B’Tselem: Israeli objection to ICC on ‘Palestine’ divorced from reality

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A report published by B’Tselem on Thursday attacked Israel’s claims that the International Criminal Court has no jurisdiction in “Palestine” as relying “on intentional misquotation, disregard for international law and an absurd misrepresentation of reality.”

The ICC Pretrial Chamber is expected to decide sometime after March whether to recognize a “State of Palestine” and approve a full criminal probe of Israel and Hamas for alleged war crimes.

On December 20, ICC Prosecutor Fatou Bensouda said she was ready to move forward on allegations against Israel relating to the 2014 Gaza War and the settlement enterprise, as well as potentially the 2018-2019 Gaza border conflict.

Israel immediately filed two extensive briefs claiming that since there is no sovereign Palestine to refer a case to the ICC, ICC intervention would merely politicize a diplomatic dispute which Israel and the Palestinians must resolve through negotiations.

The impact of the ICC delving further into the Israeli-Palestinian conflict would be unprecedented at the diplomatic, legal and public relations levels.

A large number of countries and NGOs have filed legal briefs to support each side of the legal dispute, but B’Tselem is now the first Israeli NGO to support the Palestinian side.

B’Tselem’s counter-brief does acknowledge that, “The status of a ‘non-member observer state’, such as that of Palestine, does raise questions that the drafters of the Rome Statute likely never imagined and therefore did not address in the Statute itself.”

However, the B’Tselem analysis then attacks Israel’s arguments point by point saying that, “the Prosecutor actually calls for a broad reading of the ICC’s jurisdiction that sees past the rigid, traditional concept of a sovereign state. The argument is that an expansive interpretation would more accurately reflect the object and purpose of the Rome Statute, which include combating immunity for perpetrators of serious crimes.”

Where Israel says that the ICC’s Rome Statute must define a “state” the same way the Vienna Convention does, requiring full sovereignty and control over territory, borders and other functions, B’Tselem suggests that the Rome Statute define a “state” in a broader fashion.

It said that using the Vienna Convention definition “would actually constrict the powers of the ICC, an institution designed to combat the immunity of persons responsible for the gravest of crimes, which ‘shock the conscience of humanity’ and ‘threaten the peace, security and well-being of the world’.”

Whereas Israel notes several provisions of the Rome Statute which appear to indicate only a fully sovereign state could fulfill the Statute, B’Tselem cited provisions to support the case for “Palestine” which invite ICC intervention under circumstances where a country is unable or unwilling to carry out its responsibility as a state to prosecute war crimes.

Israel cites the principle of complimentarity – the idea that the ICC cannot intervene if a nation probes its own alleged war crimes – as proof that the cardinal principle of the ICC is respecting national sovereignty.

B’Tselem responded that, “the principle of complementarity is intended not to preserve sovereignty but to serve justice, adding that ‘justice may not suffer the fate of the neglected orphan in the province of national sovereignty’.”

The long-time critic of Israeli policy said that Israel’s brief, “overlooked the international community’s positions on Israel’s policy in the Occupied Territories for more than fifty years, and absurdly misrepresented reality.”

This means that while Israel dismisses rulings against it by the UN Human Rights Council or UN General Assembly as political, B’Tselem views them as binding moral and legal positions.

Next, B’Tselem criticizes Israel for describing, “Israel and the Palestinians as negotiating in good faith to bring about full reconciliation. In these circumstances, he argues, the parties do not need ‘a criminal process to pull them further apart’.”

“Yet the attempt to hide behind supposed negotiations is utterly disconnected from Israel’s actions and declared long-term intentions regarding the Occupied Territories,” said the brief.

Further, B’Tselem asserted that, “Israel’s top officials have long since confirmed that the state does not view the occupation as temporary and intends to cement its control over the Palestinians while dispossessing them of land and rights.”

Moreover, Israel has argued that the ICC cannot intervene because taking sides in a two-party conflict, including prosecuting the building of settlements does not match the crimes of genocide as in the Holocaust against the Jews for which the ICC was created.

B’Tselem referred to this argument as “With shameless cynicism, Israel is trying to use these very horrors to justify continued oppression, land grab and killings at its own hands, dismissing global efforts over the last 75 years to…help form a world based on justice, equality and dignity for all.”

B’Tselem Executive Director Hagai El-Ad commented, “Israel’s attempt to clutch at formalistic straws to evade the ICC’s jurisdiction is shameful…Palestine is not a ‘sovereign state’ precisely because it is under Israeli occupation, whose crimes the ICC has the jurisdiction – and responsibility – to investigate.”

Anne Herzberg, Legal Advisor at NGO Monitor responded, "For years, NGOs like B'Tselem have distorted the plain meaning of international law and treaties as part of the political campaign to 'internationalize' the Arab-Israeli conflict. The ultimate objective is to create international pressure to force Israel into accepting maximalist Palestinian demands, while at the same time, absolving the Palestinians of their responsibility to negotiate a final peace settlement with Israel. The attempt to circumvent the clear rules governing ICC jurisdiction is just the latest effort to weaponize an international institution for the Palestinian political war against Israel. B'Tselem's latest publication should be viewed within this context."

Neither the Foreign Ministry nor a spokesperson for Yuval Steinitz responded to the report.