Will She or Won’t She Proceed with War Crimes Claims Against Israel?

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There are two schools of thought in government circles on what the International Criminal Court Prosecutor Fatou Bensouda will decide about alleged war crimes in the Israeli-Palestinian conflict.

The main topics concern the 2014 Gaza war and the settlement enterprise.

During the 2014 Gaza war, when there were thousands of Hamas rocket attacks on Israel and thousands of Israeli air strikes on Gaza, more than 70 Israelis and 2,100 Palestinians were killed. Whether 50 percent or 80% of the latter were civilians is a matter of debate.

Despite Israel’s view, the settlements are considered in dispute or illegal by most of the world, but no authority has ever formally gone so far as to declare them a war crime.

Both issues are before Bensouda following the Palestinian Authority’s joining the ICC in January 2015.

The first, “traditional,” school stems from the view that most of the world is “out to get us.” The second school does not necessarily view the ICC as a friend, but is confident that Israel will convince it to stay out of Israel’s business by virtue of the more than 500 examinations and over 30 criminal investigations it has initiated regarding its own soldiers’ conduct.

One school is likely overly pessimistic about the ICC prosecutor and is geared up to try to diplomatically bruise and isolate her if she bears down on Israel, while the other is likely overly optimistic about the chances of convincing her, through dialogue, to stay out of Israel’s business.

Both views have elements of truth, but are likely mostly wrong.

After visiting the ICC Prosecutor’s Office in The Hague this week, including the first on-record and in-person interview by an Israeli media outlet with Bensouda as well as off-record meetings and years of discussing the issue with top Israeli and international officials, The Jerusalem Post has an unprecedented inside view of what the ICC prosecutor is likely to do.

The big question is whether Bensouda will move from her current preliminary examination to a full war crimes criminal investigation, which could have major diplomatic and economic ramifications. This would require a finding that the IDF’s investigations are insufficient.

But first back to the two schools of thought and what they are missing.

Most of Israel’s right-wing and some centrist politicians belong to the first school, with one leading proponent being Prime Minister Benjamin Netanyahu.

In this view, there may be no reason to cooperate with the ICC. The ICC is seen as being like many other already proven anti-Israel multinational entities, with a kangaroo court judgment against Israel waiting at the end of the train tracks regardless of what Israel does.

Regarding trying to beat or isolate the ICC diplomatically, many officials have alluded to this, especially after South Africa ignored an ICC arrest warrant against Sudan President Omar al-Bashir.

The thinking goes, if South Africa, which is signed on to the ICC’s Rome Statute, can ignore the ICC by calling it political, Israel, which never ratified it, is in an even better position to ignore it and declare it political. Proponents of this view would say this thinking is especially true since the US and some other Israeli allies are against ICC involvement.

However, it would seem to be inaccurate to lump the ICC together with other UN institutions that many on the Israeli side say have demonstrated track records against Israel.

Of course it is always possible that the ICC Prosecutor and her staff are public relations geniuses who have a hidden agenda and can convince even a reporter who pushes extremely hard that they are open-minded and carry no bias against Israel.

But what is more likely is that the fact that they are not on Israel’s side - and they say they are not nor are they on anyone else’s side- plus their decisions on Palestinian statehood in January 2015 and a May 2015 veiled threat by Bensouda, have been misunderstood as them being anti-Israel.

In January 2015, Bensouda said, over Israeli, US and a small group of other countries’ objections, she was accepting the idea of Palestine as a state for the purposes of the ICC, opening a path for the PA to submit war crimes complaints.
Her decision infuriated Netanyahu, who assumed that the decision and her justification, taking instructions from the UN General Assembly, meant she was out to get Israel along with some other UN bodies.

In May 2015, Bensouda issued a veiled threat that if Israel did not start sharing information with her that she might need to decide the issue of a full war crimes criminal investigation without hearing Israel’s side of the story.
Many speculated at the time that Bensouda was showing her true colors of bias against Israel.

But by early July 2015, Israel was quietly providing Bensouda information about the jurisdictional issues she is currently analyzing, while not committing to recognizing the ICC formally.

Also in late July 2015, Bensouda appealed a decision by the ICC Pretrial Chamber which essentially ordered her to open a full war crimes criminal investigation against Israel in the Mavi Marmara 2010 flotilla incident.

