Pro-Israel groups try to save country from ICC war-crimes disaster

February 13, 2020

By Yonah Jeremy Bob

The Jerusalem Post

https://www.jpost.com/Israel-News/Pro-Israel-groups-try-to-save-country-from-ICC-war-crimes-disaster-617538

Pro-Israel groups filed a barrage of legal briefs on Thursday, hoping to convince the International Criminal Court Pretrial Chamber to block the ICC prosecution from probing Israelis for war crimes in a case with fateful legal and diplomatic implications.

On December 20, ICC Prosecutor Fatou Bensouda announced her blockbuster decision to recognize a State of Palestine over Israeli objections, as well as her desire to probe Israelis and Hamas members for a variety of alleged war crimes.

If the pro-Israel groups fail to convince the ICC Pretrial Chamber to drop the case, the IDF and the Israeli settlement enterprise could be in jeopardy.

Three groups – the Israel Bar Association, the US-based Lawfare Project (on behalf of a group of NGOs) and the European Center for Law and Justice – had already filed briefs for the Israeli side by Thursday.

Their arguments could prove crucial since there were signs that, other than two legal briefs filed on December 20, the Israeli government was not necessarily going to file new arguments responding to the ICC prosecutor’s decision.

Israel is walking a fine line between trying to have the case thrown out on jurisdictional grounds while projecting to the entire ICC system that it believes it is beyond its jurisdiction since it refrained from acceding to the ICC’s Rome Statute.

Numerous briefs had also been filed for the Palestinian side, and an unknown number of additional briefs were expected to be filed through the Friday deadline for non-state groups to weigh in on the historic fight.

Meanwhile, on Thursday, the Czech Republic filed a legal brief to support Israel’s position that the case should be dismissed.

Israel Bar Association president Avi Himi said his 70,000-strong group “is obligated to support justice in any legal proceeding, including before the International Criminal Court in The Hague. In light of the position of the State of Israel that it does not recognize the ICC’s jurisdiction, we decided that we should act independently to prevent an international criminal probe against Israel, IDF officials and publicly elected officials.”

The bar association’s brief, exclusively obtained by The Jerusalem Post, argued that the “original sin” that led to the December 20 decision against Israel dates back to a 2012 decision by previous ICC prosecutor Luis Moreno-Ocampo.

In that decision, Moreno-Ocampo rejected Palestine as a state but provided a road map for obtaining recognition by the ICC if it could achieve recognition as a nonmember state of the UN General Assembly.

Only states can refer a case to the ICC.

The bar association said Bensouda relied on this 2012 ruling as the launching point for recognizing Palestine as a state, without which the entire case disappears.

In its brief, the bar association wrote that Bensouda “should have rejected her predecessor’s erroneous opinion… and avoided informing the presidency of the so-called “Situation in the State of Palestine.”

Another point made by the bar association was that a September 23, 2011, letter from PA President Mahmoud Abbas to the UN secretary-general made certain guarantees as part of the process for seeking full membership to the UN.

Abbas’s letter emphasized that the “Palestinian leadership stands committed to resume negotiations on all final-status issues – Jerusalem, the Palestine refugees, settlements, borders, security and water – on the basis of the internationally endorsed terms of reference, including the relevant United Nations resolutions, the Madrid principles, including the principle of land for peace, the Arab Peace Initiative and the Quartet Roadmap.”

The bar association said that “when applying for membership of the United Nations, even the Palestinian authorities acknowledged that territorial boundaries, settlements and the status of [east] Jerusalem – all of which are pertinent to the prosecutor’s request – would remain subject to future determination through the various peace processes and international diplomatic initiatives.

Under the Oslo Accords, the bar association said this would “not entitle the Palestinian authorities to delegate issues pertaining to the alleged criminal responsibility of Israeli officials to the International Criminal Court.”

Lawfare Project executive director Brooke Goldstein and senior counsel Gerard Filitti said in their legal brief that they view “the ICC prosecutor’s attempt to exercise jurisdiction over Israel, who is not a signatory to the Rome Statute, as an improper intrusion into a multiparty international peace process that is inherently political in nature.”

The Lawfare Project brief – which also included the Institute for NGO Research, Palestinian Media Watch and the Jerusalem Center for Public Affairs – argued that Palestine cannot be a state because the “extent of its territory is not fixed, having been left to a settlement to be agreed upon at a later date. Neither is there a permanent population, given the express understanding that borders would be adjusted and fixed at a later date.”

The brief said: “‘Palestine’ lacks a government in total control of the territory. On the one hand, its purported government shares with Israel control over some territory it clams for itself. On the other hand, there is currently no functioning, unified government that actually exerts control over the entirety of the territory it purports to include in the so-called ‘State of Palestine.’”

“Anti-Israel forces are once again using ‘lawfare’ to attack Israel, in this case by pursuing baseless claims in a court that has no jurisdiction over it,” the brief added.

“The Lawfare Project is there to fight a zealous prosecutor’s overreach and defend the rule of law and the civil and human rights of the Jewish community,” the brief said.

European Center for Law and Justice chief counsel Jay Sekulow and senior counsel Robert Ash wrote in their brief: “The prosecutor asserts that there are no substantial reasons to believe that an investigation would not serve the interests of justice. We will submit that it is not in the interests of justice to ignore well-established, unambiguous customary international legal norms regarding non-party states and treaties to which they have not acceded.”

In addition, their brief said: “Neither is it in the interests of justice to override explicit international agreements nor to use up the court’s resources while ignoring the reality of principled non-cooperation by non-party states.”

Reviewing the ICC prosecutor’s argument that the “court’s territorial jurisdiction includes the West Bank and Gaza, we submit that this is wrong for a variety of reasons, both historic and legal, including, among others, the international legal principle of uti possidetis juris and the right to self-defense under UN Charter Article 51, both of which support Israel’s right to exert sovereignty in these locations,” the brief said.

In making her argument for Palestinian statehood, “the prosecutor erroneously attributes the status of international law to statements made by political bodies that possess no such law-making authority,” it said.

Moreover, “the prosecutor seems to acknowledge that Palestine does not meet the standards required for statehood, but then claims that this must be understood in light of Israeli practices that she deems to be contrary to international law,” the brief said.

“Israeli actions… are in full compliance with all relevant international legal norms, and… that regardless this would have no bearing on the question of whether a non-state should be considered a ‘state,’” the European Center for Law and Justice brief said.

Another claim in the brief is that the ICC prosecutor gives a skewed view of the 1967 War, noting Israel conquered various areas, but “in an egregious omission, the prosecutor failed to mention that east Jerusalem, the West Bank, and Gaza were recovered by Israel in a defensive war in response to aggression by Israel’s Arab neighbors.”

“The record is clear: this acquisition of land was the direct result of Jordanian, not Israeli, military aggression in June 1967,” the brief said.

Several Palestinian groups also filed briefs in support of Bensouda’s position to recognize Palestine as a state and to probe Israelis for war crimes.

Prior to Bensouda’s December 20 decision, her office had said it was also considering whether the PA might be guilty of war crimes for torture of its own people or for its so-called “pay for slay” policy.

In an interview with the Post after the December 20 decision, Bensouda indicated that she was still considering the issue but had not reached a decision. It is unclear if this issue will also come before the ICC Pretrial Chamber in the current round of legal arguments or only at a later date.