

## al-shabaka policy brief

# PALESTINE'S DAY IN COURT? THE UNEXPECTED EFFECTS OF ICC ACTION

By **Valentina Azarova**

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## Overview

Palestine's membership of the International Criminal Court (ICC) formally goes into effect April 1, 2015. As Palestinians and proponents of international justice worldwide await the Office of the Prosecutor's next move, it is important to assess what heavy-lifting the ICC could realistically undertake in the Palestine-Israel context as well as what other accountability avenues exist.

Against the backdrop of Palestine's brief yet turbulent history at the ICC, Al-Shabaka Guest Author Valentina Azarova discusses the current state of play regarding Palestine at the ICC and its potential trajectory given the Court's practice and policy considerations. She also discusses Israel's legal offensive against the Palestinian move, including pressure against the ICC itself, the potential for an ICC examination to further other accountability efforts, including those directed towards third party actors, and the danger that the UN Security Council may suspend the investigation. In doing so, Azarova addresses many of the misconceptions that exist about what the ICC can and cannot do – including amongst Palestinian policy makers themselves. She concludes with policy recommendations for a way forward.

## Palestine & the ICC: The State of Play

The ICC was intended to serve as an international judicial body that pursues individual perpetrators of international crimes that “[deeply shock the conscience of humanity](#)”. Given its limited resources and capacity, it is expected to ensure the efficiency and effectiveness of its interventions in situations of conflict and mass atrocities, in order to combat impunity and deter acts that perpetuate conflict.

As with any international body, the International Criminal Court (ICC) is a political animal dependent on state consent. It is also a normative “powerhouse” of international legal enforcement against individual delinquents, embodying the common interests of law-abiding states. To protect the ICC's machinery, it should not be appealed to politically. Regrettably, all sides have subjected Palestine's move to trigger ICC jurisdiction – and with it, the basic service of justice – to the politics and compromises of the Palestinian statehood bid.

Palestine's accession to the [Rome Statute and 15 other treaties](#) on January 1, 2015 was the latest iteration of Palestine's statehood bid. The process began in early 2011 and saw Palestine gain membership of the United Nations Educational, Scientific and Cultural Organization (UNESCO) later that year. Palestine has now ratified or acceded to a total of 44 treaties and conventions, including eight UNESCO conventions in early 2012, and 20 other treaties, including key international humanitarian law (IHL) and international human rights law (IHRL) instruments, in April 2014.

The proponents of Palestine's statehood bid [framed](#) it as a move intended to "internationalize the conflict," level the playing field, and operationalize Palestine's political and legal rights as a state in the international system. Most of the discussion of these moves has focused on their political benefits – but [they also opened up](#) legal channels and mechanisms which could facilitate concrete achievements if implemented diligently and in good faith with other states and international bodies.

Palestinian and international human rights groups, which lauded the statehood bid for its potential to guarantee rights and accountability, lobbied Palestinian leaders to go to the ICC. They hoped it would restrain Israel's use of force, curb its illegal conduct, and provide at least a nominal judicial forum for victims to hold Israeli perpetrators accountable.

In fact, Palestine's history at the ICC predates the UN General Assembly vote to accord Palestine non-member observer state status in 2012. Some of the 400 complaints on file with the ICC Office of the Prosecutor (hereinafter also referred to as "the Prosecutor") were submitted by groups and individuals immediately after the 2008-2009 military offensive, Operation Cast Lead, in the Gaza Strip. These included complaints submitted by South African lawyers concerning their own nationals enlisted in the Israeli army and documented cases of war crimes allegations submitted by Palestinian human rights groups in Gaza.

In the aftermath of that offensive, in January 2009, the then Minister of Justice Ali Kashan sent an official declaration under Article 12(3) of the Rome Statute to the Office of the Prosecutor, then headed by Luis Moreno Ocampo. The Prosecutor slow-walked the process into oblivion by launching an unnecessary academic debate on the question of Palestine's status as a state in international law. If Palestine's statehood status were in doubt, the Prosecutor should have accepted Palestine's declaration, or referred the question to the [Pre-Trial Chamber](#).