Bensouda had closed the incident in November 2014 saying essentially that the body count was not high enough to justify her office’s involvement, but the ICC Pretrial Chamber disagreed.

Her decision to appeal that to the ICC’s top body, the Appeals Chamber, showed not only commitment to her own legal view of the case, but was an overt missed opportunity to go after Israel with cover that she had no choice because the court was ordering her to.

The Appeals Chamber basically punted the issue back to her to think through the issues one last time, but also gave her a path for closing the case again if she modified the reason for closing the case – and most expect her to close it.

So, retrospectively, Bensouda’s overall past conduct does not appear to have shown a stand against Israel.

Further, on Monday, given numerous chances by the Post to blast Israel or agree with those who have slammed it on a range of topics, Bensouda and others passed on each chance.

She and others also endorsed Israeli positions on some issues or said they have yet to decide their views on issues that matter to Israel (meaning they have not rejected Israel’s position and could endorse it later) where Israeli critics have already decided against Israel.

The endorsements or positive stances Bensouda took or the ICC Prosecution appeared to take from the Israeli perspective relate to: how she views the United Nations General Assembly and the UN Human Rights Council and its report on the 2014 Gaza war; her likely readiness to give extensive additional time to Israel to do its own investigations; and what seems to be the ICC Prosecution’s initial stance on home demolitions as part of the alleged settlements war crimes debate.

For example, Bensouda and others took pains to differentiate themselves as independent from the UN General Assembly, the UNHRC, the UNHRC Report on the 2014 Gaza war and from the group of human rights groups which regularly accuse Israel of war crimes.

Though, Bensouda cited the UNGA’s upgrading of Palestine’s status as the reason she accepted the idea of Palestine for ICC purposes, she was clear that this was a one-time decision connected specifically to that issue.

In other words, she said that when deciding whether the IDF’s investigations of its own soldiers are sufficient, the central issue to be decided, she will not take any directives from other UN bodies and would even regard directives as unwanted interference.
She was unmoved by the speculative scenario of incurring the wrath of the UNGA and other Israel critics in the event that she gives the IDF investigations a passing grade.

That is music to Israel’s ears.

She also demurred from taking sides over a statement by the lead author of the UNHRC Report Judge Mary McGowan Davis that Israel was obligated to alter its targeting policy mid-war once many civilians started to die in its attacks, however unintentionally.
Though she wished her refusal to take sides to be seen as neutral, even many who support Israel in general saw that statement as a strong somewhat common sense point against Israel, which makes her refusal to endorse it stand out more.

All of her statements also made it clear that, at least at this point, she was not viewing that report as a monumental event any more than many other reports from both sides.

Another crucial issue from the Israeli perspective is time.

Israel moved almost at hyper speed in its initial investigations into the 2014 Gaza war, putting out details of criminal investigations only weeks after the war, an initial report only after three months and two subsequent reports.
However, since then some of the IDF’s more complex initial inquiries have been more drawn out.

For example, there is still not even an initial decision on criminally investigating the August 1, 2014 Hannibal Protocol incident in which between 29 to 150 Palestinian civilians were killed when Israel tried to block the escape of Hamas fighters who were trying to carry off and kidnap IDF soldier Hadar Goldin.

On other incidents, a criminal investigation was ordered, but no decisions on indictments have been announced for an extended period.

Some in Israel worried that under pressure from the PA, which regularly references the ICC as a threat, and from human rights NGOs, that the ICC would soon lose patience and order a full criminal investigation.

Once again Bensouda and other officials not only did not appear to be in a rush. Rather, they appeared uninterested in even the idea of setting deadlines at this stage.

The focus on the process appeared to be critical, with timing appearing a far distant second.

Of course, many lawyers balk at committing to set timelines, but almost all will fold and commit when asked about seemingly absurdly distant future timelines that are years out.

Bensouda did not. She would not discount the preliminary review process taking seven years or even 10 years. This is crucial because her term only runs until 2021.

While that seems a lifetime away, since she was really unwilling to sign off on any speculative timeline whatsoever, the message appeared to be that this is not a legacy issue for her.

All legal officials are committed to the rules and laws that frame their office, but those who want their legacy connected with a particular case often let it be known that it will be decided on their watch.

