**Why the Palestinian case at The Hague took a big hit this past week**

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The notion that “Palestine” is a full-fledged state that can grant jurisdiction to the International Criminal Court was dealt a serious blow over the past week, as seven countries and many scholars of international law argued that the issue was not as simple as the Palestinians and their supporters would like to make it seem.

Even some countries that have formally recognized the “State of Palestine” along the pre-1967 lines argued that Palestine cannot necessarily be considered to have validly granted the ICC jurisdiction to probe war crimes allegedly committed on its territory.

Germany, Australia, Austria, Brazil, the Czech Republic, Hungary and Uganda last week submitted written documents to The Hague, each asking to become an amicus curiae — a “friend of the court” that is not a party to the case but wants to offer its views. They all posited that Palestine cannot transfer criminal jurisdiction over its territory to The Hague.

Not a single country filed a request to argue the opposite.

“I have spoken with several leaders from these countries and, along with international organizations and leading experts in the world, they have expressed a clear stand that the international court has no authority to discuss the conflict between the State of Israel and the Palestinians,” Prime Minister Benjamin Netanyahu said Sunday.

“The fact that many countries have lined up alongside us… is a fact that certainly needs to encourage every friend of Israel around the world and every citizen of Israel.”

Professionals, too, stressed the importance of having several countries backing Israel’s position at the ICC.

“It is significant that even states like Brazil and Hungary, that have nominally recognized Palestine, raise serious doubts about the court’s jurisdiction,” said Tel Aviv-based attorney Daniel Reisner, who headed the Israeli army’s international law department between 1995 and 2004 and served several governments as legal adviser and negotiator in various rounds of peace talks.

In his position as vice president of the International Association of Jewish Lawyers and Jurists, Reisner was one of dozen experts who also filed amicus requests to the court.

“Issues like the fact that recognition can be symbolic [but] not legal, that the territory of the Palestinian entity is undetermined and subject to negotiation, and just the exceptional degree of controversy and uncertainty surrounding this entire question, all make the case for ICC jurisdiction highly doubtful even for recognizing states,” he said.

On December 20, the ICC’s chief prosecutor, Fatou Bensouda, said she had concluded her half-decade-long preliminary examination of the “situation in Palestine” and has “reasonable basis to believe that war crimes were committed” by both the Israel Defense Forces and Hamas and other “Palestinian armed groups.”

At the same time, she acknowledged that The Hague may not have the jurisdiction to deal with Israel/Palestine. Hence, she asked for a ruling by three ICC judges to determine the scope of the court’s territorial jurisdiction.

The prosecutor herself believes “Palestine,” which acceded to the Rome Statute, the ICC’s foundational document, in early 2015, is enough of a state for the purposes of transferring criminal jurisdiction over its territory to the court.

Israel has long argued that the ICC lacks jurisdiction over the case not least because there is no sovereign Palestinian state that could delegate to the court criminal jurisdiction over its territory and nationals.

It is now up to a so-called pre-trial chamber to rule on the matter. The three judges of this chamber — Péter Kovács of Hungary, Marc Perrin de Brichambaut of France and Reine Adélaïde Sophie Alapini-Gansou of Benin — invited “Palestine, Israel, and victims in the Situation in the State of Palestine, to submit written observations” on the matter by March 16.

Jerusalem has not yet decided whether it will make a formal submission, but it is widely expected to refrain from doing so, lest it be seen as legitimizing a process Israeli leaders have denounced as absurd, unfair, illegal and anti-Semitic.

States, as well as private groups or organizations, could apply for amicus curiae status by last Friday.

While not a single country filed such a request arguing in favor of jurisdiction, the Arab League and the Organization of Islamic Cooperation did submit amicus curiae observations saying that Palestine is of course a sovereign nation and that the ICC can proceed with launching an investigation into the Israeli-Palestinian conflict.

“The [Arab] League would submit that, as a matter of international law, the State of Palestine is the sole sovereign over this territory. The status of occupation over the territory of Palestine has been universally recognized,” the Cairo-based organization said in its application.

The Organisation of Islamic Cooperation, which is headquartered in Jedda, Saudi Arabia, said it would highlight the “historical aspects of the Question of Palestine and the injustices the Palestinian people have been subject to,” including the 1917 Balfour Declaration and 1947 UN Partition Plan, “which determined the historical founding contours of the State of Palestine and Palestinian sovereignty rights.”

But these umbrella groups mainly represent themselves and not their member states, very few of which are members of the court, and can be expected to influence the three judges of the pre-trial chamber much less than the powerful and democratic Western nations that spoke out against the court’s jurisdiction.