After more than three years of deliberations, the Prosecutor abruptly issued a non-decision on 4 April 2012 requesting that the question be settled by the UN, although Palestine's statehood status [had been confirmed](#) in October 2011, when a majority of UN member states voted in favor of its membership in UNESCO.

Meanwhile, Israel, France, the United Kingdom (UK), the United States and others pressured Palestinian officials not to trigger the ICC, which further politicized the issue of the ICC. Nevertheless, on 25 July 2014, PA Justice Minister Saleem al-Saqqa and General Prosecutor Ismaeil Jabr submitted a letter to the Office of the Prosecutor, via a French law firm, requesting that investigations be opened on the basis of the 2009 declaration. However, the then Prosecutor Fatou Bensouda, [responded that](#) "only the Head of State, Head of Government and Minister of Foreign Affairs" could express Palestine's consent to be bound by the Court's jurisdiction. The letter stated that Palestine's Foreign Minister Malki,

who paid a visit to the Office of the Prosecutor on 5 August 2014, did not confirm that his government approved the request.

To disperse misconceptions about Malki's visit to her office in August 2014, Prosecutor Bensouda [authored an op-ed](#) in *The Guardian* and on 2 September 2014 her office [published a statement](#) clarifying that the "alleged crimes in Palestine are beyond the legal reach of the ICC" because the Palestinian government had not taken the necessary steps to trigger the Court's jurisdiction by either submitting a *new* 12(3) declaration, or acceding to the Rome Statute as a new State Party.

Meanwhile, on 6 November 2014, the Prosecutor decided not to open an investigation in response to the referral made by the Comoros Islands under [Rome Statute Article 14](#) regarding the May 2010 attack by Israeli forces that killed 10 civilians trying to reach the Gaza Strip in the "Gaza Flotilla" (the Comoros was a flag-state for a ship in the flotilla.) The Prosecutor held that, despite reasonable basis to believe that war crimes were committed on board the vessel, the incident was not of sufficient gravity to justify ICC action.

On 1 January 2015, after almost a two-year delay, Palestine sought to activate two triggering-mechanisms for ICC jurisdiction: It filed [a new 12\(3\) declaration](#) with a temporal scope dating back to 13 June 2014, to match that of the Commission of Inquiry on the 2014 Gaza conflict, and [it deposited accession instruments](#) to the Rome Statute with the UN Secretary General. The ICC registrar transferred the declaration to the Office of the Prosecutor on 7 January 2015, and the accession instrument was effected on 2 January 2015 to become operative from 1 April. The Office of the Prosecutor [announced](#) on 16 January 2015 that it had opened a preliminary examination on the basis of the 12(3) declaration. It should be noted that, while the ICC's Pre-Trial Chamber may weigh in on the issue of statehood at some point, it is strictly speaking not in a position to decide that Palestine cannot accede to the Rome Statute.

Statements made by Palestinian officials following the recent declaration and accession to the ICC – [including reports](#) that "the appeal to the ICC would be withdrawn if Israel were to freeze settlement construction" – indicate continued attempts to use the ICC as a political bargaining chip. However, short of Palestine withdrawing its declaration or accession, there it has no way to reverse the move and bring the ICC's ongoing preliminary examination to a halt in favor of a return to negotiations.

It should be noted that, according to Article 16 of Rome Statute, the UN Security Council does have the power to defer an investigation or prosecution for a renewable period of 12 months, if a UN Charter Chapter VII resolution is adopted by an affirmative vote of nine members with no vetoes. The provision, which mandates a strict construction of a threat to international peace and security, has only been used on two previous occasions (Resolutions 1422 and 1487 granting immunity to UN Peacekeepers from countries not party to the Statute). Yet there have been a number of other attempts to trigger the use of this proviso, and in the case of Palestine there are rumors that an Article 16 deferral of the ICC might be on the cards if a UN resolution setting parameters for a peace settlement is presented by France, which may be advocating one, or the US, which has made noises in this regard.

