

March XX, 2021

The Honorable Joseph R. Biden
President
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

The Honorable Anthony J. Blinken
Secretary of State
U.S. Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Dear President Biden and Secretary Blinken:

We, the undersigned, write to share our deep concern regarding the recent decision of the International Criminal Court (ICC) to open a highly improper and discriminatory investigation into our closest ally, Israel, based on a referral to the ICC by the Palestinian Authority (PA). Recent reports suggest that your administration is actively considering the current situation of American-PA funding and relations, including the consequences of PA use of the ICC. We therefore write to urge that any outcome continue to ensure the full and effective implementation of longstanding American law governing Palestinian usage of the ICC, in conformity with American interests.

We note, with appreciation, that the State Department has already strongly objected to the Court's decision to open an investigation.¹ We believe that the ICC's determination here reflects a dangerous politicization of the Court. Unfortunately, for years, the PA has sought to use international organizations and international courts to avoid a directly negotiated path to peace. Successive administrations from both sides of the aisle have unequivocally supported negotiations as the key to a peaceful future. As a result, since 2014 the United States has made clear in annual appropriation legislation – adopted by a massive bipartisan majority every time – that if the PA were to initiate an ICC investigation, or if they were actively to support such an investigation, the United States would cut funding for the PA. This requirement was reaffirmed very recently, by a strong bipartisan majority, in the Consolidated Appropriations Act of 2021.²

Despite these clear warnings, the PA did initiate,³ and does continue to openly and officially support,⁴ such an investigation, and by law must be held to account for the willful disrespect of and disregard of American laws, values and interests.

The Palestinian Liberation Organization's mission in Washington D.C. was closed in compliance with the law prohibiting the existence of such an office – unless the President is able to certify that “the Palestinians have not initiated or actively supported an ICC investigation against Israeli nationals for alleged crimes against Palestinians”.⁵ Obviously, no such certification can be made.

For its part, the ICC's decision to allow “Palestine,” a non-state actor, to initiate an investigation into Israel a non-member state, is a serious affront to international law. The Court's assumption of jurisdiction depended on a panel of judges awarding Palestine ‘statehood’ under conditions that are inconsistent with well-established legal principles. In addition, Israel, like the United States, is not a party to the Rome Statute. The Court's appropriation of jurisdiction in the case of non-party states is especially egregious when it comes to the United States and Israel, countries with robust judicial and military justice systems. In ignoring these facts, the Court violates its own rules along

with the fundamentals of international law, including respect for sovereignty, consent, and complementarity with national legal systems.

The Court ignored these very same considerations last year when it initiated an investigation into our own American soldiers.⁶ Furthermore, the Palestinian Prime Minister recently made it clear that the PA intends to use the Court's new investigation into Israel as a way of taking American companies and organizations to the Court.⁷

In light of these considerations, we urge you to adhere firmly to established law governing the American reply to the PA's actions regarding the ICC. In addition, the current policies of the Executive Branch⁸ providing an answer to the ICC Prosecutor's political overreach should be maintained. These American actions provide for an unambiguous bipartisan response to efforts to use the ICC to challenge our sovereignty, our ability to defend ourselves, and the sovereignty and self-defense of our allies.

Sincerely,

¹ "Opposing International Criminal Court Attempts to Affirm Territorial Jurisdiction Over the Palestinian Situation," Press Statement by Ned Price, U.S. Department of State Spokesperson, February 5, 2021, <https://www.state.gov/opposing-international-criminal-court-attempts-to-affirm-territorial-jurisdiction-over-the-palestinian-situation/>

² Consolidated Appropriations Act, 2021, Public Law No: 116-260, enacted on December 27, 2020 <https://www.congress.gov/116/bills/hr133/BILLS-116hr133enr.pdf>; See: funding assistance for the Palestinian Authority (PA) is forbidden if they violate either of two conditions: (1) if they were to initiate an International Criminal Court (ICC) judicially authorized investigation; or (2) if they were to actively support such an investigation into alleged crimes committed against the Palestinians by Israel. Pub. L. No. 116-20, div. K, Department of State, Foreign Operations, and Related Programs Appropriations Act, 2021, § 7041(k)(2)(A), <https://www.congress.gov/116/bills/hr133/BILLS-116hr133enr.pdf>

³ "Referral by the 'State of Palestine' Pursuant to Articles 13(a) and 14 of the Rome Statute," https://www.icc-cpi.int/itemsDocuments/2018-05-22_ref-palestine.pdf, May 22, 2018; See also: "Declaration Under Article 12(3) of the Rome Statute Accepting the Jurisdiction of the International Criminal Court," January 1, 2015, https://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf;

⁴ See "Palestine welcomes decision by ICC Prosecutor to proceed with investigation," *Wafa News Agency*, March 3, 2021, <https://english.wafa.ps/Pages/Details/123512>; "Presidency appreciates ICC Prosecutor's decision to open a criminal investigation into the Situation of Palestine," *Wafa News Agency*, March 4, 2021, <https://english.wafa.ps/Pages/Details/123529>

⁵ See: Department of State, Foreign Operations, and Related Programs Appropriations Act, 2018, Public Law No: 115-141, div. K, § 7041(m)(2)(B), enacted on March 23, 2018, <https://www.congress.gov/115/bills/hr1625/BILLS-115hr1625eah.pdf>

⁶ Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, ICC-02/17-138, March 5, 2020, https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF

⁷ "Palestinian PM Dr. Mohammad Shtayyeh: As International Criminal Court Members, We Can Take American Companies And Organizations To Court," The Middle East Media Research Institute, March 1, 2021, <https://www.memri.org/tv/palestinian-pm-mohammad-shtayyeh-icc-we-can-take-american-companies-to-court>

⁸ <https://www.federalregister.gov/documents/2020/06/15/2020-12953/blocking-property-of-certain-persons-associated-with-the-international-criminal-court>