Will the UN Resolution Bring Down a Full ICC War Crimes Probe On Israel?

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How does the UN Security Council resolution declaring Israel’s settlements and buildings in the West Bank and east Jerusalem as illegal impact International Criminal Court Prosecutor Fatou Bensouda’s decision about whether to dive deeper into the Israeli-Palestinian conflict?

First, the context. Bensouda opened a preliminary examination into alleged war crimes relating to the 2014 Gaza war and to the settlement enterprise in January 2015.

The million-dollar question has been whether she would move from a preliminary review to a full criminal investigation.

The concerns were not only potential actual war crimes trials.

They were also about the lasting diplomatic and public relations damage such an investigation would do to Israel. The problems could be both big-picture and specific to Israeli officials who might suddenly be unable to travel to 120 countries who are members of the ICC (including Europe) without risking arrest.

Further, there was a concern that such an investigation, if it was into the 2014 Gaza war, could negatively impact Israelis volunteering for combat units, or combat units fearing to defend themselves lest they might find themselves in the dock at The Hague.

It is clear that UNSC Resolution 2334 was a disaster diplomatically, as well as from a public relations angle, and that Israel is living in a new more hostile world than it was prior to Friday.

In fact, one might say that one of the worst case scenarios of impacts from an ICC full criminal investigation has already happened because of the resolution, ironically making the ICC issue less high stakes.

Simply put, diplomatically, such a UNSC resolution might be worse than any ICC criminal case.

But even in the worst case scenario and this new hostile world, the damage legally is also far more contained than people may realize.

While the non-judicial UNSC calls the entire settlement enterprise of hundreds of thousands of people illegal, Bensouda’s examination from the start has been limited to events which occurred after November 29, 2012 – when the UNGA declared “Palestine” a state.

In place of hundreds of thousands of settlers’ residences being in play, the numbers suddenly drop to thousands or somewhere in the 10,000 range.

Also, individual settlers would not be on the hook before the ICC. At worst, the defendants would include key ministers involved in settlement approvals, such as the defense and housing ministers, and possibly also local settlement officials.

It is also possible that aspects of the legal proceedings could be avoided, mitigated or defended if specific residences built after November 29, 2012 were removed or if they became legalized in a future peace agreement.

Moreover, the decision may be far away. In multiple exclusive interviews with The Jerusalem Post in February and October, both Bensouda and her office’s head of jurisdictional issues, Phakiso Mochochoko, signaled that they were far from decided about the war crimes issue and also would likely take years to decide.

After setting the stage, how much did the UNSC resolution move the dial toward a full criminal investigation?

The Jerusalem Post spoke and was in contact with the Foreign Ministry, former IDF international law division head Col. (res.) Pnina-Sharvit Baruch, former IDF international law division head Col. (res.) Liron Libman, former foreign ministry top legal adviser Robbie Sabel, former Hebrew University Law School Dean and Israel Democracy Institute Senior Researcher Yuval Shany and others.

The Foreign Ministry is not giving much at this time, saying it is studying the issue, and might be unlikely to give its opinion even if it had one, lest its opinion damage Israel’s tactical options.

Beyond that, there is no consensus with the dust just starting to settle from this diplomatic earthquake. But the overall trend appears to be that the UNSC resolution at most will give Bensouda a political headwind if she was already going to go after the Israeli settlements, but changed very little in a strict legal sense.

Libman pointed out that all of the worst language against the settlements in the UNSC resolution is basically word-for-word from three UNSC resolutions from 1979-1980. Saying the settlements have “no legal validity” are “flagrant violations” and are against both international law and “international humanitarian law” are not new.

In that sense, if Bensouda wanted to go after the Israeli settlements as war crimes, she had a case based on prior UNSC resolutions as well as the 2004 International Court of Justice opinion declaring the settlements illegal.

Critically, the UNSC resolution was not passed in the context of Chapter 7 of the UN Charter, which is the most binding under international law and is the main mechanism for wide-based international sanctions. This means it was weaker than it could have been.

In that sense, legally, there is “nothing new under the sun” here.

However, until now, the UNSC resolutions condemning the settlements as illegal were around 35 years old. They had not been repealed, but the Oslo Agreements had intervened, Camp David II had set out a vision of Israel keeping settlement blocs and all attempts to repeat such unequivocal settlement language had been vetoed by the US.

Now those arguing that the settlement enterprise should be prosecuted as war crimes can connect the dots between the 1979-1980 resolutions, the 2004 ICJ decision and the 2016 resolution.

More critically, the 2016 resolution comes out in the middle of an ICC examination. If Bensouda wants to point to what the most current trend of thinking is regarding the settlements of international law, the resolution could be a body blow for Israel.

But all of this misses maybe the most important potential defense for Israel, among many possible defenses.

Flying through another country’s air space for a few seconds is a violation of international law. But it is a low grade violation. It is not a war crime. None of the UNSC resolutions nor the ICJ decision say that the settlements are a “grave” (the use of “flagrant” violation as opposed to “grave” is likely not a coincidence) violation of international law, let alone label them a war crime.

Still, that does not end the debate, as the ICC’s Rome Statute does include language that both direct and indirect actions of population transfer are war crimes. The late addition of “indirect” was perceived as focused on Israel’s settlements and was the reason Israel never ratified the ICC’s Rome Statute, despite being deeply involved in trying to establish the ICC.

At the end of the day, the question is whether Bensouda will decide to be the first one in history to prosecute people for building houses and laying water pipes, as opposed to being focused on genocide, mass killings and mass rape – which many conceive of as the ICC’s true purpose.

No one can know for sure, but Shany said he believes Bensouda will order a full criminal investigation. He noted that the settlement enterprise “is not just one porch sitting in Gilo” and that, along with the UNSC resolution, its immensity will be too big to ignore from its perspective.

Sharvit-Baruch has different views than Shany and believes no decision is close to imminent, but overall also believes that Bensouda will move to a full criminal investigation.

Sabel said he believes Bensouda will not order a full criminal investigation. He noted that it would be difficult for her to explain what she was investigating, since even after the UNSC declared the settlements illegal, and she recognized Palestine, “Palestine” has no borders.

This exposes that the whole issue is a political one of setting the borders between the Israelis and the Palestinians, Sable says.

Libman says it is too close to call and that most of the evidence which shows how Bensouda will act could cut either way.

A case in point is a few African countries withdrawing from the ICC because they accuse it of being too focused solely on Africa. Will their withdrawal encourage Bensouda to take risks, such as with the Israelis and Palestinians to address the criticism, or will it discourage her, as their withdrawal may make her more risk averse.

Israel lost a significant battle on Friday. But the war over the ICC is still in play.