The scope of the examination and any specific cases ultimately chosen for prosecution by are also out of Palestine's control. For example, the Prosecutor would be unlikely to accept a limitation that seeks to

shield Palestinians from possible prosecution or to consider an a-la-carte investigations menu. All wrongdoing within the Court's jurisdiction in the Palestine-Israel context since 13 June 2014 may be held to account.

In addition, there are several hurdles on the way to opening actual criminal investigations, including the procedural criteria considered during the preliminary examination phase and the substantive hurdles pertaining to the choice of specific cases.

## Procedural Issues: Palestine's Options (and Lack Thereof)

The opening of a preliminary examination by the Office of the Prosecutor does not indicate that an investigation is likely to follow; most of the Prosecutor's preliminary examinations have been closed without opening investigations. Indeed, the Prosecutor opens a preliminary examination in every case referred to it. The preliminary examination stage consists of: Initial assessment of information; resolution of jurisdictional matters, identifying the location and type of crimes; considering questions of the admissibility of the situation and specific cases; and the effects of the Court's prospective action on the "interests of justice" in the broader Palestine-Israel context.<sup>1</sup>

Practitioners at the Court reported an attempt by Canada, on behalf of Israel and the US, to launch a campaign in the Assembly of States Party to prevent Palestine's accession. However, there is no official procedure for challenging accession. The UN treaty system has already been updated to include Palestine as the 123<sup>rd</sup> State Party of the Rome Statute and the ICC's website has done the same.

As of April 1, Palestine could submit a referral under Article 14, as a State Party to the Statute, to refer a "situation" without selecting specific cases; the referral's content could be new, or could consist of the content of the January 2015 Article 12(3) declaration. If Palestinian officials attempt to direct the Office of the Prosecutor's attention to specific cases, it may reject the referral. Any such referral, as is the case with a 12(3) declaration, would not limit the type of cases or evidence considered by the Office and is highly unlikely to direct the Prosecutor's attention away from Palestinian violations.

If the Prosecutor decides to open an investigation but decides to treat the 12(3) declaration as distinct from any referral that Palestine as a State Party might make after April 1, then the investigation would be opened *proprio motu* (i.e. on her own motion) and [Pre-Trial Chamber](#) approval would be required to proceed with the investigation. Alternatively, if the Prosecutor treats the 12(3) declaration as a state referral after Palestine's accession becomes operative, or if Palestine submits a referral under Article 14 with the same parameters, dating back to 13 June 2014 — no Pre-Trial Chamber approval is required.

If the Prosecutor declines to investigate, there would also be a procedural difference between a 12(3) declaration and a referral. If the Prosecutor's decision to decline investigation is based on

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<sup>1</sup>The author extends particular thanks to Professor Kevin Jon Heller, School of Oriental and African Studies (SOAS), University of London, co-editor of [Opinio Juris](#) and author of an impressive body of [relevant publications](#), for his insightful guidance and detailed explanations. Special thanks also go to Victor Kattan, Chantal Meloni, Ata Hindi, Mitchell Plitnick, and the reviewers.

considerations of the “interests of justice” Palestine could petition the Pre-Trial Chamber to initiate a “hard” review with option to reverse once it becomes a State Party on 1 April. If the decision not to investigate is based on admissibility concerns — including the lack of gravity of the situation or the availability of domestic prosecutions as happened [in the case](#) of the Comoros referral – the Chamber can only request the Prosecutor to reconsider, but cannot order it to do so.

Experts on the court have said that the Chamber is unlikely to second-guess a Prosecutor decision not to investigate or to refuse to approve a Prosecutor decision to open an investigation *proprio motu*. The Chamber has never ordered the Prosecutor to open an investigation. As Kevin Jon Heller has [remarked](#) in relation to the Comoros referral of the Flotilla case: “No one quite knows what would happen if the [Chamber] ever ordered the [Prosecutor] to conduct a formal investigation against its will.”

