Lawfare is not the path to peace

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Foreign Minister Marise Payne had good reason to express Australia’s deep concern over the International Criminal Court’s ruling that it has jurisdiction over “the situation in Palestine”. As University of Wollongong law professor Greg Rose pointed out on our Commentary page on Monday, the decision presages decades of prosecutions targeted at Israeli leaders for alleged war crimes, a goal that has long been a key ambition of Palestinian leaders in their campaign against the Jewish state.

Yet it is a judgment that is based in legal fantasy land given that, as Senator Payne noted, there is no such sovereign state as “Palestine” that has rights under the 2002 Rome Statute, the ICC’s founding treaty that forms the basis on which the court may or may not take action such as that demanded by the Palestinians. Neither is Israel among the 123 countries that have signed the statute, which mandates specifically that the ICC’s jurisdiction and right to act is reserved for, and confined to, only those countries that consent to it.

In 2015, Palestinian Authority president Mahmoud Abbas lodged a declaration under the Rome Statute accepting the ICC’s jurisdiction over alleged crimes committed “in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014”. He did so in a fit of pique after the rejection of a UN Security Council resolution demanding an end to Israeli occupation of the Palestinian territories, with the US and Australia voting against.

Buoyed by the ICC’s legal acrobatics in claiming jurisdiction to act on his complaint, Mr Abbas clearly will seek to use the court’s processes to try to cause major damage to Israel. But his real aim is likely to be to bolster his attempts to achieve Palestinian statehood through the back door with recognition of it by key international bodies such as the ICC, rather than through negotiating directly with Israel. It will be a pity if the ICC allows itself to be manipulated in this way. As Australia/Israel and Jewish Affairs Council executive director Colin Rubenstein said: “Palestine is not a state and international law should not be abused in order to manufacture one. A Palestinian state will only be created after negotiations with Israel to resolve important issues such as borders, refugees and the status of Jerusalem.” Yet implicit in the court’s 2-1 decision is acknowledgment by the ICC of Palestinian statehood.

No wonder Israeli Prime Minister Benjamin Netanyahu reacted so vehemently, denouncing the decision as “refined anti-Semitism” against the Middle East’s only functioning democracy and the only country in that region where the rule of law prevails. He has a point, not least because the ICC’s judgment can be read as drawing a moral equivalence between Israel and terror groups such as Hamas and Islamic Jihad.

Of course, any serious allegations against Israeli security forces ought to be investigated. As Dr Rubenstein pointed out, Israel has “an independent legal system which is quite capable of addressing any allegations of war crimes, and the ICC is only supposed to intervene where such domestic legal processes are not available. Rather than doing the bidding of Israel’s enemies, the ICC should focus on the egregious human rights breaches in Xinjiang, in Myanmar and in Iran.”

That is unlikely to happen. The ICC’s Palestinian overreach was encouraged by the League of Arab States and the Organisation of Islamic Co-operation, while key Muslim-majority nations have financial interests and political calculations above solidarity with Uighur coreligionists. This is not about justice and it’s not as if the ICC has credibility to squander. As for the Palestinian cause, the only path towards harmony and prosperity for this long-suffering people is for an end to angry gestures and futile manoeuvre. Palestinians deserve a leadership with a firm grasp of what is strategically possible and unafraid to take responsibility for good-faith negotiations with Israel.