

What does Palestinian membership of the International Criminal Court mean for Australia?

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Rob McLaughlin and David Letts ("Gaza conflict our concern", Times2, January 29,p5) have presented a myopic view of the options for Australia flowing from the acceptance by Palestine of the jurisdiction of the International Criminal Court.

Their first error is to suggest that the obstacle arising from Palestine not yet meeting the criteria to be a "state" under international law has been overcome. It has not.

Under international law, to be a state and, therefore, entitled to rights before the International Criminal Court, the Palestinian Authority would have to demonstrate it has a permanent population, a defined territory, a government that is in control of that territory; and capacity to enter into relations with the other states. As things stand, the territory any future state of Palestine might encompass is yet to be negotiated with Israel, and possibly Jordan (which has a majority Palestinian population), and it is not even clear if the claimed Palestinian state includes the Gaza Strip, where the Palestinian Authority was violently expelled by Hamas, which continues to rule there.

Secondly, in respect of that territory, there must be a government that is in control. The Palestinian Authority complains it does not have control even over the West Bank, by reason of continued Israeli occupation. So, on its own case, Palestine cannot meet the defined territory and government criteria. It simply cannot yet meet the requirements of international law.

The position of the Australian government consistently has been to make clear to the international community that the only way a state of Palestine can come into being is by negotiating in good faith for a two-state solution with Israel. Australia has consistently called for both Israel and the Palestinians to engage in just such negotiations. One must remember that in [2000](#), 2001 and 2008, Israel offered the Palestinians an independent Palestinian state in about 95 per cent of the West Bank and Gaza. These offers were either rejected or given no constructive response.

The authors suggest Australia might assist the Palestinian Authority with getting laws into place that would enable Palestine to prosecute offenders against international criminal law. The policy of the Palestinian Authority, publicly promoted, is to continue to verbally support active terrorist actions, which they call "resistance", until Palestinian claims are met. These actions, which, to the extent they target civilians, in large part might be crimes under international law, even though they are not regarded as crimes by the Palestinian Authority. It is unrealistic to imagine Palestinian authorities will suddenly agree to start prosecuting them.

Finally, the authors acknowledge the Commonwealth Criminal Code could characterise Palestinian Australians who fight in Palestine for Hamas' Izz al-Din Al-Qassam Brigades and Islamic jihad as committing "illegal hostile acts under Australian law". That is because these organisations are listed, quite accurately, by the Australian government as terrorist organisations.

In short, the position of the Australian government should continue to be that Palestine could become a state under international law, but only by engaging directly in good-faith negotiations with the state of Israel so that both a new state of Palestine (which does not yet exist) and Israel can live side by side in peace and security.

Meanwhile, Australia should continue to characterise participation in terrorist organisations and in acts of terrorism as illegal hostile acts.

And, consistently with that principled position, if Australia was ever asked to co-operate with the International Criminal Court in investigating a matter brought forward by the Palestinian Authority, Australia should politely but firmly object to jurisdiction. There is precedent for doing so. Australia objected to the International Court of Justice taking jurisdiction in the application for an advisory opinion concerning Israel's security barrier, a barrier that effectively stopped most terrorist incursions into Israel since the 1990s.

Perhaps next time Israel offers 95 per cent of the West Bank and Gaza for a new Palestinian state, the Palestinians will accept, and save themselves the massive expense of an international court case, which, in any event, will not bring the

Palestinians closer to statehood or improved prosperity.

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