Analysis: IDF vs. ICC Phase 2 - More Talking, More Controversy

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It’s time for phase two.

Phase one of the legal battle over alleged war crimes during the 2014 Operation Protective Edge entailed numerous interim reports from the IDF and Israel’s human rights critics, with no serious questioning of IDF commanders, no talking between Israel and the International Criminal Court prosecutor and everyone waiting for the UN Human Rights Council’s June report.

Then came the UNHRC’s report creating a more hostile environment legally for Israel in some ways, but it was much more toned down helping leave more space for dialogue between Israel and ICC prosecutor Fatou Bensouda.

And now that dialogue is happening for the first time in years.

There was a degree of quiet and sometimes indirect dialogue from 2009-2012 when the ICC prosecutor was deciding whether to intervene in the 2008-9 Gaza war crimes allegations legal battle (it did not in the end, stating that there was still no “State of Palestine” to file complaints).

But as of last week, there will be direct dialogue, even as Israel says it will be limited to its arguments about why there is still no State of Palestine (a position the ICC prosecutor has rejected) and why the ICC cannot second-guess the IDF’s own investigations of its soldiers.

Is this a change in policy? Until now was the final decision frozen pending either the UNHRC report or an extensive internal governmental professional evaluation of the situation – which only recently presented its conclusions as The Jerusalem Post has learned? It is debatable, because even if the government had not decided what to do about the ICC, that not deciding had lagged on for half a year and had already brought some strong statements – some said threats – from Bensouda complaining of lack of cooperation.

However, Bensouda had not gotten deep into investigating the UNHRC report’s allegations, so cooperation at this point is still plenty early for Israel to get its arguments heard.

While the increased talking between Israel and the ICC is probably the most significant news for phase two, there is far more controversy in the IDF’s legal divisions’ investigations and general decisions.

Until now, there were 22 criminal investigations out of 190 reviewed incidents, but with the exception of a few controversial cases like the Gaza beach incident in which the IDF killed four Palestinians minors, the IDF had not made final announcements on most of the highest profile hot-button events.

Until now, the only indictments and serious interrogations have involved low-grade theft.

But on Monday, Lt.-Col. Neria Yeshurun is to be questioned by IDF Military Police under caution, making him the first high ranking commander to be examined in a serious criminal investigation of alleged war crimes.

This is a major turning point not only because of the particular case and the significance of a war crime case against a senior commander, but also because a case against a senior commander brings on the classic battle between the army’s lawyers and its operational commanders.

As long as lower level soldiers are indicted for violating rules, such as individual incidents of beatings, human shields or theft, the IDF lawyers’ kingdom is respected.

But when commanders are under fire, suddenly campaigns erupt accusing the IDF’s legal division of undermining IDF combat soldiers’ morale.

It is a replay of the trial in public of Col. Ofer Winter for another controversial incident from the war, though it seems with Winter, the Post understands that his recently announced promotion to brigadier general, means he will be cleared.

Of course, all of this is a prelude to the ultimate question: Will Bensouda accept the IDF’s investigations as valid or not? Whether Israel likes it or not, that answer may be tied to how many “Yeshuruns” get indicted, and will determine the direction of the legal debate for months and years to come.