the strike on the Gaza police.

Critics said that it was illegal for the IDF to attack a police force, since police are viewed not as military combatants but as keepers of local public order.

She said that whether “the blue police in Gaza were legitimate targets or not, there was intelligence that they had roles being incorporated into Hamas’s fighters if there was a heightened tension... many of them had a double hat – as blue police but also to be in the less organized forces of Hamas.”

Relating to the staring-yourself- in-the-mirror test late at night after dealing all day with such life-and-death decisions, she said these are “professional dilemmas; I do not want to go into them. Children and civilians get killed, or IDF soldiers get killed. These are very difficult decisions, although you don’t have time to go into deep philosophical thought when you are in armed conflict. I don’t think I got home for a month.”

She also explained that for really hard calls, “sometimes you get more intelligence.

Sometimes, if it is a big dilemma, it goes up to the prime minister and the attorney- general.”

Sharvit-Baruch also unequivocally rejected any allegations that she or other lawyers in the International Law Division can be pressured by operational commanders to approve questionable attacks.

“Legal advisers are not subordinate to commanders. We are in touch with legal advisers in other militaries. I am not going to compromise because of pressure. More than once or twice, I had a fierce argument with commanders,” she said.

She added that the International Law Division also has the backing of the justice ministry and the court system.

Concluding, she explained: “I was never afraid of them [commanders] and never compromised what I believed, because I knew I was right.

And if they have a problem, they can go to the attorney- general and the prime minister.”