In their amicus requests — which are merely an application to submit more detailed legal argumentation — the various countries differ in their arguments and in the depth at which they would make their case to the pre-trial chamber.

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Australia, for instance, sufficed by stating that it does not recognize the State of Palestine and “does not have any relationship” with it under the Rome Statute, and that it would submit observations relevant to jurisdiction.

Germany — one of the biggest supporters of the court — offered a more detailed preview of its argumentation. Berlin’s amicus request, signed by the Foreign Ministry’s legal adviser, starts by stressing that Germany was “a staunch supporter” of the ICC and noting that it has long been a proponent of a two-state solution to the Israeli-Palestinian conflict.

But, it argued, “The scope of the Court’s territorial jurisdiction pursuant to Article 12 of the Rome Statute does not extend to the occupied Palestinian territories. Article 12 of the Rome Statute presupposes that there is a “State” that has the ability under international law to delegate territorial jurisdiction to the Court with respect to the relevant cases.

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Austria noted that it had voted in favor of Palestine’s membership in UNESCO in 2011 and in favor of grating it non-member observer state status in the UN General Assembly in 2012. It also acknowledged that it did not protest Palestine’s accession to the Rome Statute in 2015.

However, its amicus request stressed that this does not mean Palestine was a state that can convey jurisdiction to the court, and that “even if there was jurisdiction, the concrete scope of territorial jurisdiction would be doubtful.”

Brazil recognized Palestine, but now opposes ICC jurisdiction

The Brazilian submission starts off by emphasizing a “permanent interest to shield the ICC from undue political interference,” warning the court that any decision “that would make political use of the Rome Statute” would undermine its credibility and legitimacy.

The Latin American country notes that it itself recognized a Palestinian state in 2010, but adds that its “unilateral and discretionary act of recognition of the State of Palestine does not entail erga omnes affect” — the idea that one country’s stance toward Palestinian statehood obligates the rest of the world to accept that view.

“As a matter of fact, under international law, recognition [is] not constitutive for third states not involved in the act of recognition,” Brasilia’s application, signed by its ambassador to The Netherlands, argues. “Additionally, the mere accession to an international treaty does not necessarily determine that the State Party is a sovereign State under international law.”

The ICC considers itself a “court of last resort” that should only get involved in cases where its jurisdiction is undisputed, the Brazilian document goes on, warning against an “undue expansion of the reach of international criminal law.”

Echoing Israel’s own arguments about the ICC’s involvement, Brazil goes on to argue that the “complex Israeli-Palestinian question needs to be addressed through political dialogue between the parties and not through an international criminal process, which would be detrimental to both justice and peace.”

Hungary, too, noted that it had previously recognized a Palestinian state, in 1988. “However,” its application states, “it is the Hungarian position that the territorial boundaries shall be settled through direct negotiations between the parties.”

Furthermore, the submission, signed by Foreign Minister Péter Szijjártó, states that Budapest “has doubts that Palestine fulfills all the constitutive elements of statehood, and hence the territorial jurisdiction of the Court does not necessarily extend to ‘occupied Palestinian territories.’”

The Hungarians also refer to the 2012 UN General Assembly vote that conferred “non-member observer State status” upon Palestine with an overwhelming majority — 138 countries voted in favor; 9 against and 41 abstained — positing that it “did not provide a clear answer regarding the question of statehood.”

Rather, Resolution 67/19 was a “mere procedural issue” and “did not constitute a recognition of Palestinian Statehood,” Budapest insisted.

The fact that Hungary submitted an amicus request is particularly noteworthy, given than one of its nationals, Péter Kovács, is one of three judges of the pre-trial chamber.

The Czech application says the question of Palestinian statehood needs to be analyzed “in accordance with general international law,” and cites the 1933 Montevideo Convention on the Rights and Duties of States, which has traditionally been recognized as the benchmark for determining what constitutes a state under international law.

According to the convention’s first article, a state needs to possess the following qualifications: a permanent population; a defined territory and government; and the capacity to enter into relations with the other states.

“It has been a long-standing position of the Czech Republic that Palestine has not fulfilled yet all criteria of statehood under international law,” the application, signed by Foreign Minister Tomas Petricek, states.

While Prague supports the Palestinians’ aspiration for independence, the fact that Palestine cannot be considered a state raises “doubts” regarding the ICC’s jurisdiction over the West Bank and Gaza, the document concludes.

