What will the ICC do with Israel's new report on Gaza war crimes?

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Yonah Jeremy Bob

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Since January 2015, the fateful legal question facing Israel has been: Will the International Criminal Court open a full war crimes criminal investigation into IDF conduct during the 2014 Gaza war? Will it dive deep into the Israeli-Palestinian conflict?

The State Comptroller’s Report on Wednesday does not give a final answer, but it is the most important piece for that puzzle to come out to date.

In terms of consequences, the negative diplomatic and legal impact of an ICC criminal investigation into IDF soldiers could be substantial.

On the positive side for Israel, the report said the IDF legal division’s system for investigating its own soldiers complies with international law.

Until now, the IDF had issued reports on its soldiers’ conduct in isolated incidents, but there had been no comprehensive evaluation.

It also clearly said the political echelon in the form of the security cabinet followed international law with a focus on reducing Palestinian civilian harm where possible and on seriously addressing the humanitarian disaster that resulted from the war.

There are also portions of the report where the comptroller said the IDF’s actions to investigate itself went beyond the minimal requirements of international law.

Finally, in most areas where the comptroller criticized the IDF, there are qualifications that the criticism is based on the idea that the IDF can improve, not that it has violated legal requirements.

This could be the entire ball of wax.

If the IDF and Israel’s political leaders properly investigate themselves, the ICC’s own statute prohibits it from getting involved. The comptroller’s broader tone is definitely in that direction. End of story.

Unfortunately for Israel, that may not be the end of the story.

The ICC’s November decision to open a full criminal investigation against the US for allegedly torturing detainees in Afghanistan showed a tendency to cherry-pick negative points from US internal investigations.

Since the US undertook a variety of investigations regarding the issue, one might have thought the ICC would view itself as prohibited from getting involved.

But regarding the US, at nearly every fork in the road, the ICC chose to look at the US investigations, and holes or imperfections they might have had, as half empty.

WHERE MIGHT the ICC cherry-pick points from the Comptroller’s Report to hit Israel with a full criminal investigation, claiming its targeting policies or investigations have been inadequate?

The comptroller offered a series of criticisms of the foundations of the legal supervision of targeting and of the probes of targeting.

The report said division and lower-level commanders in the field, the commanders who were making the real-time calls about attacking targets, were disconnected from the top-notch legal advisory apparatus the IDF senior command benefits from.

The Jerusalem Post has learned that the IDF view on this was that there may have been individual narrow problems with legal advice, but as a whole, the comptroller highly complimented the advisory apparatus.

Yet, orders regarding the Hannibal Protocol issued by the IDF senior command, which had been revised to ensure that there were no mistakes about the rules of proportionality and distinction restricting the use of force, were not revised at the field-command levels.

This is not surprising, as an interview only weeks after the war by IDF soldiers involved in the Hannibal Protocol incident projected that there were soldiers who did not know the standard legal limits on the use of force to minimize civilian harm still applied even for trying to prevent the kidnapping of a soldier.

The IDF trained its soldiers and commanders regarding international law before the war, but the comptroller was concerned that the limited hours and structure of the training might mean that it did not stick.

While the IDF devoted substantial resources to warn Palestinian civilians to evacuate areas, the report said only 50% of the resources needed to identify sensitive civilian sites were allocated.

A number of IDF decisions to close cases have given the reason as faulty intelligence. An IDF soldier who fired on a building cannot be prosecuted for killing civilians if he was given intelligence that the civilians had evacuated the area.

But if the IDF knew and knows that its resource investment in intelligence for ensuring minimizing risks to civilians is only half of what is needed, the ICC may flag this.

However, the Post has learned that the intelligence in question did not impact the IDF’s ability to evacuate civilians, and in one interpretation, may be more connected to general planning than to what happened operationally during the 2014 Gaza war. Also, it is a long way to move from funding issues to talking about legal issues.

LIKEWISE WITH the IDF’s innovative idea of having its units on the front accompanied by a civilian affairs officer whose mission is to advise soldiers how to avoid harming civilians. But COGAT itself questions civilian affairs officers’ abilities to perform their role, since only 34% of those officers speak Arabic. If that is true, how much is the innovative idea worth as a defense of Israel’s procedures for protecting civilians?

The report said even where the IDF’s fact-finding mechanisms were deficient and too slow, its legal division took sufficient actions to fix those deficiencies. Further, the Post has learned that other democratic countries’ militaries are interested in applying Israel’s Fact Finding Assessment model. The Post has also learned that the IDF views the time limits discussed by the comptroller as inapposite, since they should apply only to peacetime and not wartime with having to examine over 450 incidents.

Will all of that sufficiently reassure the ICC?

Finally, in February 2016, the Post met with ICC Chief Prosecutor Fatou Bensouda and other staff members at The Hague.

In those conversations and others afterward, the ICC staff made it clear they might not view the comptroller’s review as sufficient since he cannot impose criminal sanctions himself. The ICC gave this reasoning for rejecting certain US reviews of torture allegations as inadequate.

This would mean that the ICC is still waiting for the IDF to issue reports on the incidents involving the largest numbers of civilian casualties.

State Comptroller Joseph Shapira’s team reviewed around 120 IDF case files from the war. Now that his team has put out its report, it will be even harder for the IDF to justify delaying its own report, which the ICC will also examine meticulously.

Ultimately, the Comptroller’s Report is not likely to fully exonerate or damn the IDF in the eyes of the ICC.

It will be the most important chapter written so far, for both good and bad, about the war crimes allegations controversy. But only the ICC will decide what to write as the final chapter.