


ICC targets Israel and declares a 'Palestinian state'

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On Saturday morning AEDT, the International Criminal Court delivered its first judgment in what will be a decades-long process of prosecution of Israeli leaders for alleged war crimes. The court decision in the case labelled the "Situation in Palestine" is predictable and is primarily political. Its circular reasoning and extensive reliance on UN General Assembly resolutions for judicial authority confirm the court's role as a UN political body.

The ICC Pre-Trial Chamber decided it has jurisdiction over Israel and can prosecute Israeli national and local political and military figures. Successful prosecutions will result in sentencing them to jail terms in The Hague. In lawfare, where geostrategic conflicts play out using the rhetoric of UN laws, the ICC can be a potent weapon. The substance of the judgment deals with two issues: the statehood of Palestine and territorial boundaries of the "State of Palestine". The Pre-Trial Chamber decided the "state of Palestine" is a fully fledged state for the purposes of the ICC. It also decided the disputed boundaries between Palestine and Israel.

Due to doubt as to the court's legal authority over Israel's government and defence forces, ICC prosecutor Fatou Bensouda requested in January 2020 that the ICC Pre-Trial Chamber confirm her jurisdiction to prosecute. In preparation of the case against Israel, the prosecutor collaborated closely with the Palestinian Authority and NGOs. Her request was procedural, looking for covering legal fire in a political attack manoeuvre.

The timing of the handing down of the judgment was also political. The three judges waited until just after Donald Trump stepped down to avoid personal sanctions on them. In June 2020, the Trump White House imposed sanctions on Bensouda and her deputy for seeking to prosecute US actions in Afghanistan.

The US and Israel are not members of the ICC and such sanctions are authorised under congressional legislation for ICC actions against the US and its allies. There was a real possibility Trump would sanction the individual Pre-Trial Chamber judges but little likelihood Joe Biden would. The long delay in handing down the judgment predicted its content.

The ICC noted a “significant proportion” of its members comprise the Arab League and the Organisation for Islamic Cooperation, which assert that the sovereignty of the “State of Palestine” is already established. It is interesting to see just who is deciding the legitimacy of the sole Jewish state.

Among the many instances of circular reasoning in its judgment, the Pre-Trial Chamber asserts that states objecting to Palestine’s membership of the ICC should have disputed it within the Assembly of States Parties when Palestine joined. There the catch-22 outcome would have been predetermined by a majority vote of the “significant number” of ICC members that support Palestine’s membership, as the court had already noted.

The Pre-Trial Chamber avoids the central jurisdictional question, concerning whether Palestine meets the international legal criteria required for statehood. Instead, it asserts the legal authority of UN recommendations that say the state of Palestine already exists.

The most important feature of the judgment is that it finds the “state of Palestine” was established under UN General Assembly resolution 67/19 in 2012 and its territory specified under the resolution extends throughout all “the territories occupied by Israel since 1967, namely Gaza and the West Bank including East Jerusalem”. The judgment, sadly, fails to interpret the resolution’s natural meaning correctly, to analyse who voted for/against the resolution, official explanations of the vote and the broader context used in interpretation of international legal instruments.

The presiding judge, Pieter Kovacs of Hungary, condemns the majority judgment reasoning and findings. His 163-page dissent, five times longer than the majority judgment in substance, is painstakingly formulated.

Foreign Minister Marise Payne reiterated that Australia “does not recognise a state of Palestine” and stated “deep concerns with the ruling of the Pre-Trial Chamber”. Australia contributes \$10m a year to the \$1bn budget of the famously ineffective ICC. We might reconsider how our participation can be worthwhile.

Major powers declined to join the ICC. It is principally a tool for small to medium countries to leverage political power. Last weekend's Pre-Trial Chamber judgment purports to elevate UN General Assembly recommendations into international law for the ICC to enforce upon them. This undemocratic global legalism merely empowers lawyers, especially international judges, who are its most powerful and self-serving advocates. It is a legal regime for a fantasyland.

Greg Rose is a Professor of Law at the University of Wollongong specialising in international law. He submitted observations to the ICC as an amicus curiae in the case of the "Situation in Palestine".