Bensouda still might make the big decision on the Israel-Palestine war crimes issues, but it is clear that another possibility is that her legacy on the issue will have been to accept the idea of Palestine and to be the first to push the process forward, without reaching the end herself.

An insider ICC analysis needs to also take into account that Bensouda and the ICC are under constant attack for bringing almost all of their cases against African countries. So there is definitely pressure for her to bring non-African cases, but possibly a long and public preliminary examination of Israel-Palestine, even without a criminal investigation, along with a full criminal investigation of the Russia-Georgia 2008 war, is enough to relieve some of that pressure.

This does not mean the IDF has all the time in the world, but it does mean that there might not be pressure to meet an artificial deadline, and that investigations can likely proceed in the normal course.

As a broader issue, it also means that Israel and the ICC will have more time to feel each other out throughout the process so that there are no sudden misunderstandings and that any unnecessary confrontations can be avoided.

Some of the time issue is not necessarily trying to accommodate Israel. The ICC Prosecutor’s Israel-Palestine team is tiny because of a limited budget which is not going to grow.

One can also point out that time may be something the Palestinians want also since indiscriminate rocket fire is basically an automatic war crimes, and as much as they like to use the ICC as a threat on Israel, they are not anxious for it to rush to turn on them either.

But it is certainly good from the Israeli perspective.

Another area of concern for Israel has been how the ICC Prosecutor’s office would relate to home demolitions of Palestinians as a component of the settlement issue.

The Palestinians argue that demolitions of their homes is part of clearing land for more Jewish settlements.

While Israel has a reading of international law to support the demolitions, 90% of the world views them as violating international law.

In a jarring instance, the home demolitions played a prominent role in the prosecution’s first interim report on Israel-Palestine.

The positive from the Israeli perspective is that it appeared on Monday that the prosecution is open to potential Israeli defenses of war crimes charges for home demolitions.

Aside of the argument that not all violations of international law rise to the level of war crimes, Israel might argue that certain houses which were demolished belonged to terrorists’ families and had oversight from the Israeli High Court of Justice.

Another possible defense might be that certain demolished houses had been built illegally without permits.

The world might still not like these house demolitions and think they are violations, but it appeared that the prosecution, while noncommittal, was at least open to the possibility that these and other arguments could be defenses against war crimes allegations.

The same was true about roof-knocking, the IDF’s firing of a non-explosive missile to bang on a residential roof to warn civilians to evacuate prior to an actual explosive strike.

The IDF tactic has significant fans among US military officials, including the head of the US military, and lawyers and some other world military lawyers.

But many officials in the UN and human rights communities have criticized the method as an insufficient warning and accused Israel of war crimes where roof-knocking failed to clear out civilians who were later killed.

Even not wanting to discuss the issue and considering it an open question for analysis is significant as it means, at least initially, not bonding with the Israel’s critics camp on the issue.

Regarding IDF attacks on locations generally defined as protected from attack, like UN buildings, it appeared that the prosecution had serious regard for a UN Secretary General report dealing with complex circumstances, such as Israel attacking to respond to illegal Hamas attacks from the UN compound or storing weapons within it.

That is positive from an Israeli perspective because it was one of the more nuanced reports to have been issued on the war in that it recognized some of the complexities which arose from Hamas’ illegally fighting from civilian locations.

None of this seems remotely like the straight unabashed anti-Israel behavior that the country is used to from some UN bodies.
Rather, Bensouda has taken flak from anti-Israel elements and has taken stances which Israel appreciates on a range of issues.

All of this bodes much better for Israel’s fate when it comes to how Bensouda will deal with war crimes issues than many have thought and makes preparing a diplomatic assault on her appear problematic, or at the very least, alarmist.

But that is only half the picture.

The second school does not necessarily view the ICC as a friend, but is highly confident that Israel will  convince it to stay out of Israel’s business by virtue of the over 500 examinations and over 30 criminal investigations it has initiated regarding its own soldiers conduct.

The idea is even if the ICC prosecution wishes aspects of the IDF investigations were different, they have still been too serious and extensive for it to step in, especially rationally calculating the already existing diplomatic opposition to critiquing a democratic country like Israel.

A good representation of the school that says we will convince them to stay out of our business with the many investigations we have already ordered is a recent interview by former Magistrate Advocate General Danny Efroni.