Uganda’s amicus application expresses “concern” over the prosecutor’s intention to have the pre-trial chamber issue a ruling on “controversial and political issues of territory and borders, which both parties in the present context agreed to resolve through direct negotiations.”

Territorial borders between Israel and Palestine need to be determined by Israelis and Palestinians and cannot be subjected to the Court’s jurisdiction,” Kampala’s submission argues. “Uganda further believes that the Court, as a criminal body, is fundamentally ill-suited and ill-placed to make determinations of such nature.”

In addition to the seven states, dozens of individual scholars and NGOs — from both sides of the argument — have submitted their own amicus requests. Most of them repeat, in one form or another, the same arguments vis-a-vis the court’s jurisdiction, or the lack thereof.

Some of the names of applicants will sound familiar to people who stay up-to-dated on news of the Israeli-Palestinian conflict.

Canadian professor of international law William Schabas, for instance, in 2014 was appointed to head the UN Human Rights Council’s probe into that year’s Israel-Gaza war. He later resigned from the inquiry after it emerged that he had received $1,300 for a legal opinion he wrote in 2012 for the Palestine Liberation Organization.

In his amicus request, Schabas argues that once Palestine was accepted as a State Party to the Rome Statute, no one, including the ICC pre-trial chamber, has the authority to challenge that fact. And as a State Party, Palestine clearly fulfills the criteria of statehood required, he posits.

It is true that the territorial borders of said state are yet undetermined, Schabas allows. However, he adds, “uncertainty about borders” cannot prevent the ICC from exercising its jurisdiction over a country.

“At this stage in the proceedings it would be wise for the Court to confine itself to generalities about territory,” he writes.

Another well-known personality offering his views is Richard Falk, who served as UN special rapporteur on human rights in the Palestinians territories between 2008 and 2014. Unsurprisingly, he argues that the ICC of course has jurisdiction over the “situation in Palestine,” citing, among other things, the “diplomatic recognition of Statehood by a reported 130 governments.”

Statehood is “a complex concept under international law,” Falk acknowledges, but adds that refusing to recognize the State of Palestine as a state for the purposes of the Rome Statute “would lead to certain legal absurdities within the Statute’s framework.”

Falk called the Oslo Accords — the 1990s framework that granted the Palestinians full autonomy in one of three parts of the West Bank — an agreement “of dubious legal value” that does not compromise the Palestinians’ authority to transfer to The Hague criminal jurisdiction over the entirety West Bank.

Dennis Ross, the former US diplomat who helped Israelis and Palestinians negotiate the Oslo Accords, says in his amicus application that some of the ICC prosecutor’s assumptions about the agreement are incorrect.

Bensouda, in her January 2020 statement about seeking to investigate possible war crimes committed in the West Bank and Gaza, argued that Oslo “only limited the enforcement powers of the Palestinian Authority (PA), without affecting powers that are considered vital to Palestine’s capacity to vest the Court with jurisdiction,” Ross writes.

The prosecutor further argues that limitations Oslo places on the Palestinians do not preclude ICC jurisdiction because parts of it “could be considered to violate the right of the Palestinian people to self-determination.”

But these arguments “fail to accurately capture the understandings between the parties and the dynamics and context of the negotiations,” Ross claims, vowing to “set the factual and legal record straight.”

Another applicant who argues that the prosecutor got the facts wrong is preeminent British international law expert Malcolm Shaw, whose works she cited nearly 20 times in her request to open an investigation. His position is particularly noteworthy because the prosecutor relied on Shaw to make her case in favor of opening a war crimes probe in Palestine.

Shaw argues that Bensouda, in her argumentation about Palestinian statehood and the court’s jurisdiction, arrived at certain conclusions that “may not accurately flow from the accepted principles of international law.” Hence he insists that “it cannot be properly concluded that the Court has territorial jurisdiction with regard to the “Occupied Palestinian Territory.”

More than 40 amicus requests were filed to the court. All but two applicants, who missed the February 14 deadline, were informed on Thursday that they can submit observations of up to 30 pages to the court by March 16. Bensouda has two weeks to respond in a consolidated document of not more than 75 pages, and then the file will go to the pre-trial chamber, which is expected to issue a final ruling within 120 days.

It is impossible to predict to what extent, if at all, the amicus submissions will influence the judges. They could dismiss all the arguments against Palestinian statehood and jurisdiction and embrace those in favor. But the fact that a handful of important countries, as well as some intellectual heavyweights, spoke out in support of Israel’s position must have certainly caused some serious consternation in Ramallah.