The PA is still ‘actively supporting’ an ICC investigation against Israel

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While the International Criminal Court (ICC) investigation against Israel has not been a focus of recent attention, make no mistake: the Palestinian Authority, which initiated the proceedings, is still doing its utmost to support, promote and advance the investigation. The P.A.’s continued efforts in the ICC activate provisions in U.S. legislation prohibiting the administration from providing the bulk of its aid to the P.A. and preventing the reopening of PLO offices in the country.

According to P.A. Minister of Foreign Affairs and Expatriates Riyad al-Maliki, P.A. meetings with ICC prosecutor Karim Khan are ongoing. Khan had even made several requests for the assistance of the P.A., which decided to cooperate “so that the investigation will begin,” al-Maliki told P.A. TV on March 5.

“Yes, we are in contact, but unfortunately it [the investigation of Israel] has not actually begun, for several reasons. As you know, the previous prosecutor [Fatou Bensouda] left and a new chief prosecutor arrived. After we met with him a number of times he said that he first of all needs to take his place and determine the priorities, to look at the cases before him and determine the priorities of the cases, and to see what his capabilities are in terms of economic capabilities and manpower, in order to determine which resources to allocate to each case so he will begin its investigation. Until now he is busy with this,” said al-Maliki.

“He sent us a letter directly and said that he expects us to help him so that his representatives will be able to come to Palestine and begin the work. He made several requests of us that we need to help him with, and we agreed and said that we are prepared to cooperate with all these requests so that the investigation will begin. We hope that soon we will meet with him at the ICC headquarters so that we will sit with him and understand what the result is of all these preparations, and whether the Israel-Palestine case is one of the priorities that he determined at this stage and which resources he has dedicated to this case, so that we will be able to see what can be expected and when and how and at what point [emphasis added],” he added.

Al-Maliki’s update followed his demand in June that the new ICC prosecutor give priority to the cases submitted by the “State of Palestine” and to expedite the opening of the investigations.

Omar al-Awadallah, the head of the P.A. Foreign Ministry’s U.N. department, told P.A. TV on Feb. 28 that the P.A. was in ongoing contact with the ICC.

“The discussion with the International Criminal Court continues. Every crime that is committed in the occupied lands is characterized according to the rules of international law, and we let all the relevant international bodies know about this, from the special investigators of the [U.N.] Human Rights Council, on to U.N. Secretary-General [António Guterres], [U.N.] General Assembly President [Abdulla Shahid] and the president of the [U.N.] Security Council, and up until the international courts, including the ICC.”

These efforts by the P.A. are nothing new. As [Palestinian Media Watch](https://palwatch.org/) has already [exposed](https://palwatch.org/page/23847), in May 2021, the head of the P.A. Attorney’s Office for International Legal Cooperation Jamil Sajadiyeh described P.A.-ICC relations at length:

“Approximately 80 meetings have been held between Palestine and the ICC, of course with the office of [ICC] General Prosecutor [Fatou Bensouda]. There are nearly 60 cases and letters that have been submitted, all of them telling about the Israeli violations,” Sajadiyeh told P.A. TV’s “Palestine This Morning” on May 25, 2021.

“There are monthly reports … being submitted to the ICC through the general prosecutor and through the [P.A.] Ministry of Foreign Affairs. … Palestine has submitted [to the ICC] all it can in order to carry out these investigations. We are [working] according to the instructions of His Honor [P.A.] President [Mahmoud Abbas] and all the relevant parties regarding the pursuit of this criminal [Israel] that is committing despicable crimes every day. … Allah willing, we hope that very soon Palestine will be asked to provide the ICC with all that has been documented, and of course, we are also prepared to provide the ICC with anything that it will ask to document or clarify in the future,” said Sajadiyeh.

Implications pursuant to U.S. law

The P.A. promotion of the ICC investigation has two major implications vis-à-vis U.S. law, one that affects aid and one that impacts the reopening of the PLO offices in the country.

For the most part, U.S. bilateral aid to the Palestinians is divided into three categories: Aid provided from the Economic Support Fund (ESF); aid provided for International Narcotics Control and Law Enforcement (INCLE); and aid provided for Nonproliferation, Anti-terrorism, Demining and Related Programs (NADR). The ESF aid accounts for the vast majority of the aid.

Passed in January 2014 under the Obama administration, the Consolidated Appropriations Act, 2014 limited ESF aid should the Palestinians “obtain the same standing as member states or full membership as a state in the United Nations” or “initiate an International Criminal Court judicially authorized investigation, or actively support such an investigation, that subjects Israeli nationals to an investigation for alleged crimes against Palestinians.” The same provision has been adopted every year since, most recently as part of the Consolidated Appropriations Act, 2022, which became law on March 15.

