More support for Israel at ICC as decision draws closer

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The Czech Republic has filed a brief in support of Israel before the International Criminal Court, The Jerusalem Post has learned.

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.

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.

The brief starts by stating that there is no State of Palestine which 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.

Next, the brief quotes the UN General Assembly Resolution of November 2012 which 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.

Next, the 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 ICC 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 that 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.

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

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

More parties are expected to file by Monday night, but 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.

Some other parties that have taken up Israel’s cause before the ICC are Germany, Austria, Australia, Hungary, Brazil and Uganda, as well as many NGOs and leading jurists, like former Canadian justice minister Irwin Cotler.

The Arab League and the Organization of the Islamic Conference, which represent dozens of countries, have taken the side of the Palestinians.