Thus, contrary to statements by Palestinian officials that Palestine *needs to* submit an article 14 referral on April 1 to direct the prosecutor to open an investigation – particularly into the settlements file, [as reportedly said](#) by Palestinian Foreign Minister Malki - the Office of the Prosecutor cannot be “forced” to open an investigation or to present a request to open a formal investigation to the Pre-Trial Chamber for approval. Nor, again, can Palestine as a State Party, post-April 1, direct the Prosecutor’s decision to consider investigation of some specific cases, and not others.

## Substantive Hurdles: Israel’s Attempts to Push Back

To open an investigation, the Office of the Prosecutor is required to examine the admissibility of the situation under the Court’s Statute and its own policy and practice. The elements relevant to the case of Palestine include the principle of complementarity; Israel’s official refusal to cooperate with the Court; and considerations pertaining to the “interests of justice.” These issues should be studied and addressed in the dossiers to be submitted to the Prosecutor.

The principle of complementarity gives precedence to national proceedings against alleged perpetrators of international crimes. Situations and cases are admissible if the state whose officials are responsible for the wrongful act remains inactive, undertakes actions that are deficient, or demonstrates unwillingness or inability (Article 17).

The threshold used to assess a State’s unwillingness to genuinely carry out investigations is based on an intention to shield perpetrators, an unjustified delay in proceedings, or a lack of independence and impartiality or genuine intent to bring perpetrators to justice (Article 17(2)). Other factual indicators include: hastiness indicative of a desire to whitewash allegations; an insufficient number of investigations opened; inadequate resources allocated to investigations, reflected in deficient evidence gathering methods and other procedural irregularities; an insufficient degree of independence; and the granting of immunities with a purpose of shielding, made possible by deficient legislation; and grossly inadequate sentences. Notably, the Office of the Prosecutor has affirmed that the crime charged does not need to mirror a crime prescribed by the Rome Statute; serious domestic crimes will suffice as long as they cover substantially the same conduct.

Israel's [track record](#) since Operation Cast Lead of prosecuting and convicting only four soldiers, and issuing the harshest sentence for a case of credit card theft, would almost certainly be deemed by the Prosecutor as insufficient to foreclose ICC jurisdiction. Israel's "Turkel II" report on investigative mechanisms for Israeli security forces has not led to any significant changes or any sign that the report's recommendations will be implemented.

The question is not whether Israel is "able" to conduct any investigations, but whether it is "willing" to do so given its long-standing legal and institutional practice, which includes refusing the application of IHL en bloc to Palestinian territory, extending the application of Israeli domestic legal jurisdiction to the West Bank, and rejecting the international consensus that the Gaza Strip is occupied territory. Furthermore, Israeli courts refuse to adjudicate certain matters, like settlement construction, through deference to the executive power's positions, and Israeli law treats settlements as part of Israel. In addition, Israeli legal and administrative practice for certain internationally criminal acts such as "targeted killings," punitive and administrative house demolitions, unlawful interrogation methods including torture indicate an unlawfully-expansive definition of military targets.

Israel, well aware of the complementarity principle, is clearly [taking steps to shield itself](#) from ICC investigation. Israel's State Comptroller, Judge Yosef Shapira decided in August 2014 to investigate decision-making by Israeli military and political echelons during Operation Protective Edge, [with reference to](#) "aspects of international law" and "Israel's mechanisms of investigating complaints and claims regarding violations of armed conflict according to international law and determined guidelines for such investigational procedures."

In addition, on 2 February 2015, news media reported that a legal team from the Prime Minister's Office, the Israeli army, and the Justice, Foreign Affairs, and Defense ministries, [are preparing](#) a joint report on Operation Protective Edge.

