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Security Council Resolution 2334: The Legal Significance

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On December 23, 2016, the UN Security Council adopted Resolution 2334 on the Jewish settlements, after the United States abstained from the vote and all other 14 members voted in favor. The Security Council resolution was the first to include such a firm condemnation of the Israeli government's policy on the settlements since Resolution 465 in 1980.

A key motif in the resolution, as emphasized in paragraph 4, is the need to cease all activity concerning the settlements in order to salvage the two-state solution. The preamble to the resolution condemns "all measures aimed at altering the demographic composition, character and status of the Palestinian Territory occupied since 1967, including East Jerusalem" and expresses "grave concern that continuing Israeli settlement activities are dangerously imperilling the viability of the two-State solution based on the 1967 lines." The resolution stipulates that measures should be taken "to reverse the negative trends on the ground which are steadily eroding the two-State solution and entrenching a one-State reality." These statements, as well as the explanations given by Secretary Kerry and other American administration sources for the United States abstention in the vote, underscore the focus of the resolution on the effort to halt Israeli measures perceived as liable to thwart the implementation of a two-state solution. This refers primarily to construction outside the settlement blocs and Israeli legislative initiatives perceived as intended to change the legal status of the area, along with statements by senior members of the Israeli government members about the end of the two-state era. While the resolution expresses a double standard toward Israel on the part of the countries of the world, these measures by the Israeli government are probably what led to the resolution, on top of the poor relations between the Israeli government and the American administration.

The resolution contains clauses that already appear in Security Council Resolutions 446, 452, and 465 from 1979-1980. The wording is also reminiscent of a 2011 resolution initiated by the Palestinians on the subject of the settlements, which the United States vetoed. At the same time, the resolution also contains new clauses that did not appear in previous documents.

What follows is a brief analysis of a number of central aspects of the resolution and their significance from a legal perspective.

1. The resolution states that the settlements in the occupied Palestinian territories, including East Jerusalem, have “no legal validity” and are “a flagrant violation of international law and a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace” (paragraph 1). The preamble to the resolution also states that as an occupying power, Israel is obligated to abide by its legal obligations under the Fourth Geneva Convention. In addition, the resolution recalls the advisory opinion rendered by the International Court of Justice in The Hague concerning the separation/security fence.

The statement that the settlements constitute “a flagrant violation” of the Geneva Convention already appears in Resolution 465 from 1980. That resolution also included a demand to halt activity in the settlements and to dismantle the settlements already built. Resolution 2334 is, however, the first time that the Security Council refers to the advisory opinion that severely criticized Israel stating that its policy in the settlements constitutes a violation of international law.

The legal stipulation in the resolution concerning the illegality of the settlements does not prevent counter arguments by Israel on the matter, since Security Council resolutions do not create international law. At the same time, such a resolution is one of the sources taken into consideration in determining the content of legal obligations under international law. This statement is therefore likely to be of importance in any discussion of the legality of the settlements.

This discussion is particularly relevant to the preliminary examination underway by the International Criminal Court prosecutor for the purpose of deciding whether to open an investigation against Israel for war crimes committed in “Palestine” since June 2014, following the accession of “Palestine” to the ICC in early 2015. This examination refers inter alia to the policy on the settlements, which under a clause in the Rome Treaty, on which the ICC was founded, is liable to be considered a war crime, i.e., of population transfer by the Occupying Power to the occupied territory. The Security Council resolution might serve as additional weight in favor of opening an investigation against those responsible for the settlement policy, and subsequently could influence a decision to file an indictment against them. At the same time, this does not mean that it will be impossible to present legal arguments that no war crime has taken place.

The resolution might also lead to attempts to institute criminal proceedings in various countries under the principle of “universal jurisdiction,” which allows the filing of indictments for war crimes even in the absence of any link to the country in which the proceedings are conducted. At the same time, past experience shows that in most cases, these initiatives do not result in proceedings against Israeli officials by the formal prosecuting authorities in foreign countries.

2. The resolution states that Israel must “immediately and completely cease all settlement activities in the occupied Palestinian territory, including East Jerusalem,” while respecting “all of its legal obligations” (paragraph 2). The resolution does not distinguish between remote isolated settlements, settlement blocs, and East Jerusalem, nor between construction on state-owned land and construction on privately owned land. Nevertheless, the recurring emphasis in the resolution that settlement activity obstructs the possible achievement of the two-state solution indicates that in practice, there would be a difference in the possible response to a violation of the resolution by construction activity in the settlement blocs compared to construction deep within the territory or the seizure of Palestinian private land for the purpose of establishing settlements. Assertions that Israel is in any case regarded as being in violation of international law, and that such distinctions are therefore meaningless, are mistaken. As in any legal system, there is a difference in the response to acts of varying degrees of severity. One can therefore reasonably estimate that if Israel’s settlement activities are more restrained and relieve international anxiety about obstruction of a two-state solution, the risk that the resolution will lead to actual measures harmful to Israel will be reduced significantly.
3. The resolution underlines that the Security Council “will not recognize any change to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations” (paragraph 3). Such a provision was not included in previous resolutions and proposals. This formulation is more restrictive than the wording in Resolution 242 from 1967 that is the agreed basis for the permanent status agreement, which refers to “secure and recognized boundaries.” Furthermore, in previous draft proposals that tried to set parameters for ending the conflict (such as the 2014 Jordanian proposal and the 2015 French proposal), the 1967 lines were referred to as reference lines for determining borders “with land swaps.” According to Resolution 2334, the point of departure is solely the 1967 lines. Any demand for setting a different boundary, including through land swaps, will be referred to as an Israeli demand that deviates from what is stated in the resolution. Accordingly, although the resolution recognizes the possibility of negotiated agreement on other lines, this paragraph will possibly serve the Palestinian side as a bargaining chip in negotiations. In addition, the wording of this paragraph, which emphasizes agreement through negotiations, might be interpreted as preventing recognition of borders set through unilateral measures, even in a situation in which Israel is willing to withdraw from large sections of the territories to settlement blocs, and even if Palestinian obduracy prevents any possibility of formulating an agreement through negotiations.
4. The resolution calls upon all states to distinguish “between the territory of the State of Israel and the territories occupied since 1967” (paragraph 5). This paragraph, which did not appear in previous formulations, is liable to lead to the escalation of already existing measures aimed at boycotting products from the settlements, and to demands that businesses refrain

from activity in the territories (including East Jerusalem) as a condition for transactions with them. The provision might also serve as a basis for efforts to institute civil court proceedings in various countries against parties that do not comply with this demand. On the other hand, this provision does make the point that there are no grounds for boycotting the State of Israel – only the settlements.

5. The resolution states that “practical ways and means” will be examined “to secure the full implementation” of the resolution (paragraph 11).” This section opens the door to further resolutions and measures by various parties in and outside the UN to ensure that Israel implement the resolution. Since the resolution states that the UN Secretary General will report to the Security Council every three months on the implementation of the resolution (paragraph 12), an ongoing supervision mechanism will be created, which could potentially serve as a basis for claims and demands to take measures to stop the violations of the resolution.

Resolution 2334 is a resolution under Chapter 6 of the UN Charter. It does not include sanctions to be imposed on Israel for failure to implement it, but violations of the resolution could constitute a basis for another resolution passed under Chapter 7 of the UN Charter containing such sanctions. At this stage, this possibility appears remote. At the same time, the damage that Resolution 2334 is liable to cause Israel in the international arena and in its relations with foreign states and international entities, including in the legal and economic spheres, should not be underestimated.

