Israel's, PA’s allies press ICC on war crimes decision – who wins?

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Israel is facing the greatest war-crimes challenge in its history from the International Criminal Court after the Office of the Prosecutor asked the judges on December 20 to approve a criminal probe of Israel and Hamas.

Up until last week, the deck was stacked against Israel.

Sure, the ICC Pretrial Chamber could reject ICC Prosecutor Fatou Bensouda’s request to criminally probe Israel and Hamas for alleged war crimes. But these are the same three judges – Marc Perrin de Brichambaut, Péter Kovács and Reine Alapini-Gansou – who ruled against Israel regarding the 2010 Mavi Marmara flotilla incident.

In other words, if a 2-1 majority of the ICC Pretrial Chamber wanted a criminal probe of Israel for killing a mere (in relative terms) 10 Turkish passengers who violently fought with IDF troops, the chances they will give Israel a pass on the settlement enterprise and Operation Protective Edge in 2014, when some 2,100 Palestinians were killed (between 50%-80% civilians), is almost zero.

Last week may have given Israel a chance.

After more than 40 parties, including countries, NGOs and top experts, filed on behalf of Israel and the Palestinian Authority, Jerusalem’s position may have improved.

No one beside Israel was paying attention to the Mavi Marmara case. Most of the world did not know it was happening, and anyone who did, viewed it as a tiny sideshow.

Whether the ICC judges followed their own personal legal or political perspectives in ruling, they were not looking at an avalanche of consequences.

Now they are presiding over the main event.

Judges used to relative anonymity if they rule against Israel will now need to rule also against Australia, the Czech Republic, Austria, Brazil, many NGOs and experts and, most importantly, Germany.

All of these parties and countries are arguing, along with Israel, that the PA has not evolved to become the “State of Palestine” and that without statehood, the ICC has no jurisdiction to even consider the case.

Germany is most relevant because it is one of the largest funders of the ICC, second only to England, and the British are already in a direct fight with the ICC over a potential case against them. (The US has never contributed funds to the ICC.)

One needs to be careful in counting the number of filings. Israel may have slightly more filings on its side, but one of the filings for the PA is the Organization of Islamic Cooperation, which represents more than 50 countries.

So how will the ICC Pretrial Chamber assess the pressures it faces? Will it look at total filings that favor Israel, total countries that favor the PA, who pays more of its budget, which may favor Israel?

It is hard to say, but the fact ICC judges will need to consider this means that politics in an international body is not working solely against Israel.

And politics should play a role, because one of the leading arguments by the pro-Israel side is that the settlements, borders and armed conflict between the parties are political issues that the ICC should stay out of.

Bensouda said “Palestine” should not be penalized for lacking aspects of statehood, such as set borders, because Israel was illegally preventing it from establishing borders.

In contrast, Germany and others said they support the ICC generally, but “Palestine” can only come into existence and can only have borders in negotiations with Israel pursuant to UN Security Council resolutions.

Bensouda relied on a combination of political UN bodies that have accepted “Palestine” as a state, as well as that the UN General Assembly deposited its declaration of being a nonmember state as proof that she is just acting in conjunction with standard international practice.

But those supporting Israel said Palestine’s UN status as a nonmember state is plainly less than full-member statehood status, and this limitation was meant to cover precisely such issues as the ICC.

The biggest problem Israel may face is that Bensouda is not acting alone even within the ICC system.

The ICC is regulated by the Assembly of State Parties, which has not only accepted Palestine but which has multiple times accepted the appointment of Palestine’s diplomats to key positions.

Can the ICC judges force the group that regulates it to roll back the clock five years to 2015 when it started to treat Palestine like a full-fledged state?

After balancing all of these issues, some commentators have pointed out that the ICC Pretrial Chamber could take a couple of clever ways out of fully deciding the issue.

One idea is that the ICC judges could say they are only ruling about the parts of the West Bank and Gaza to which Bensouda’s probe extends, because she technically said she believes her finding that Palestine is a state is sufficient without the judges’ confirmation.

Another idea is the judges could say they will put off the statehood question until a later trial stage as requested by the ICC Office of Public Counsel for the Defense.

While either of these “pass the buck” strategies could happen, the ICC, at this stage, will likely rule against Israel.

Culturally, “Palestine” is overwhelmingly accepted in the environments in which international judges tend to operate (more than 130 of around 190 states recognize “Palestine”).

Many judges will simply find it unthinkable to toss the case out, disregarding the real argument underlying Bensouda’s move: that Palestinians’ right to self-determination trumps everything else (Israel says negotiations between the parties trump everything else).

Yet, even if Israel loses this round, there will be many other battles to fight along the way.

Israel’s support versus the ICC in the White House and from Germany may continue, and maybe in the future England will take its side. If that support remains firm, the ICC judges or the future ICC prosecutor (Bensouda retires in mid-2021, long before any criminal probe will be concluded) may decide to drop all or part of the case at a later stage, still before trial.

If Israel derails the case at a later stage without having to go to trial, its allies rallying to its side this past week will likely stand out as the moment in which the tide started to turn.