Israel's decision not to cooperate with the Court will present an additional substantive hurdle to the Prosecutor's ability to effectively conduct investigations, choose specific cases and pursue alleged criminals. Israeli non-cooperation may not present an obstacle to open-and-shut cases – including Israel's settlement activities, the effects of the Gaza blockade, and some Israeli attacks during Protective Edge. However, Israeli non-cooperation will hinder the Prosecutor's ability to investigate more complex cases concerning Israel's conduct of hostilities in Gaza, and some of the law enforcement operations conducted in the West Bank. If Israel refuses to provide its version of events, for instance, the Prosecutor might feel unable to launch and see through a criminal process alleging violations of the law of targeting.

The decision to open an investigation may in certain cases also be subject to the countervailing consideration of the "interests of justice." While the Court should not meddle with the prospects of peace when determining the interests of justice – which the ICC's very existence repudiates, and which the Office of the Prosecutor has officially disclaimed – it may [nevertheless conclude](#) that there are "substantial reasons to believe that an investigation would not serve the interests of justice" (Article 53(1)). Relevant considerations may include issues of crime prevention, security, and the duty to protect victims and witnesses.

However, the circumstances in which the “interests of justice” may be invoked are exceptional. The Rome Statute apparently addresses the potential that this vague criterion may cause mischief by providing the Pre-Trial Chamber with the power to conduct a “hard” review as noted above. Given that the Court’s role is “to guarantee lasting respect for and the enforcement of international justice,” a narrow interpretation of the “interests of justice” is consistent with the Statute’s object and purpose. It is reasonable to expect that the Court will see the need to intervene, while treading carefully, in a long-standing conflict in which victims experience an accountability vacuum.

The Prosecutor will also be bound to consider gravity: both in terms of the overall situation as well as regards specific cases. If it does open a formal investigation that appears defensible in terms of the gravity of the situation, it then has to decide which specific cases are important enough to pursue.

## What Might Some Specific Case Choices Be?

As part of the Office of the Prosecutor’s examination of issues of jurisdiction and admissibility, it will seek to identify cases based on the evidence available, including submissions by groups and individuals. The Office will identify specific incidents and patterns that fit within the Court’s jurisdiction over Palestinian territory (the West Bank, including East Jerusalem, and the Gaza Strip), including war crimes and crimes against humanity. In choosing specific cases, it will also take into account considerations such as the gravity of specific incidents and the “contextual” requirement that each crime have a connection to policies and practices that perpetuate atrocities. In addition, it will take into account its ability to see each case through, from evidence-gathering, to prosecution, to bringing alleged criminals before the court, in light of its limited resources.

No Prosecutor would be able to examine, let alone investigate every war crime committed within the ICC’s temporal jurisdiction in the Palestine situation. Yet, as Harvard Professor Alex Whiting, who served at the Office of the Prosecutor, aptly remarks, it is often made “to strike hard and nuanced balances” between pragmatism and principle.

The Prosecutor’s consideration of gravity, in particular at the level of specific cases, is not limited to quantitative criteria. As per its practice generally, all the crimes within the jurisdiction of the Court are grave enough to pursue; however, which crimes are actually pursued is a matter of the Office’s policy. For example, despite the relatively small number of people killed by rockets and mortars launched into Israel by Palestinian armed groups in the Gaza Strip, the attacks would most probably be considered grave enough for inclusion among the specific cases within the overall situation, especially given the political significance of investigating both sides. The relative ease of pursuing certain cases in terms of gathering evidence that supports charges of war crimes under the Statute could persuade the Prosecutor to pursue these attacks along with a number of more complex ones.

In the case of war crimes, the successful prosecution of high-ranking defendants involves showing an abuse of power and of the rule of law. In the Israeli case, the Prosecutor might demonstrate abuses based on domestic laws and institutional practice. Mark Osiel, an expert on mass atrocities, remarks that “the aim of international law [...] is precisely to remind and exhort that our relevant normative environment is never exclusively that of our particular nation-state and its law.”