Efroni made all decisions regarding alleged war crimes from the 2014 Gaza war up until he retired in October.

In light of the extensive IDF investigations, Efroni suggested that, “it is hard for me to see how the prosecutor [Bensouda] could explain a decision to open a full criminal investigation due to a lacking” in the IDF’s investigations of itself.

But this view, which many take along with Efroni, possibly mistakes the ICC prosecution as rationale actors with a strong political sense. Whether the office has a political sense or not, it has shown a readiness to jump off a political cliff if it believes that its rules dictate that as the correct legal action.

No one thought that the ICC would intervene regarding the Russia-Georgia 2008 war crimes allegations, if for no other reason because it would mean confronting a vengeful diplomatic power like Russia with many UN allies.

But the prosecution has jumped.

Yet in January, the ICC Pretrial Chamber authorized the prosecutor’s request to open a full criminal investigation, including against Russia, and when the Post visited Monday, elements of the office had just returned from a first visit on the ground in Georgia to lay the investigation’s groundwork.

Also, the ICC Prosecutor has run into trouble in its Kenya case. There, Bensouda was sent clear signs that if she went after Kenyan President Uhuru Kenyatta, versus focusing on lower hanging fish, she would face heavy Kenyan opposition.

She dashed straight into the opposition, and while remaining true to her legal principles, her office’s standing in terms of being able to stare down defendants in a hard case may have been harmed far more than if she had taken a pass.

Most experts in Israel never expected Bensouda even to get this far, betting she would balk from even touching the Israeli-Palestinian conflict.

One expert even suggested that the UNGA’s recognition of Palestine  would not let the PA join the ICC club, meaning it was entirely symbolic and would just add a seat with the letter “P” to the UN gallery of states.

So even if the prosecution thinks that the majority of the IDF investigations are fine, one cannot expect it, without some hard negotiations, to give Israel a pass on cases it views as problematic in order to avoid a confrontation and diplomatic pressure.

In fact, in one unexpected moment, Bensouda said she has faced much greater challenges than her predecessor Luis Moreno-Ocampo, because she has had to get deeper into cases, their challenges and their consequences (including killing or intimidating witnesses.)

This moment stood out all the more so because Bensouda is by nature understated and does not try to focus the attention on herself personally.

Another potential negative from the Israeli perspective is the prosecution’s refusal to endorse Israeli exceptionalism.
Israel has far more critics than friends for its controversial national security policies.

But where it has larger groups of supporters in the US and parts of Europe it is with military lawyers who “get it” and see its challenges are unique when it comes to fighting asymmetric terror adversaries.

Such adversaries, like Hamas, routinely fight from within civilian locations, do not identify themselves as combatants in uniform and often use human shields.

Most critics of IDF attacks which kill civilians in these circumstances say it should have used less firepower even if Hamas was using human shields.

Supporters tend to say that Israel’s situation is exceptional because of Hamas’ fighting among civilians and that more civilian casualties may just be unavoidable.

While the prosecution appeared to recognize Israel faces asymmetric challenges, it was committed to staying neutral and looking at each situation case by case.

This commitment was so great that they did not appear willing to even take Israel’s side that it faces a unique predicament in trying to avoid civilian casualties when fighting Hamas.

One top Israeli official had told the Post in the past that even fighting Hamas in 2008-9 and 2012 was “peanuts” compared to fighting Hamas in the 2014 Gaza war, in terms of its systematic fighting among civilians, including a Hamas manual committed to that goal.

The prosecution appeared unmoved by the manual or the sentiment and stubbornly focused on standard legal rules – which in and of itself says that they may be less likely to take Israel’s side at the end of their review.

Rather, it appeared that the prosecution was ready to compare the Israel-Palestine conflict to prior examinations they have handled such as Russia-Georgia, Colombia and Nigeria.

Outside of war crimes questions, none of these countries are generally viewed as developed and stable democracies which respect the rule of law to the extent Israel does (even if Israeli critics have a lower view of Israeli commitment to rule of law than Israel’s view of itself.)

A readiness to compare their circumstances and not view Israel as unique does not bode well from the Israeli perspective down the line, even if it is not an issue yet.

Tying into the same theme, there is a cultural divide between Israel and the ICC Prosecutor’s office which could lead to very different ways of thinking about complex incidents in war where civilians were killed.