The Consolidated Appropriations Act, 2022 also provides that in certain circumstances the president can waive that prohibition. To do so, however, the president needs to show that the Palestinians have not “obtained in the United Nations or any specialized agency thereof the same standing as member states or full membership as a state outside an agreement negotiated between Israel and the Palestinians; and (II) initiated or actively supported an ICC investigation against Israeli nationals for alleged crimes against Palestinians.”

Section 1003 of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 provides, inter alia, that the Palestine Liberation Organization (PLO) may not “maintain an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof” in the United States.

While PLO offices were opened in the United States despite this, they were [closed](https://palwatch.org/page/23835) under the Trump administration.

While the Palestinians have not had their status upgraded in the United Nations, since the P.A. is, by its own admission, clearly “actively supporting” an ICC investigation against Israel, the United States is prohibited from providing ESF aid to the Palestinians and the president may not invoke any waiver to allow the opening of a PLO office.

The PA is critical of the Biden administration for not renewing funding to the P.A. and for not allowing the PLO to reopen its offices in the United States. However, in reality, it is the P.A.’s own actions that are the obstacle.

Neither of the above provisions is new. Despite them, and with full knowledge of the repercussions of its decisions, the P.A. nonetheless decided to join the ICC and actively support an investigation against Israel. As in many cases regarding the P.A.’s complaints, they have no one to blame but themselves.

A brief history of the proceedings in the ICC against Israel:

In complete violation of the Oslo Peace Accords—a generic name used to describe a series of agreements between Israel and the PLO signed between September 1993 and September 1995—on Jan. 1, 2015, the P.A., calling itself “The Government of the State of Palestine,” lodged a declaration under Article 12(3) of the Rome Statute accepting the jurisdiction of the ICC over alleged crimes committed “in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014”

Membership in the ICC is limited to states. No independent “State of Palestine” has ever existed. The ICC and related mechanisms nonetheless allowed “Palestine” to join the court.

The date chosen by the P.A. was not coincidental. On June 12, 2014, Palestinian terrorists kidnapped three Israeli teens, sparking a substantial military operation in Judea and Samaria. Seeking to argue that the operation was arbitrary, the P.A. chose to curtail the jurisdiction of the court by requesting that its jurisdiction start on June 13, thereby removing any context for the Israeli operation.

On May 15, 2018, al-Maliki, in the name of the P.A., “referred to the [ICC] Prosecutor” the “situation in Palestine.” In the referral, al-Maliki baselessly accused Israel of committing a host of crimes.

The date of the P.A. referral was also not coincidental.

On Dec. 6, 2017, ex-U.S. President Donald Trump announced his intention to fulfill the requirements of the 1995 Jerusalem Embassy Act and move the U.S. embassy to Jerusalem. The opening ceremony of the new embassy in Jerusalem was held on May 14, 2018, the day preceding the P.A. referral.

Since no “State of Palestine” has ever existed, and since non-existent states can have no borders, in January 2020, the ICC prosecutor petitioned the court to define the “geographical jurisdiction” of the court regarding the “State of Palestine.” In the petition, the prosecutor asked that the court ignore the specific provisions of the 1949 armistice agreements between Israel and Egypt—that had occupied the Gaza Strip—and between Israel and Jordan—that had occupied Judea and Samaria—and the Oslo accords, and recognize the 1949 armistice lines as the borders of the “State of Palestine.”

Objecting to the petition, PMW joined with partners and submitted a [detailed brief](https://palwatch.org/page/17589) explaining why the court should reject the factually and legally flawed petition.

While considering the request of the ICC prosecutor, PMW [exposed](https://palwatch.org/page/17849) the illicit collusion between the prosecutor and the P.A., and that the P.A. had intentionally submitted a [falsified document](https://palwatch.org/page/17971) to the court. PMW also exposed that even statements made by P.A.’s own Justice Minister [nullified](https://palwatch.org/page/18335) the asserted jurisdiction of the court.

In February 2021, not unsurprisingly, two of the three judges of the ICC’s Pre-Trial Chamber I accepted the prosecutor’s arguments, invented the “State of Palestine” and set its borders as the 1949 armistice lines. The decision of the court was followed soon after, in March 2021, with a decision of the prosecutor to open a formal investigation against Israel. At the time al-Maliki boasted that the prosecutor had informed the P.A. of her decision but asked that it be [kept secret](https://palwatch.org/page/18644).