The Office of the Prosecutor's limited resources and political sensibility make it likely to prosecute the safest cases, legally and practically speaking. Israeli settlements – which involve the unlawful and extensive appropriation of land, and the direct and indirect transfer of the occupier's civilians into occupied territory – are widely viewed as being among the soundest and strategically safe case in the Israeli-Palestinian situation. Settlement construction would not be possible without the legal and administrative machinery of state bodies, members of both the military and civilian governments. Private companies and individuals also play a crucial role: For instance companies registered with the Israeli Civil Administration (the military commander's government in occupied Palestine) facilitate fraudulent land transactions that trigger "state land" declarations, amongst other internationally-unlawful processes of land appropriation. This network of public and private perpetrators is both structurally significant and substantively relevant to the Prosecutor's "efficacy" consideration in choosing cases.

A key legal question concerning the settlements case would be whether the nature of the criminal act of appropriation and transfer of the settler population is "continuous" for so long as a given settlement continues to exist, or conversely whether the only crimes under ICC jurisdiction would involve unlawful appropriations or transfers of Israeli civilians into occupied territory that occurred after 13 June 2014, the temporal jurisdiction ascribed to the Court (the date set by Palestine in its 12(3) declaration.) There is limited practice in respect of this question.

The Prosecutor could also investigate whether a regime of apartheid results from the establishment of settlements and their ensuing effects – including two separate legal systems for Palestinians and Israelis that entrench systematic and widespread violations of humanitarian law. Despite the [overwhelming evidence](#), the Prosecutor might consider an apartheid prosecution to be excessively novel, challenging, and politically charged. Since the crime of apartheid is comprised in the main of sub-sets of war crimes, the Office might view investigating and prosecuting the latter crimes as a sounder legal and political strategy, and less resource-intensive, than a case that Israel's illegal regime in Palestinian territory amounts to apartheid. A complex prosecutorial agenda might also risk further delaying the opening of specific investigations.

Given the temporal scope for retroactive investigations under Palestine's new article 12(3) declaration, the Office of the Prosecutor might examine and where appropriate open investigations into Israeli and Palestinian actions during Israel's Operation Protective Edge in summer 2014. Here, the difficulty for the Prosecutor would be obtaining the facts and identifying specific Israeli decision-makers and commanders to ensure that prosecutions survive a criminal proceeding without being debunked by Israel's counter-claims. Some cases appear to present overwhelming evidence of war crimes, including the targeting of specially-protected civilian objects such as hospitals, or the undeclared policy of [targeting inhabited homes](#), the extensive and wanton [destruction of high-rise buildings](#) during the final days of the offensive, the Israeli army's use of [Palestinian civilians as "human shields."](#) and the indiscriminate use of heavy artillery in Rafah, Shujaiyeh, and Beit Hanoun. It is not unreasonable, in light of [the Office's practice](#), to expect that it will open investigations into difficult cases and gather sufficient facts to issue indictments even without Israel's cooperation.

## Israel's Campaign to Head Off the ICC

The Israeli official response to Palestine's moves at the ICC is unsurprising. Prime Minister Benjamin Netanyahu [reportedly ordered](#) the launch of a media campaign against the ICC, whereas Foreign Affairs Minister Avigdor Lieberman [went so far as to say](#) that it should be put out of business. The Court's leading supporters and funders, including Germany, the UK and France, [have so far resisted](#) Israel's call to cut the Court's funding. It is unclear what these governments might choose to do when the Office of the Prosecutor decides upon its next steps.

Some commentators have warned that the Israeli campaign [may not serve the best interests](#) of Israeli allies like the US and Canada, or even of Israel itself. Some years after the US "un-signed" the ICC Statute in 2002, the US State Department Legal Advisor said that a cooperative relationship with the ICC ultimately [served US interests](#) because of the large body of international support the ICC's enjoyed." Whiting argued that it would be [imprudent and counterproductive](#) "for the US to step back from the court now because of Palestine." Other experts have also [cautioned against](#) US government threats to cut off funding to the PA.

