

***BRING U.S. POLICY IN LINE WITH
INTERNATIONAL LAW***

***The Legal Basis for Immediate Reversal of
Trump Policies on Palestine/Israel***

Legal Memorandum to the Biden/Harris Administration



**National Lawyers Guild
April 2021**

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About the National Lawyers Guild

The National Lawyers Guild (NLG) is the nation's oldest and largest progressive bar association; it is composed of lawyers, legal workers, law students, and jailhouse lawyers based on the founding principle that human rights are more important than property interests. The NLG was the first racially integrated bar association in the United States.

About the NLG Palestine Subcommittee

The Palestine Subcommittee is part of the NLG International Committee (IC), which supports legal work around the world “to the end that human rights and the rights of ecosystems shall be regarded as more sacred than property interests.” The IC seeks to promote U.S. foreign policy that engages rather than threatens, and that is based on a model of respect, rather than domination. To that end, the IC provides assistance and solidarity to movements in the United States and abroad that work for social justice in this increasingly interconnected world.

The Palestine Subcommittee, specifically, provides legal support to the movement for justice and freedom in Palestine. This includes working with Boycott, Divestment and Sanctions (BDS) movements, challenging repressive legislation, supporting the right to organize and speak on Palestine, advocating for Palestinian political prisoners, organizing delegations, and challenging directly U.S. and Israeli violations of international law and Palestinian rights.

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Introduction

Following four years of bullish and detrimental U.S. policy on Palestine and Israel under the Trump administration, the health, human rights, and humanitarian situation for Palestinians, both in Palestine and in the refugee camps of surrounding countries is dire. From withdrawing vital funding from humanitarian organizations that provide basic needs to Palestinian refugees and moving the U.S. Embassy to Jerusalem, to targeting human rights advocates in the United States, the Trump administration enacted a number of policies that have harmed both Palestinians and U.S. citizens, and continue to do so today. Further, in enacting the aforementioned policies, the Trump administration ignored many of the international commitments that the United States is charged to abide by, including core principles of international law. The Biden administration must not only correct course; it needs to go beyond Obama era policies to affirm and demonstrate its commitment to civil and human rights and international law, both at home and abroad. This memo prepared by the National Lawyers Guild¹ provides the factual background and legal framework for the Biden administration to begin this overdue transition and affirm its respect for universal human rights and the rule of law.

Summary of Recommendations

- Return the U.S. Embassy to Tel Aviv to put the United States in compliance with U.N. Security Council resolutions and signal to the international community the Biden administration's intent to respect international law.
- Issue a clear and unequivocal policy statement on Israel's settlements, clarifying that the U.S. position is in line with the 1978 State Department legal opinion (Hansell memorandum) and with U.N. Security Council resolutions, including Resolution 2334 (2016), which affirm that all Israeli settlements in the West Bank, including East Jerusalem, are illegal.
- Reinstate all guidelines and restrictions differentiating between Israel and the occupied Palestinian territory in bilateral dealings, which were removed by the Trump administration.
- Reverse the Trump administration's guidelines for labeling imports originating in the West Bank and Gaza so these products clearly disclose that they were produced in the occupied Palestinian territory.
- Rescind Trump's March 2019 proclamation recognizing Israel's illegal annexation of the Syrian Golan Heights and refrain from any further actions or statements that may appear to

¹ The National Lawyers Guild (NLG) is the nation's oldest and largest progressive bar association and was the first one in the United States to be racially integrated. Our mission is to use law for the people, uniting lawyers, law students, legal workers, and jailhouse lawyers to function as an effective force in the service of the people by valuing human rights and the rights of ecosystems over property interests. The NLG's Palestine Subcommittee has been involved in supporting the human rights of Palestinians and Palestine advocates across the country for decades. Our members come from a range of organizations committed to protecting people's civil and constitutional rights and defending the right to dissent and protest, including the right to boycott. See www.nlg.org/about and www.nlg.org/committees

legitimate Israel's illegal actions.

