Israel, PA allies escalate ICC war crimes legal fight

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Fourteen parties including countries, NGOs and leading jurists filed legal briefs by press time on Monday for both the Israeli and the Palestinian sides of the war-crimes contest currently before the International Criminal Court.

The ICC is expected to hand down a fateful decision about Israel, the Palestinians and alleged war crimes sometime after March 30.

In anticipation of that decision, around 40 parties, including countries, NGOs and leading jurists filed legal briefs in February supporting either Israel or the Palestinians.

The core issue is whether the ICC Pretrial Chamber will view “Palestine” as a state and what territory it would say it has jurisdiction over since if there is no state of Palestine, the ICC would need to reject the case.

Technically, those initial legal briefs were to ask the ICC for permission to file a later legal brief by Monday, March 16, and possibly to appear to make oral arguments.

Although only 14 parties had filed by press time, most of those briefs were filed later on Monday, such that it was expected that many more briefs would be filed late into Monday night.

The Czech Republic and Austria had already filed supporting Israel’s position, and Germany, Australia, Hungary, Brazil and Uganda were all expected to file as well.

The Israel Bar Association, the Lawfare Project, the Institute for NGO Research, Palestinian Media Watch, the Jerusalem Center for Public Affairs, Shurat Hadin and other NGOs as well as leading jurists, like former Canadian justice minister Irwin Cotler, also support Israel’s position.

The Arab League and the Organization of the Islamic Conference, which represent dozens of countries, were expected to support the Palestinian position.

A number of other leading jurists, many who were once UN officials who criticized Israel such as William Schabas and Richard Falk, also support the Palestinian side.

On December 20, ICC Prosecutor Fatou Bensouda ruled that Palestine is a state and that there was sufficient evidence that both Israel and Hamas committed war crimes, warranting her opening a full criminal investigation.

However, she also asked the ICC’s Pretrial Chamber to endorse her view.

The Israeli government itself is not expected to respond to Bensodua’s December 20 decision, resting instead on two legal briefs it filed on December 20, hours before Bensouda’s announcement.

Israel does not want to appear to have accepted ICC jurisdiction since it is not a member of the Rome Statute.

In contrast, the Palestinian Authority published a statement on Monday calling on the ICC to disregard any countries objecting to the idea of Palestinian statehood.

The PA said such a decision would undermine the object and purpose of the ICC on formalistic grounds by preventing it from prosecuting war crimes.

The Czech Republic brief, which was filed enough in advance that The Jerusalem Post was able to review it, starts by stating that there is no state of Palestine that could refer a case to the ICC, negating the court’s jurisdiction over allegations against Israel because it failed the 1933 Montevideo test for statehood.

Under that test, an entity can only become a full-fledged “state” if it has a permanent population, a defined territory, government and capacity to enter into relations with other states.

According to the brief, the Palestinians fail most of these parameters.

In contrast, those supporting the Palestinian side say that the principle of Palestinian self-determination and prosecuting war crimes overrides the Montevideo principles, especially in light of UN General Assembly and Assembly of State Parties decisions accepting Palestine.

The Assembly of State Parties is effectively the legislative branch of the ICC.

The Czech Republic brief turns this around and quotes the UN General Assembly Resolution of November 2012 that elevated Palestine from observer status to non-member state, but prevented it from being a full-member state.

“The urgent need for the resumption and acceleration of negotiations within the Middle East peace process … for the achievement of a just, lasting and comprehensive peace settlement between the Palestinian and Israeli sides that resolves all outstanding core issues, namely the Palestinian refugees, Jerusalem, settlements, borders, security and water,” implies that the statehood of Palestine is yet to be achieved, said the Czech Republic.

Further, the brief stated that, “The controversy over the question of statehood of Palestine has also appeared in relation to the unsuccessful application of Palestine for admission to membership in the United Nations.”

Cutting to the heart of the Palestinians argument that they are a state and that they can give the ICC jurisdiction to criminally prove Israel for war crimes, the brief states, “the membership of

Palestine in international organizations or its accession to multilateral treaties, including the Rome Statute, cannot substitute the missing elements of statehood.”

Moreover, the brief attacks the idea that the acceptance of the UN secretary-general of certain instruments in which “Palestine” acceded to various international treaties, a technical issue, is sufficient to allow Palestine to grant criminal war crimes jurisdiction to the ICC, a far more substantive issue.

Bensouda has said that once the UN secretary-general accepted Palestine as a state and permitted it to join dozens of treaties, conventions and UN-related bodies, that there is no basis to block it from joining the Rome Statute.

Next, the Czech Republic brief ironically quotes the famous 2004 International Court of Justice decision, which declared Israel’s West Bank barrier an illegal infringement on Palestinian rights, to prove that there is no state of Palestine.

In that decision, the ICJ gives Israel responsibility for upholding a variety of legal issues in the Palestinian areas under the international law of belligerent occupation.

Regardless of how well Israel is doing that, the Czech Republic said this legal framework, along with the Oslo Accords, which give Israel exclusive jurisdiction over criminal issues in the West Bank relating to Israel, prove there is no Palestine to send a case to the ICC.

In contrast, Bensouda cited the ICJ decision as proof of her case regarding Palestine and that Israel may be committing war crimes.