Analysis: Did Israel’s cooperation with the ICC fail? Is the game over?

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One of the unusual aspects of the International Criminal Court and Israel saga has been that Jerusalem has simultaneously rejected the ICC’s jurisdiction, while cooperating with it quietly to provide information to dissuade it from coming after the IDF and the settlement enterprise.

Was this cooperation a failure or a success?

Given the ICC Prosecution’s push late Friday to open a full war crimes investigation into both the IDF and the settlement enterprise, it would seem to have been a clear failure.

The picture is much more complex, however. In a global environment where Israel is usually condemned by international bodies like the UN Human Rights Council before all of the facts even emerge, there is an argument that Israel’s legal campaign has achieved significant goals and may still yet achieve more.

Underneath all of the Palestinian happiness and Israeli fury at the ICC Prosecution’s decision to go after Israelis, there are open questions which Israel may yet be able to exploit.

Though ICC Prosecutor Fatou Bensouda initiated her preliminary review of the Israeli-Palestinian conflict in January 2015, the first key-point was in mid-2015 when she already threatened to open a full war crimes criminal trial if Israel did not provide her information.

Some top Israeli officials, especially in the political class, thought that cooperating was a lost cause.

Their message was that Israel should boycott the ICC and attack its credibility, as it did with the infamous 2009 Goldstone Report from the UN Human Rights Council, which condemned Israel for war crimes during the 2008-2009 Gaza War.

However, a decision was quickly reached, based on the urging of certain legal officials in the Foreign and Justice ministries as well as the IDF, that Israel should cooperate on a limited basis.

These officials argued that, given the threat on the table, Israel had nothing to lose by providing counter-information to Bensouda’s team, while reserving its right to object to the ICC’s very jurisdiction.

So how can Israel be said to have achieved anything if the ICC Prosecution is coming after it, both for IDF conduct and for the settlement enterprise?

ISRAEL'S BIGGEST achievement, simply put, has been time.

First of all, Israel’s legal officials disputing ICC jurisdiction prevented the ICC from even considering jurisdiction over the 2008-9 and 2012 Gaza Wars, as well as over any settlement activity before mid-2014.

Second, Israel’s decision to cooperate in mid-2015, pushed off a full war crimes criminal investigation from late 2015 until late 2019.

A four year delay is nothing to scoff at.

The ICC Prosecution is much weaker in late 2019 than in 2015, both because it is already in fights with the US, Russia and England, and because some of its major cases, like the Kenya case, have fallen apart.

While the ICC’s Rome Statute still has about 125 member states, many states have also withdrawn from the statute in recent years.

While there are both positives and negatives to being in the Trump administration era versus the Obama administration era regarding diplomatic and legal battle between Israel and the ICC, there is no question that at least until January 2020, Israel will have strong US support.

And the future is also not set.

Though the prosecution could have taken Israel’s arguments into account far more than it did in attacking the idea that Palestine is a state for its purposes, Bensouda did not go straight after Israel. She acknowledged that Israel has made a case that the jurisdictional issues regarding “Palestine” are unique, and asked the ICC pretrial chamber to ratify her decision.

Based on other ICC pretrial chamber rulings regarding the 2010 Mavi Marmara flotilla, there is every expectation that Bensouda will get the approval she wants.

But the approval is not guaranteed, and Israel will have its day in court.

The ICC pretrial chamber rejected Bensouda’s request to open a full war crimes investigation into the US and the prosecutor is currently appealing that decision to the court's highest body, the Appeals Chamber.

Whether Israel wins or loses the battle before the pretrial chamber and in a potential appeal, it will probably drag out for months, if not a year.

And if the full criminal investigation starts before Bensouda exits office, it will likely drag on for years. She is only in office until mid-2021, and the process for replacing her has already begun.

Who knows what could change between now and then? Undoubtedly, Israel and the US will mount a campaign regarding her successor.

In the meantime, the full war crimes investigation could be snuffed out, or at least significantly narrowed.

THERE ARE other signs of hope for Israel.

Bensouda’s extensive legal brief to the ICC pretrial chamber, asking for permission to open a full war crimes probe into Israel, does not make a determination about the compliance of Israel’s legal system with international law.

Under Articles 17 and 53 of the Rome Statute, it can be argued that no full criminal investigation can be initiated – and there is no question that no indictment can be issued – until the ICC Prosecutor makes a finding that Israel itself has failed to probe the alleged war crimes.

In other words, it is significant that Israel initiated over 500 probes and more than 30 full criminal investigations of its own soldiers during the 2014 Gaza War. It has also convicted three soldiers of crimes for shooting Palestinians since 2014 (though not from that war).

Finally, it has published several extensive public reports, even providing intelligence information about mistakes made by IDF forces during the 2014 War.

This last detail may be the most important, as mistakes cannot be war crimes since they lack intent.

If Israel bombed a dual-use military-civilian building and killed civilians, but its intelligence on the ground suggested that all civilians had fled – with agents having in fact watched around 90% of civilians fleeing, but not realizing that 10% stayed behind – then none of its soldiers committed a war crime.

Put simply, if an IDF fighter plane or drone operator reasonably believed that there were no civilians when he fired on a building based on intelligence he was given, then there was no intent to kill.

More than the question of Palestinian statehood where, fair or unfair, Israel never stood much of a chance, this question regarding the sufficiency of Israel’s own criminal probes of itself has always been the most critical question – and Bensouda did not answer it on Friday.

Rather, she asked the ICC pretrial chamber if she could push off deciding it until a later stage in the full criminal investigation, as long as she decides before deciding whether to issue indictments.

In fact, Bensouda specifically said that she is withholding a final ruling on this issue because she recognizes that Israel has ongoing investigations. She also hinted that she might take a piecemeal approach of recognizing some Israeli investigations as valid and others as insufficient.

This would be a mixed bag. Israel would far prefer that Bensouda simply recognize that its entire legal system is valid and decline to go after any IDF conduct. There were even some hints in prior Bensouda annual reports that she might give the IDF a pass.

Despite Israel's disappointments regarding this issue, Israeli cooperation has already probably headed off many war crimes allegations, and may yet head off more.

This was one of the few olive branches Bensouda offered to Israel.

The IDF can still potentially sideline any ICC Prosecution involvement in further dialogue with the court about specific cases where the ICC is not satisfied.

In contrast, Bensouda said that Hamas and other armed Gazan groups have initiated no probes of their firing rockets on civilians.

She said that she is already satisfied that there is no complimentarity issue in going after Palestinians in Gaza for war crimes.

Moreover, she alluded that she will likely go after the Palestinian Authority for the war crime of torturing its own civilians.

However, that is the end of the silver lining.

WHEN IT came to the settlement enterprise, the ICC Prosecution had long hinted through its annual reports that it would go after Israel with little restraint.

In an exclusive Jerusalem Post interview with Bensouda’s predecessor, Luis Moreno Ocampo, he had said that Israel might head off the ICC going after the settlements because the High Court of Justice has issued dozens of rulings to uproot settlements or redirect Israel’s West Bank barrier.

But Bensouda said that all of these rulings were limited to specific settlements and that Israel’s High Court had always declined to rule on the legality of the broader issue of the settlements.

Based on that finding, Bensouda said that there is also no complimentarity question regarding the settlements.

This means that, unlike regarding IDF conduct, the ICC is almost certain to eventually issue indictments regarding the settlements.

After all the analysis, none of the above “brighter” points reduce the extreme disappointment on the Israeli side regarding Bensouda’s decision.

On the other hand, without even getting into the expected diplomatic pressure campaign, Israeli cooperation has been far from a total failure – and the Friday decision is far from the end of the legal game.