- Reinstating aid to agencies, specifically to the United Nations Relief and Works Agency (UNRWA), which provides critical basic needs for Palestinians.
- Call for an immediate end to Israel's 15-year punishing closure of Gaza—an unlawful policy of collective punishment that has devastated the lives of the Palestinian population; and condition U.S. aid to Israel on its compliance.
- Issue an executive order bypassing the consent provisions of the Promoting Security and Justice for Victims of Terrorism Act (PSJVTA) and allow the PLO mission to operate within the United States without triggering U.S. courts' personal jurisdiction over the PLO and/or its representatives.
- Notify Congress that the criteria laid out in Sec. 1004(a)(1) of the Taylor Force Act for making the relevant funds available to the Palestinians cannot be fairly or accurately verified and work with Congress to repeal the Act.
- Rescinding the Trump administration's executive order targeting investigations and prosecutions at the International Criminal Court (ICC) was a necessary step. The United States should refrain from any further interference with the independence of ICC judicial proceedings and consider ratifying the Rome Statute.
- Rescind Trump's executive order of December 2019 that falsely conflates political speech critical of Israel or of Zionism with antisemitism in an effort to stigmatize and suppress advocacy for Palestinian rights.
- Issue a declaration affirming that boycotts for human rights aimed at the policies of a country, including Israel, along with other such non-violent tactics, are a form of highly protected speech under the U.S. Constitution.

(1) Settlements and Sovereignty

Over its four years, the Trump administration made a number of critical policy changes aimed at nullifying Israel's status as a belligerent occupying power and legitimizing Israel's illegal settlement enterprise and unlawful annexation of Palestinian and Syrian land. These actions and policy positions not only broke with decades of stated U.S. policy; they also put Washington at odds with most of the international community, and rendered the United States in violation of numerous United Nations Security Council and General Assembly resolutions as well as core tenets of international law. The Biden administration should take immediate steps to reverse each of these policies as a starting point to bringing U.S. policy in line with international law.

- a. Legal status of Jerusalem and relocation of the U.S. Embassy

On December 6, 2017, President Trump signed a proclamation recognizing Jerusalem as Israel's capital and ordering the U.S. Embassy to be relocated from Tel Aviv to Jerusalem.² While the move purported to reflect the will of Congress, expressed in the 1995 Jerusalem Embassy Act,³ in actuality, it was part and parcel of the Trump administration's embrace of Israel's extremist and expansionist policies—policies that undermine Palestinian human, civil, and political rights and make the prospects of a just peace between Israel and the Palestinian people impossible.

Israel militarily occupied East Jerusalem,⁴ as well as the rest of British Mandate Palestine, in the June 1967 war. Within weeks of capture, it unilaterally expanded the municipal boundaries of Jerusalem,⁵ enlarging East Jerusalem nearly tenfold by taking sizable parts of the West Bank to the north, east, and south, and formally incorporating these areas into Israel.⁶ The United Nations rejected Israel's claims that its actions did not constitute annexation and passed a number of General Assembly and Security Council resolutions unequivocally condemning Israel's attempts to alter the status of Jerusalem.⁷ Among other actions, on November 22, 1967, the Security Council unanimously adopted Resolution 242, which emphasized the inadmissibility of acquisition of territory by war and called for the "[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict," and "[t]ermination of all claims or states of belligerency."⁸

Israel disregarded all related U.N. resolutions and, on July 30, 1980, formally legislated the annexation of East Jerusalem with the passage in the Israeli Knesset of the Basic (quasi-constitutional) Law – Jerusalem, Capital of Israel. This law declared “Jerusalem, complete and

² Presidential Proclamation Recognizing Jerusalem as the Capital of the State of Israel and Relocating the United States Embassy to Israel to Jerusalem, Dec. 6, 2018, <https://trumpwhitehouse.archives.gov/presidential-actions/presidential-proclamation-recognizing-jerusalem-capital-state-israel-relocating-united-states-embassy-israel-jerusalem/>

³ Jerusalem Embassy Act (Public Law 104-45), Nov. 8, 1995, <https://www.congress.gov/104/plaws/publ45/PLAW-104publ45.pdf>

