

# The ICC Prosecutor's statement on the Situation in Palestine: A Hand Stretched forth in Friendship?

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On 3 March the OTP of the ICC confirmed that it had initiated an investigation regarding the Situation in Palestine. The investigation will cover crimes within the jurisdiction of the Court that are alleged to have been committed in the Situation since 13 June 2014. The OTP statement was no surprise: according to Article 18 of the Rome Statute, upon the initiation of an investigation the Prosecutor must notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. Each of those states may, within one month of receipt of that notification, inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes under the Court's jurisdiction and which relate to the information provided in the notification. At the request of that state, the Prosecutor shall defer to the state's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorise the investigation.



The OTP's statement triggered the almost Pavlovian responses from Israel's leadership. Prime Minister Netanyahu labelled the decision to initiate an investigation is 'pure antisemitism' and Foreign Minister Ashkenazi called it 'moral and legal bankruptcy'. Not to be missed was a touch of whataboutism relating to Syria, as if the political constraints external to the Court that indeed prevent it from addressing international crimes in Syria justify inaction elsewhere. To top it all, the head of the legal desk in Makor Rishon, a daily newspaper associated with right-wing religious and conservative views, suggested that the Mossad should assassinate the ICC Prosecutor and judges (in a tweet he later removed).

Ironically, the OTP's latest announcement is possibly the least conflictual message that can be expected at the present stage, and its tone is as conciliatory towards Israel as could be hoped for. To begin with, unlike previous statements by the OTP, which followed decisions that could – and have been – debated as a matter of law and policy, the present statement is required under the procedure of the ICC. Moreover, as part of the complementarity mechanism, this statement enables and invites states, including Israel, to take steps that would defer action by the ICC. Nonetheless, Israeli politicians treated it as nothing more than an opportunity for another tirade against the OTP, when in fact it presents an opportunity for Israel to take steps that, at least to some extent, can counter (as Israel would see it) the investigation.

The tone of the OTP's statement is very different from previous ones. In some respects it seems to make a point of responding to Israeli complaints and accusations and attempting to assuage the Israel's concerns, without openly mentioning that it does so.

Perhaps most conspicuous is the fact that for the first time, the OTP states explicitly and repeatedly that the investigation concerns crimes against both Palestinian victims and Israeli victims. One can believe that this is in reaction to the Israeli media, which invariably presents the OTP as targeting Israel and Israelis only, failing to mention that the OTP is also looking at alleged crimes by Hamas and other Palestinian armed groups. As has been mentioned in the past, the latter are at least as vulnerable to indictment as Israeli military personnel, if not more so.

Secondly, the statement emphasises the OTP's non-political agenda, repeatedly referring to its statutory obligation and intention to adopt a principled, non-partisan, approach. This should probably be read against Israel's repeated accusations of the Court's anti-Israel and antisemitic bias. The mention of the OTP's obligation 'to investigate incriminating and exonerating circumstances equally' may allude to Israel's criticism of its decision relating to the flotilla incident, where, notwithstanding the decision not to commence an investigation, the Prosecutor maintained that there was reasonable basis to believe that war crimes were committed (by Israeli military personal) on board the Mavi Marmara, but dismissed claims of self defence as irrelevant at that stage.

Perhaps the strongest expression of the OTP reaching out to Israel is the Prosecutor's reference, 'by way of an example', to her decision not to open an investigation about the conduct of the Israeli Defence Forces on board the Mavi Marmara, when she found that there was not a reasonable basis to proceed in light of the Rome Statute criteria. The apologetic tone is almost a supplication, seeking to show that previous treatment of matters relating to Israel should have earned its trust in the OTP.

The statement ends with an appeal to the support and cooperation of the parties, mentioning Israel and Palestine specifically. With respect to Israel and Hamas, one should hardly expect unqualified engagement with the OTP in order 'to determine to justice may best be served within a framework of complementary domestic and international action', to 'achieve some measure of accountability and justice for the benefit of Palestinian and Israeli victims'. But even if Israel has a fierce – and legitimate – legal dispute with the Court, self-victimisation (on behalf of the Jewish people!) and name-calling will do nothing to advance its interests.