

Is the IDF ready for its next legal war?

While protests, attempts to infiltrate Israel's border fence, and fire kites have slowed some in recent weeks, no one has declared the crisis over and the IDF still views the situation as ongoing.



ALESTINIANS PRAY yesterday next to the bodies of Hamas terrorists killed by Israeli tank fire, during their funeral at a mosque in Gaza City.. (photo credit: REUTERS/MOHAMMED SALEM)

With around 140 Palestinians killed by the IDF during the ongoing Gaza border crisis, and almost every incident of death being initially probed, *The Jerusalem Post* has learned that the volume of reviews is drawing out the process of reaching legal decisions.

How soon the IDF makes decisions about the probes is crucial as it could impact ongoing war-crimes probes of Israel by the International Criminal Court and the UN Human Rights Council.

Although the IDF has two teams performing initial probes of incidents in which Palestinians were killed and some controversial incidents where Palestinians were injured - one led by Brig.-Gen. Moti Baruch and another led by Brig.-Gen. (res.) Nitzan Nuriel - the sheer number of incidents has delayed its ability to reach decisions.

In addition, the *Post* has learned that the IDF's probes need to alter their paradigm for investigating and the methods they use to review incidents in light of the unique mixture of civilians and Hamas operatives. For example, the IDF has experience with balancing military goals and potential civilians casualties regarding aerial attacks, but has not found any country facing a similar paradigm of a long border of conflict that mixes combatants and civilians.

The crisis started with mostly civilian-run protests on March 30 - with Hamas operatives mixed in - but over time became more dominated by Hamas and other terrorist groups using increasingly violent methods, sometimes including gunfire

or plastic explosives.

While protests, attempts to infiltrate Israel's border fence, and fire kites have slowed some in recent weeks, no one has declared the crisis over and the IDF still views the situation as ongoing – a third factor in the delay in deciding whether to criminally investigate incidents.

Late Thursday afternoon, *Haaretz* reported that the two teams probing the incidents are close to turning over a large number of recommendations to military advocate-general Maj.-Gen. Sharon Afek, who has the final word on whether to criminally investigate an incident.

Haaretz reported that the two teams will recommend to Afek not to criminally investigate any of the incidents as the Palestinians killed had either been shot by accident, had died due to other operational errors, or had been shot justifiably.

Even if the two teams send recommendations soon to Afek, the *Post* has learned that the IDF legal division will likely need to request the gathering of additional evidence, which will draw out the probes further and only Afek makes final decisions.

Moreover, the *Post* has learned that in many cases, the IDF has been in touch with Palestinians' lawyers to get information and is waiting for responses or has received initial responses and is in an extended process of dialogue.

The IDF's open-fire rules during the crisis have been highly controversial and on Wednesday the UN Human Rights Council appointed an official commission, headed by Syracuse professor and war crimes expert David Michael Crane, to probe alleged war-crimes allegations against Israel.

In April, the International Criminal Court issued a warning to both Israel and Hamas that its ongoing war-crimes probe of both sides dating back to the 2014 Gaza war could also include any new crimes committed during the current border conflict.

Even if the IDF puts forth the above reasons justifying its needing more time to make final decisions about criminal investigations and – down the road – whether to indict soldiers or not, there are concerns that the longer the probes run the more global legal problems may build up.

Despite these concerns, the Post has learned the IDF will likely not push to speed up the process.

Regarding the 2014 Gaza war, though the IDF made several announcements about criminal probes in the weeks and months after the war ended, there are still, to this day, no final decisions regarding whether to criminally probe the three largest incidents of Palestinian deaths.

The *Post* has learned that final decisions regarding those incidents are due in the coming months or by the end of 2018.

It appears that the IDF and top Israeli legal officials have not reached a final decision about whether to put out large public reports about their probes, as they did for the 2014 Gaza war, preferring to wait until the current border crisis has ended and they can view its full scale.

Moreover, many of the government officials and soldiers that the legal officials need information from are still serving on the border as long as the crisis continues – causing a delay in how quickly they can provide documentation.

The 2014 Gaza war led to over 30 criminal investigations out of around 500 initial probes. If none of the current crisis incidents lead to criminal probes, the IDF would likely come under even greater scrutiny by the ICC and the UNHRC.

On the other hand, the IDF is hopeful that a High Court of Justice ruling declaring its open fires rules legal may shield it from outside legal scrutiny.

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