Israel legal offensive against Palestine's accession to the ICC in fact began in 2009, when it set out to refute Palestine's state status as a means of disqualifying its January 2009 12(3) declaration. Although UN General Assembly resolution 67/19 of November 2012 upgraded Palestine to non-member state observer, [the assertion that Palestine was not a state](#) was nonetheless the basis for Canadian, US, and Israeli objections to the UN Secretary-General, as depositary for the Rome Statute, regarding Palestine's accession.

Given that the Prosecutor no longer considers Palestine's statehood an issue, at least not after November 2012, the Israeli legal offensive on ICC jurisdiction has apparently shifted to the issue of complementarity. Israel has embarked on a series of potentially resource-intensive, prolonged investigations into alleged wrongdoing by its forces in the Gaza Strip, as described above. Among other things, the Israeli army spokesperson and other officials [have framed entire groups](#) of the Palestinian population in the Gaza Strip as either voluntary or involuntary human shields, often while seeking to justify attacks that could amount to war crimes.

Qualitative and quantitative [research on the impact of ICC actions](#) on unlawful harm to civilians, as well as Israel's campaign to head off the ICC, indicate that the prospect of ICC investigations and prosecutions are part of Israel's political calculus regarding Palestine. Indeed, one expert [argues](#) "Israel's fury gives credence to the view that the court is [...] a deeply relevant institution in international politics."

### Beyond the ICC: A Strategy to Broaden Accountability

The ICC is only one manifestation of the values, standards enshrined by states in international law. Even if the Prosecutor slow-walks the preliminary examination, not all is lost: Other processes of international law enforcement, some already underway, can benefit indirectly from the effects of an ICC

examination of Israeli violations.

Indeed, a Palestinian strategy to broaden the spectrum of international and inter-state accountability mechanisms and processes could ease the Prosecutor's political burden of having to deal with one of the most politicized conflicts in the world. The Palestinian bid to ratify international treaties has opened up a range of mechanisms and processes, such as those available under UNESCO treaties and the UN human rights system. But much work needs to be done to seize the opportunities that the bid has created.

There are substantial opportunities to hold the public and private sectors in Europe and North America to their own obligations under international law – as the [MATTIN Group's methodology](#) has demonstrated in the context of the European Union (EU) inter-state relations with Israel and as affirmed by the European private sector divestment wave in recent years. States' domestic regulation requires them to vet Israeli conduct and refuse dealings with private and public entities involved in or operating under illegal Israeli acts.

The ICC's examination of Israel's conduct could induce third party states, companies, and international organizations to review their engagements with Israeli entities and ensure that they do not give legal effect to unlawful Israeli conduct. In some cases, third states could even be obliged to trigger inter-state enforcement processes to obtain guarantees from Israel that condition the continuation of relations.

Actions third parties could take in relation to Israeli wrongdoing include: military, judicial and law enforcement cooperation, including multinational military training exercises (Israel's air force [was removed last October](#) from the list of armed forces taking part in training exercises in Sardinia); sale of arms and parts to Israel, given the unlawful use of certain weapons by Israeli forces; and restrictions on the travel and activities of specific Israeli individuals, political, military and private, involved in unlawful acts. The EU, for instance, has adopted [a combination of these measures](#) against Russia following its illegal annexation and demographic transformation of Crimea and Sevastopol.

The enforcement of international law can start with international institutions and norms that have concrete application in terms of obligations and enforcement measures in domestic law. For instance, UNESCO mechanisms [could be triggered](#) to determine that Israel's large-scale looting of artifacts and illegal excavations in occupied territory are international criminal acts. Such determinations could then be used to [trigger domestic processes](#) in third states, to ensure that persons, institutions, and companies involved in such acts are barred from carrying out their activities and bringing criminally-obtained property into third party state jurisdictions.