This cultural difference is a worldwide difference which separates groups even within their own countries between military lawyers and academic lawyers.

Israel is a military lawyer dominated culture likely more than any other democratic country, though others like the US, have similarities.

Military lawyers, even once they enter a state’s Justice Ministry or academia, tend to have greater sympathy for Western militaries’ actions which lead to civilian casualties when fighting asymmetric terror groups.

An attack in which the IDF used artillery because calling in a more accurate airstrike was five minutes or 40 minutes away is more likely to be understood as unavoidable in dynamic fog of war circumstances.

In contrast, the ICC is dominated by lawyers with an academic or non-military background.

Academic lawyers tend to have less sympathy for attacks leading to civilian casualties even where a Western military faces off with fighting asymmetric terror groups.

In the same example of the use of artillery instead of an airstrike, academics have numerous times argued that Israel or another military must have had an airstrike option in light of the vast number of air attacks, but simply ignored that opting for an artillery strike with greater likely harm to civilians.

These are gross generalizations and the ICC prosecution appeared to indicate that it does have military expertise in its ranks and has a list of military experts on-call to better understand hardcore military issues.

Also, members of the ICC prosecution team have experience in other war crimes tribunals which have given them exposure to military issues, and such academics tend to move a bit closer to sympathy to military lawyers’ views.

But at the end of the day, there still is a gulf between these two groups, and Israel would be more confident that the ICC prosecution would view its tough cases sympathetically if the prosecution was led and being mostly run by former military lawyers.

The prosecution did not appear to think that it was important to have a greater military lawyer presence on staff.

There are some other individual issues, where the ICC prosecution’s explicit or implicit views appeared problematic from the Israeli perspective.

Despite the overall positive approach of the prosecutor to closing the Mavi Marmara case, in her opinion closing the case, Bensouda did also made an initial finding that she still considers Gaza occupied despite Israel’s 2005 withdrawal.

Tough only initial, this was an unnecessary finding since she was closing the case and one which clashes significantly not only with the Israeli government’s view, but also the view of the Israeli High Court of Justice.

The same is somewhat true about views on whether Israeli settlements are war crimes and whether the Israeli High Court’s rulings generally can free the IDF and Israeli officials from war crimes.

The Post confronted Bensouda with her former boss and former chief ICC prosecutor Luis Moreno-Ocampo’s [statements to it about settlements.](http://www.jpost.com/Arab-Israeli-Conflict/Former-ICC-prosecutor-High-Court-approval-could-save-settlements-from-war-crime-label-436967%22%20%5Ct%20%22_blank)

On December 10, Moreno-Ocampo told the Post that anyone prosecuting Israelis regarding settlement activity might be incapable of proving criminal intent if those Israelis explained that they honestly believed their actions were legal once ratified by the country’s top court.

While calling Moreno-Ocampo a good prosecutor who did his best, she refused to prejudge any issues related to the settlements. This was significant since the Post did not ask her to decide legal issues regarding a specific settlement, only to comment on whether there could be any theoretical situation in which an Israeli High Court ruling could be a defense to the alleged crime of illegally building settlements (direct or indirect forcible removal under the ICC Rome Statute.)

Bensouda refused to name any situation, regarding settlements or otherwise, where an Israeli High Court ruling could be a defense, standing true to her overall theme of staying away from theoretical situations.

That is not the same as disagreeing with Moreno-Ocampo, but leaving the issue open is of concern from the Israeli perspective since there are fewer potential defenses regarding the settlements, if the High Court rulings do not help, than to the 2014 Gaza war crimes allegations.

Bensouda also insisted neutrality between Israel and Hamas. She argued that the ICC’s rules demand such neutrality and that she has no choice.

But one might have expected some hint of understanding, at least in off-the–record meetings, that there is a wide gap between Israel, which whether one criticizes its targeting policy or not, clearly is committed to the rule of law, versus Hamas, which systematically targets civilians with indiscriminate rocket fire. There was no such hint.

The ICC prosecution’s emphasis on the rules requiring neutrality with no hint of incorporating this difference into analyzing the issues is problematic from the Israeli perspective.

Also, the ICC prosecution’s hope, which may prove correct but which is more likely naïve, that Hamas will hand over names and information about investigating its own agents who fired rockets, could be problematic from the Israeli perspective.

