**How will the UNHRC’s report impact the ICC’s decision - analysis**

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The UN Human Rights Council's initial report of last Thursday, accusing the IDF of war crimes, could not have come at a worse time for Israel in terms of its impact on the International Criminal Court.

What impact will the report have on the ICC’s fateful decision of whether to delve deeper into the Israeli-Palestinian conflict?

The ICC has taken its time in its review of whether to open a full criminal investigation into the 2014 Gaza War, the settlement enterprise, and most recently, the Gaza border conflict.

It started its review in January 2015. Almost four years later, in December 2018, the ICC prosecution issued a report saying that for the first time it was close to a decision.

Notably, the ICC prosecution said that the Israel-Palestine review had moved to “Phase III” – the final phase of the review process.

The UNHRC report said that the IDF illegally killed 183 Palestinians and wounded thousands during the ongoing border conflict dating back to March 2018, and declared the IDF’s investigations of its own soldiers inadequate.

Could this tip the scales before the ICC against Israel?

The report could tip the scales, which would put Israel in a new level of danger legally and diplomatically far beyond the UNHRC 2009 Goldstone Report. Around 125 countries are obligated to arrest anyone who the ICC issues a war crimes arrest warrant for.

That said, there is a lot of evidence that the UNHRC report will not, on its own, tip the scales.

In an exclusive interview with The Jerusalem Post in February 2016, ICC Chief Prosecutor Fatou Bensouda declined to endorse the UNHRC’s 2015 report, which accused the IDF of war crimes during the 2014 Gaza War.

“We are not judging what the report said or what it didn’t say... We take note of this report... but I don’t feel... our work is based on what other people are saying, but it is more based on the information that we collected,” Bensouda told the Post. “We do not collect from one source, we collect from different, divergent sources, we do cross-checking.”
So the ICC is not necessarily just a rubber stamp for the UNHRC.

In addition, in the ICC’s December report, it recognized that “all of the relevant incidents are or have been the subject of some form of investigative activities... within the IDF military justice system.”

This statement did not mean that the IDF was off the hook for alleged 2014 Gaza war crimes. The ICC could decide the IDF probes were insufficient.

But many viewed the statement as signaling a readiness by the ICC to give Israel a broad pass on the 2014 war by deciding to recognize the IDF probes as precluding an ICC probe.

This would be a stunning rejection of the 2015 UNHRC report.

It is certainly far different from Thursday’s UNHRC report, which noted that Israel has opened five criminal investigations, but did not bother to wait for the results. Rather, it basically declared them invalid preemptively, saying in general that the IDF’s accountability has been “scarce.”

Other differences include that the ICC prosecution discusses the 2014 Gaza War in terms of nuanced questions of whether the Israel-Hamas conflict is an international or non-international armed conflict.

In either of these legal frameworks, the model is war and not law enforcement.

IN CONTRAST, the Thursday UNHRC report almost entirely took on a law enforcement legal framework.

This is crucial because soldiers at war are permitted to use lethal force far more broadly than soldiers performing law enforcement functions.

Bizarrely, the UNHRC report says that there were only 29 members of organized armed groups among the killed Palestinians. In contrast, senior Hamas members themselves have put the number much higher in interviews. One official bragged on television that 50 out of 62 Palestinians killed on May 14 were from Hamas.

Just as bizarrely, the UNHRC report appeared to set an impossible standard for self-defense. When a Palestinian “fired a rifle towards the Israeli side of the separation fence at a distance of between 50 and 70 m.,” the UNHRC said this only “may have amounted” to an attack which would allow the IDF to fire back.

This case is practically the definition of a self-defense case and it would appear from prior statements that the ICC prosecution understands that better than the UNHRC.

The UNHRC report appeared not to do its homework on a hearing before the Israeli High Court of Justice about the rules of engagement.

The report correctly stated that the High Court rejected an attack on the IDF’s rules of engagement without seeing those rules.

But crucially the report left out that the court was ready to see the classified rules if the petitioners had agreed to let the court view the rules without the petitioners present.

It was the petitioners’ refusal to leave the room so that the court could view the rules without exposing them to persons without security clearance which led to the court’s inability to view the rules.

But this does not mean that the IDF will not come under ICC scrutiny.
Some of the bizarre statements in the UNHRC may mask areas where the IDF could be vulnerable.

While initial IDF probes into its own soldiers’ alleged crimes were opened from the earliest days of the Gaza border conflict in April 2018, the first announced criminal investigations were in August.

The Jerusalem Post has learned that of the five criminal investigations, the IDF legal division does not expect to announce any decisions any earlier than May 2019, and quite likely several months beyond that.

Though international law does not set a specific time period for how long it is reasonable to reach a decision, the ICC prosecution may contend that the IDF takes too long.

Even with the High Court, the ICC prosecution may question why the court did not let the petitioners present specific cases where they viewed the IDF as breaking international law.

True, the High Court said that it would be missing the full picture until the IDF performed a full criminal investigation, but in refusing to look at specific cases, the ICC could contend that the court passed the buck.

The ICC has shown more of a readiness to hear out Israeli perspectives than the UNHRC and Thursday’s report was thin on legal analysis.

Still, there is no question that the UNHRC report will only bring more pressure to bear on the ICC to go after the IDF at a potentially crucial tipping point.