## **Outbidding the Bid: Conclusions and Recommendations**

Based on past practice as well as probable political considerations, some experts [predict](#) that the ICC may take years to open an investigation and several more to reach any decisions, short of declining to open an investigation. Others, like Whiting [maintain](#) that the Office of the Prosecutor's "pragmatism will not last forever" and it "will be compelled to move forward". Yet the heavily politicized nature of the Israeli-Palestinian conflict, the Prosecutor's limited resources and the lack of state cooperation mean that Palestine's trajectory at the Court might well follow those of Afghanistan and Colombia, where the

preliminary examinations have taken 8 and 10 years respectively. There is also the risk that any ICC action might be indefinitely postponed by the Security Council, as noted above, in order to restart the moribund peace process. The high stakes riding on the ICC's actions mean it is crucial that Palestine and its supporters should act strategically.

Palestine should realize that its interests are best served not by misconstruing the ICC as a political tool but rather by seeking to depoliticize the ICC's examination of the situation in Palestine. It should establish a common, informed official and public position on the significance of the ICC as an impartial mechanism intended to provide the basic service of justice. A 21 January 2015 Presidential Decree established a Supreme National Committee responsible for ICC follow-up and for preparing files, consulting with international experts, and coordinating with civil society. Two committees were also established that include a technical and a civil society committee. The National Committee has come in for some criticism for lacking solid expertise and clear and transparent decision making processes, among other things. Nevertheless, the Committee should make it a point to ensure that the Office of the Prosecutor accurately understands the Israeli legal system and Israel's intrinsically deficient practice in applying international law.

At the same time, the public should be kept informed. While some workshops and roundtables have been organized in recent weeks, the public remains largely in the dark about the state of play, and Palestinian official statements on the issue have varied, often with a counter-productive effect.

Moreover, Palestine needs to couple a legal strategy, at the ICC and beyond, with key housekeeping measures that show its commitment to international law. It should ensure domestic conformity with international human rights law, humanitarian law, and criminal law through adequate legislation and institutional practice. Indeed, it is hoped that Palestine's accession to the Rome Statute will promote necessary domestic legislative and institutional reform, and harness domestic interest and capacity to prosecute crimes – an effect of ICC accession known as "positive complementarity".

Another housekeeping issue that has yet to be adequately addressed involves the structure and responsibilities of the Palestinian government. There is an urgent need to distinguish between the PA, the government of the State of Palestine, and the Palestine Liberation Organization (PLO), which represents the State in its external relations.<sup>2</sup> It is crucial to clearly distinguish the actions of the PA, which are subject to political and circumstantial coercion by Israel, from the positions of PLO representatives who represent the state in its international relations.<sup>3</sup> Perhaps not even the settlements case would be straightforward if the ICC mistook the PA's actions pursuant to the Oslo Accords – which explicitly provided for settlement activity in some instances, albeit under coercion – for acquiescence to such activity by a Palestinian government.

The ICC's action might indirectly help to clarify of Hamas' position within the structures of Palestinian government. The question of whether Hamas, as a local government, is responsible under international law treaties and conventions signed by the federal government of Palestine is consequential, since,

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<sup>2</sup>Palestine's 12(3) declaration was regrettably submitted to the ICC in 2009 on Palestinian Authority rather than PLO letterhead.

<sup>3</sup>See Valentina Azarova, An international legal demarche for human rights? Perils and prospects of the Palestinian UN bid, *International Journal of Human Rights*, Vol 18, No 4-5 (2014).

formally, Hamas officials are considered part of the Palestinian unity government.

Finally, given that the path to ICC investigations is expected to be long and tumultuous, it will be crucial to garner the support of friendly states for independent ICC action. Moreover, the support of friendly states, and states that have enshrined their commitment to international law in their domestic orders will be essential to counter efforts by Israel and the US to politicize the issue. The EU's [Common Position on the ICC](#) and the policy commitments by states to the significance of the basic service of justice provided for by the ICC are “essential means of promoting respect for international humanitarian law and human rights,” and should be the basis for productive exchanges by Palestinian officials and civil society to seek advice and expertise and bring EU Member States on side.

*The Arabic translation of this policy brief will be available within the coming week and will be disseminated through social media.*

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