Time to quit the UN’s criminal court

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A new year resolution for the Australian Government should be to withdraw from the International Criminal Court.

The court is recognised as becoming increasingly political across its 15 years of operation. A handful of mostly African cases are considered by it at an annual cost of a quarter of a billion dollars.

A familiar act of political cunning is to leave nasty public decisions until late Friday afternoon before holidays.

This was the Christmas gift of the prosecutor at the United Nations International Criminal Court. The decision on Friday, December 20, at 4pm to investigate Israel for war crimes and crimes against humanity came five years after a preliminary inquiry into “the situation in Palestine”. The ICC Palestine manoeuvre further threatens its credibility as an impartial judicial body.

Australia’s Department of Foreign Affairs and Trade spokesman said: “Australia is concerned by the ICC prosecutor’s proposal to consider the situation in the Palestinian territories. . . Australia’s position is clear — we do not recognise a so-called State of Palestine and we do not recognise that there is such a State party to the ICC’s Rome Statute.”

Most developed and democratic countries consider a State of Palestine doesn’t yet exist in any factual or legal sense. Canada signed on to the ICC and Canada will not co-operate with the ICC on this case. The US says that the ICC criminal investigation is unjustified and unfairly targets Israel.

UN decision-making on Israel is predetermined by widely acknowledged politicisation. All UN members have one equal vote but they vote in blocs. The sole Jewish State lacks a supporting bloc of UN votes.

UN institutional bias against the Jewish State has been critiqued even by the UN’s highest level officials, including consecutive secretaries-general.

The ICC treats UN General Assembly resolutions as legally authoritative. General Assembly members allocate institutional budgets and senior appointments in UN judicial bodies. The courts repay them with subordinate deference.

When political bias is reformulated as international legal principle, the UN court system itself falls into disrepute. The result is to both judicialise international relations and to politicise international law. For instance, the prosecutor refuses to investigate the legal situations in disputed territories, such as by Turkish settlers in northern Cyprus or by Russians in Ukrainian Crimea. However, Jews in disputed territory are supposedly criminal.

In another example, the ICC pre-trial chamber decided that the prosecutor should charge Israelis with war crimes, though the alleged incidents lacked gravity, according to the prosecutor herself. In contrast, the chamber decided against charging NATO members with more grave war crimes because it is “not in the interests of justice”. This is pure politics.

The ICC prosecutor personally is not an angel of impartial justice. Fatou Bensouda is accused in her native Gambia, before its Truth, Reconciliation and Reparations Commission, of responsibility for torture and arbitrary political detentions. She served as district prosecutor and as chief legal adviser to the dictator Yahya Jammeh, who took over The Gambia in a coup in 1994 that led to repression and a wave of atrocities. Her appointment as prosecutor in 2011 adjusted the optics of ICC prosecution only of Africans and only by white men.

Essential to civilised government is non-political, non-arbitrary administration of the rule of law. Presently, Australia has voluntarily consented to the broad authority of the UN International Court of Justice. However, that court’s power to determine matters that can affect Australia should be revised to be limited to matters specifically consented to by Australia.

The ICC is a different court that prosecutes regardless of consent by the country of nationality of the accused person. In cases against Australians and citizens of Australian allies, Australia should legislate against assistance to the ICC.