⁴ Jerusalem was divided into East and West following the 1948 war. Before that, the United Nations Partition Plan for Palestine, U.N. Resolution 181 (November 29, 1947), had called for all of Jerusalem to be established as a *corpus separatum* — an international city administered by the United Nations. But this resolution was never implemented. In the lead-up to and during the 1948 war between Israel and surrounding Arab countries, Zionist forces engaged in the mass depopulation of Palestinian villages and neighborhoods of West Jerusalem. By the end of the war, Israel had expelled nearly 80,000 Palestinians from their homes in the city and made West Jerusalem part of the new state of Israel. Thereafter, the Hashemite Kingdom of Jordan assumed administration of East Jerusalem and the rest of the West Bank, until June 1967.

⁵ On June 27, 1967, the Israeli Knesset (parliament) passed a law providing that “the law, jurisdiction and administration of the State shall extend to any area of Eretz Israel [i.e. Mandatory Palestine] designated by the Government by order.” See Law and Administration Ordinance (Amendment No. 11) Law, 27 June 1967, <https://mfa.gov.il/mfa/foreignpolicy/mfadocuments/yearbook1/pages/13%20law%20and%20administratio%20ordinance%20-amendment%20no.aspx>. Another law was passed on the same day enabling the Minister of Interior to enlarge the area of any municipality by the inclusion within it of an area designated under the first measure. See Municipalities Ordinance (Amendment No. 6) Law, 27 June 1967, *id.*

⁶ B'Tselem, *East Jerusalem*, Jan. 27, 2019, <https://www.btselem.org/jerusalem>.

⁷ U.N. Security Council Resolutions 252 (1968), 267 (1969), 271 (1969), 298 (1971), 446 (1979), 465 (1980); and U.N. General Assembly Resolutions 2253 (ES-V) 1967), 2254 (ES-V) (1967), 31/106A (1976), 33/113 (1978).

⁸ S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967), <https://unispal.un.org/unispal.nsf/0/7D35E1F729DF491C85256EE700686136>.

united” to be the capital of Israel and the seat of its government.⁹ In response, the U.N. Security Council passed Resolution 478 on August 20, 1980, in which it censured Israel “in the strongest terms” for the enactment of the basic law on Jerusalem and its “refusal to comply with relevant Security Council resolutions.”¹⁰ Further, the resolution declared “that all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem ... are null and void and must be rescinded forthwith,” and it called on all member states with diplomatic missions in Jerusalem to withdraw them from the Holy City.¹¹

Still today, the international consensus largely remains that Israel is occupying East Jerusalem and that its *de facto* and *de jure* annexation of the city is illegitimate. The U.N. Security Council most recently underscored this consensus and its legal basis in December 2016, with the passage (14-0-1) of Resolution 2334.¹² This resolution, from which the Obama administration decided to abstain rather than use its veto power to shield Israel, reaffirmed that Israel's settlement activity constitutes a “flagrant violation” of international law and has “no legal validity.”¹³ Further, the resolution demands that Israel “immediately and completely cease all settlement activities” and fulfill its obligations as an occupying power under the Fourth Geneva Convention; and it reiterates its call on member states to refrain from recognizing the unlawful situation created by Israel’s actions.¹⁴

On December 17, 2017, the United States exercised its veto power to prevent the passage of a Security Council resolution condemning the Trump administration’s proclamation of Jerusalem as Israel’s capital. But the United States could not prevent an emergency special session of the General Assembly, held four days later, which affirmed the illegality of Israel’s actions and called on “all States to refrain from the establishment of diplomatic missions in the Holy City of Jerusalem, pursuant to Council resolution 478 (1980).”¹⁵ The emergency resolution further demanded “that all States comply with Security Council resolutions regarding the Holy City of Jerusalem, and not recognize any actions or measures contrary to those resolutions.”¹⁶

⁹ Basic Law: Jerusalem, Capital of Israel. (July 30, 1980),

https://www.knesset.gov.il/laws/special/eng/basic10_eng.htm

¹⁰ S.C. Res. 478, ¶1, U.N. Doc. S/RES/478 (Aug. 20, 1980), [https://undocs.org/S/RES/478\(1980\)](https://undocs.org/S/RES/478(1980)); *see also* S.C. Res. 476, U.N. Doc. S/RES/476 (Jun. 30, 1980), [https://undocs.org/S/RES/476\(1980\)](https://undocs.org/S/RES/476(1980)).

