What does IDF closing Black Friday war crimes probe mean for ICC?

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So much action happened and so many Palestinian civilians died tragically on Black Friday, August 1, 2014, that it is hard to distill the issues.

While there are many specific challenges, this distilling challenge may be the greatest challenge that the International Criminal Court Prosecution may face when it addresses the incident.

The conclusions that it draws about the IDF’s investigation of the incident may be the most important in the ICC Prosecution’s process of deciding whether to delve deeper into the Israeli-Palestinian conflict.

What are some of the top issues?

1) Did the nature or the troop’s understanding of the Hannibal Protocol (unleashing massive firepower to prevent Hamas kidnappers from escaping with an IDF soldier) lead to more deaths of Palestinian civilians and war crimes

2) Did the wider part of Black Friday battles between the IDF and Hamas depart from the IDF’s broader policy of giving civilians specific evacuation?

3) Was intelligence about the presence of civilians insufficient to order portions of the attacks?

4) Can a battle which led to up to 70 killed Palestinian civilians in a small area in only one day lead to no indictments without harming the IDF legal division’s credibility?

The IDF’s report confirmed a March report by the state comptroller that there was a different and more aggressive understanding of the Hannibal Protocol in the field than at headquarters.

Further, a September 2014 interview by officers and soldiers involved in carrying out the Hannibal Protocol indicated a potentially problematic understanding of the kind of use of force that it permitted.

But The Jerusalem Post has learned that the IDF view would be that the main question is not: whether the IDF forces in the field misunderstood how much force they could use?

Rather, the main question would be: did they actually act on those incorrect understandings in a way that violated the laws of war?
The world is a place where critics connect any separate pieces of data they can without checking the connection. Immediately after the operation, critics connected the problems surrounding the Hannibal Protocol with the large number of Palestinian civilians dead – and with a limited picture it seems like a reasonable connection.

According to the IDF view, the Post has learned that the problem with this is that all of the massive firepower used in the Hannibal Protocol at most led to 10 of the 70 killed Palestinian civilians.
The other 60 were killed in a separate but broader chaotic series of skirmishes between IDF and Hamas forces nearby.

Moving away from questions surrounding the Hannibal Protocol and carefully combing through the six central specific incidents in which most of those 60 were killed, it turns out that the biggest questions for the IDF were not a disproportionate use of force.
None of the incidents probed have any clear evidence that the IDF simply started leveling anything in its path.

The opposite is true. The IDF did a massive review of where it fired and why.

It also provides significant information in each incident about who it was targeting and efforts made to use less force to reduce potential collateral damage.

The central questions are about sufficiency of warnings and sufficient intelligence.

Here, the report does itself a bit of a disservice. In breaking down the many incidents relating to Black Friday, it only mentions attacks where it did not give specific warnings to civilians to leave a structure – each time citing the need for surprise against the Hamas targets.

However, the Post has learned that even during the Black Friday incident there were numerous incidents where civilians were given specific warnings.

In fact, these incidents may not be in the report as they succeeded in getting the civilians out of harm’s way.

In that case, the IDF can be accused of a public relations error in not sharing this exonerating information, and it would be wise to correct that error.

Since there is no rule obligating issuing a warning even at the cost of tipping off a target, critics would need to produce information about specific incidents rebutting the IDF’s claim that a warning would have tipped off a Hamas target.

But critics could still say that the large number of instances in which the IDF vastly underestimated the number of civilians near a Hamas target shows that its intelligence capacity for checking for civilians in Gaza’s urban areas were insufficient.
This could lead to mounting a broad claim of reckless indifference to human life in targeting policy.

The March comptroller report could be viewed as bolstering this claim when it said that the IDF only allocated 50% of the resources needed to identify sensitive civilian sites.

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.

Yet, the only way to attack the IDF’s intelligence sufficiency would be to have complete access to the intelligence and no army in the world has opened its intelligence to outside authorities other than concerning a very specific and singular incident.

Critics cannot expect the IDF to open all of its intelligence regarding the Black Friday battle which involved a wide range of infantry, tanks, artillery and aircraft.

There are some especially problematic incidents in the report the IDF put out on Wednesday which have nothing to do with Black Friday.

Multiple ambulances were shot up by IDF soldiers despite having coordinated their movements with IDF headquarters. Unfortunately, IDF headquarters did not relate their movements to the soldiers in the field in time. The soldiers, with intelligence of ambulances being used to conceal surprise attacks, opened fire when the ambulances came close to their positions at high speeds.

There was an incident with a Palestinian designated as A who claimed he was used by an IDF infantry unit for several days as a human shield. Besides that, the incident carries a red flag because the IDF probe found that the unit failed to report his capture or their use of him for intelligence purposes. But at the end of the day, the entire unit admitted they used him and failed to report that, but denied he was used as a human shield.

There have been past wars, like the 2009 Gaza war, where IDF soldiers used human shields to help approach what were feared to be booby-trapped houses, and soldiers did not deny those accusations, but tried to justify them. So critics cannot just say that IDF soldiers always cover up using human shields.

The IDF did prosecute a group of soldiers for stealing from Palestinians, but four years after the war, not a single soldier has been prosecuted for shooting a Palestinian.

This does not mean the IDF never prosecutes soldiers for shooting Palestinians.

The Hebron shooter Elor Azaria and the 2014 Nakbah Day shooter Ben Deri were both recently sentenced to jail terms.

But the IDF, like other Western armies, does seem highly reluctant to doubt its soldiers’ narratives in the midst of an all-out war.
There is little in the report with which to base any specific charges against specific soldiers or commanders.

The question then for the ICC Prosecution will be: will it hook onto the IDF’s reluctance, the lack of a single war crimes indictment and the large number of civilian deaths as a basis to declare the IDF investigations flawed as the UN Human Rights Council report essentially did in 2015.

Alternatively, it could recognize that the IDF’s methods of investigation, though even top IDF officials recognize they are imperfect, are within the spectrum of methods used by other Western armed forces engaged in significant battles.

A third path would be not to directly attack or directly clear the IDF, but to rather work with it on clarifying specific problematic incidents to see if the IDF might share more information in a targeted fashion, and possibly to get the IDF to improve in certain areas on a cooperative basis.

The good news for Israel is the ICC Prosecution is taking its time and not rushing to conclusions like the UNHRC. The bad news for Israel is that in November the ICC Prosecution went aggressively after the US for alleged war crimes, rather than take a middle path.
What is for sure is that now that Black Friday has been decided, the countdown for the ICC Prosecution’s decision will likely accelerate.