The prosecution has taken the position that judging whether opening a full war crimes investigation is in the “interests of justice” as mandated by the statute is less focused on achieving peace or balance between the parties than on victims’ justice.

This could mean a scenario where the prosecution moves against Israelis faster than against Hamas simply because there is more open information about which Israeli soldiers were involved in which actions than there is about Hamas.

It also makes less likely a scenario that the prosecution moves first against Hamas for failing to perform any investigations (unlike Israel whose investigations may be sufficient or insufficient but they indisputedly exist) since the ICC can only prosecute individuals it has identified with specific crimes.

On the positive side from the Israeli perspective, Bensouda’ office was careful to issue a clarification to the Post after her interview was initially published on Tuesday that her implication that she would not “choose” between Israel and Hamas was mandated by the statute and did not express any sympathy toward Hamas.

There were also some issues with some split results.

Israel has hoped that the State Comptroller’s report on war-making decisions and their compliance with international law, once it comes out, will impress the ICC prosecution and fulfill its requirement to have reviewed not only individual cases, but overall targeting policy at the highest levels.

From the Israeli perspective, on the positive side, the ICC prosecution is cognizant of the comptroller process and keen on viewing the report.

Also a potential positive, the prosecution seemed ready to wait for the report to come out, though it is likely to take another six to 12 months – meaning it could be issued at late as 2.5 years after the war ended. That level of patience was not a foregone conclusion, especially after Bensouda’s May 2015 public pressure on Israel to move ahead with the process.

However, it appeared that the prosecution might lean toward viewing the report as inadequate since technically it is more of a non-binding administrative report than a criminal investigation.

Since the IDF is not reportedly criminally investigating its targeting policy at the level of generals and the state is not investigating top political officials for their war-making decisions, the ICC prosecution could then conclude that Israel failed to review those issues and step in.

How Israel relates to the comptroller’s report in another year or so, whether it is perceived as implementing it and whether there is some kind of visible committee implementing it could be significant to the ICC prosecution’s perception on this key issue.

Coming back to the question of Israeli exceptionalism, though the ICC prosecution would not openly acknowledge it or some of Israel’s non-conventional tactics and interpretations, the fact that so many tactics and questions of legal principles are viewed as open could be an indirect positive from the Israeli perspective.

It means that even as the prosecution denies the uniqueness of the Israeli-Palestinian situation, it implicitly acknowledges that uniqueness by acting toward such a long list of legal issues as brand new matters which it needs to carefully review to develop a position on. Careful reviews tend to come out closer to Israeli positions than knee-jerk emotional reviews based on the volume of Palestinian civilians Israel killed in the 2014 Gaza war.

There are some other open questions which are too early to answer. For example, if the process moves forward will the sides be able to strike some kind of creative arrangement for Israel to share some of its intelligence with the ICC prosecution on a one-time basis so that the information does not get to the victims or to the defense in cases against Hamas?

This is not provided for under the Rome Statute, but Moreno-Ocampo told the Post that Israel should not share intelligence with the prosecution without strings attached since otherwise the intelligence would, under the rules, eventually find its way into Hamas’ hands.

Overall, the ICC prosecution itself is far away from deciding what it thinks about the Israeli-Palestinian war crimes issues and that decision is likely to be drawn out by at least a few years if not several years.

But what is already clear is that Israeli dialogue with the ICC prosecution, as opposed to the UNHRC Gaza Commission of Inquiry who Israel boycotted, is not a wasted investment.

A diplomatic showdown may still occur, much farther down the road, but it does not appear to be a foregone conclusion.

There is a clear opportunity to influence the prosecution’s decision both on individual cases and on basic legal principles about how they approach analyzing hard cases.

At the same time, the Israeli legal establishment cannot become complacent and think that the investigations ordered until now plus the comptroller’s report will be viewed as sufficient without any second-guessing.

What is most likely is the ICC prosecution will pick some individual cases and some targeting policy decisions where it will press Israel to do more and then there will be a legal game of chicken in which Israel and the ICC prosecution will need to guess how far they can push the other before drawing a line in the sand.

Even with the best of intentions, how well the sides communicate, how flexible the IDF is to some second-guessing and whether the ICC prosecution eventually becomes open to making some unique moves in how it views and treats Israel will likely be crucial in avoiding a full speed crash at the end of the track.