¹¹ *Id.* S.C. Res. 478, ¶¶3, 5.

¹² S.C. Res. 2334, U.N. Doc. S/RES/2334 (Dec. 23, 2016),

<https://www.un.org/webcast/pdfs/SRES2334-2016.pdf>; Former Canadian ambassador to the United Nations, Paul Heinbecker, noted that Security Council Resolution 2334 “reflects what the world thinks.” Paul Heinbecker, *Ignore the political theatre, Resolution 2334 has global support*, The Globe and Mail, May 17, 2018, <https://www.theglobeandmail.com/opinion/ignore-the-political-theatre-resolution-2334-has-global-support/article33448958/>.

¹³ *Id.* S.C. Res. 2334, ¶1.

¹⁴ *Id.* S.C. Res. 2334, ¶¶2, 5.

¹⁵ G.A. Res. ES-10/19, U.N. Doc. A/RES/ES-10/19 (Dec. 21, 2017), <https://undocs.org/en/A/RES/ES-10/19>.

¹⁶ *Id.*

Under Article 25 of the Charter of the United Nations, U.N. Security Council resolutions are legally binding on member states.¹⁷ The argument made by some, that only resolutions adopted under the Security Council's Chapter VII powers are binding, finds no support in law. The International Court of Justice made this clear in its 1971 *Namibia* advisory opinion, explaining that the question of whether a particular provision of a Security Council resolution is legally binding depends not on whether it was adopted under the Council's Chapter VII powers, but on whether the Council has chosen to use words within the provision indicating its intent to create a legally binding obligation.¹⁸ Applying this test, the court determined that operative paragraphs 2 and 5 of Security Council Resolution 276 were legally binding on all U.N. member states.¹⁹ These paragraphs of the *Namibia* resolution mirror the operative paragraphs of numerous Security Council resolutions condemning Israel's building of settlements in occupied territory and its annexation of occupied land,²⁰ including in regard to the obligations the resolutions place on U.N. member states.

In addition to the binding obligations created by the operative paragraphs of Security Council resolutions, it is critical to note that the resolutions of both the Security Council and the General Assembly addressing Israel's occupation recall and reaffirm applicable principles of customary international law. Most significant among these is the cardinal principle of the inadmissibility of the acquisition of territory by force – a peremptory norm of international law (*jus cogens*) from which states are not permitted to derogate.²¹ When serious breaches of peremptory norms of international law arise, third state obligations are triggered. Among these obligations are that of non-recognition and non-assistance.²²

Based on the foregoing, the relocation of the U.S. Embassy from Tel Aviv to Jerusalem not only constitutes a violation of Security Council Resolutions 478 and 2334, but is also a flagrant violation of the U.S. obligation not to recognize or assist a country's breach of a peremptory norm of international law.²³ We strongly recommend that the Biden administration reverse this move.

¹⁷ “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” United Nations Charter, art. 25, <https://legal.un.org/repertory/art25.shtml>.

¹⁸ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21) paras. 113-114, <https://www.icj-cij.org/public/files/case-related/53/053-19710621-ADV-01-00-EN.pdf>.

¹⁹ *Supra* note 18, at paras. 108-114, 133.

²⁰ *See, e.g.*, S.C. Res. 478, ¶5, U.N. Doc. S/RES/478 (Aug. 20, 1980), <http://unscr.com/en/resolutions/478>; and S.C. Res. 2334, ¶5, U.N. Doc. S/RES/2334 (Dec. 23, 2016), <https://www.un.org/webcast/pdfs/SRES2334-2016.pdf>.

²¹ Charter of the United Nations, Articles 1(2) and 2(4); *see* International Law Commission, Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, Jan. 31, 2019, A/CN.4/727, para. 56, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/024/33/PDF/N1902433.pdf?OpenElement>; *see also* ICRC, 1958 Commentary on Geneva Convention IV, Article 47, paras 275-276 (footnotes omitted), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=C4712FE71392AFE1C12563CD0042C34A>.

²² Int'l Law Comm'n, Responsibility of States for Internationally Wrongful Acts, art. 41 (Dec. 12, 2001), https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

²³ The U.S. Embassy move also likely violates the 1961 Vienna Convention on Diplomatic Relations, requiring a country to locate its embassy on the territory of the host state. *See* https://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf. In September 2018, Palestine instituted proceedings against the United States in the International Court of Justice (ICJ), asking

Returning the embassy to Tel Aviv would send an important message to the international community regarding the administration's respect for international law. The move should be promptly and decisively undertaken on that basis, irrespective of political pressure urging otherwise.

b. Legitimizing illegal settlements in the occupied West Bank

In November 2018, the Trump administration disavowed the 1978 State Department legal opinion (Hansell memorandum) and declared that “the establishment of Israeli settlements in the West Bank is not per se inconsistent with international law.”²⁴ This erroneous and misguided view of the legal status of Israel's settlements was subsequently reflected in the Trump “peace” plan, dubbed a smokescreen for annexation and apartheid by both Palestinian and Israeli human rights organizations.²⁵

Furthering the Trump administration's drive to legitimize Israel's land grabs, in October 2020, the United States and Israel amended three bilateral cooperation agreements to remove geographical restrictions that had previously prohibited U.S. funds from being used to finance projects in West Bank settlements.²⁶ Weeks later, in November 2020, the Department of State announced new guidelines requiring Israeli goods produced in illegal West Bank settlements to be labeled “Product of Israel” or “Made in Israel” when shipped to the United States.²⁷

Under international law, the West Bank (including East Jerusalem), captured by Israel in 1967, is “occupied territory.”²⁸ This legal status was confirmed by the International Court of Justice in its 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.²⁹ Israel, however, has consistently rejected this classification, arguing instead that the

the ICJ to declare that the United States is in breach of its obligations under the Vienna Convention and asking the Court to order the United States. to withdraw its diplomatic mission from the city. *See* Application Instituting Proceedings, Relocation of the United States Embassy to Jerusalem, Sept. 28, 2018, <https://www.icj-cij.org/public/files/case-related/176/176-20180928-APP-01-00-EN.pdf>.

²⁴ Secretary Michael R. Pompeo statements to the press, November 18, 2019,

<https://2017-2021.state.gov/secretary-michael-r-pompeo-remarks-to-the-press/index.html>.

²⁵ *See, e.g.,* Al-Haq, *Palestine: United States Plan to Entrench Israel's Apartheid Regime Must be Rejected*, Feb. 5, 2020, at: <https://www.alhaq.org/advocacy/16429.html>; B'Tselem on President Trump's "peace" plan: not peace, *Apartheid*, Jan. 28, 2020, at: https://www.btselem.org/press_releases/20200128_btselem_on_president_trumps_plan.

²⁶ Press release of the U.S. Embassy in Jerusalem, October 28, 2020,

<https://il.usembassy.gov/u-s-israel-expand-reach-of-binational-foundations-and-establish-new-scientific-and-technological-cooperation-agreement/>

²⁷ “Marking of Country of Origin,” U.S. Department of State press statement, November 19, 2020,

<https://2017-2021.state.gov/marking-of-country-of-origin/index.html>.

²⁸ U.N. Office of the High Commissioner for Human Rights, *Israeli settlements: UN expert condemns U.S. decision to “jettison international law,”* Nov. 19, 2019,

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25319&LangID=E>; *see also*

European Union Statement by High Representative/Vice President Federica Mogherini on Israeli settlement policy, November 18, 2019,

https://eeas.europa.eu/headquarters/headquarters-homepage_en/70610/Statement%20by%20High%20Representative/Vice-President%20Federica%20Mogherini%20on%20Israeli%20settlement%20policy.

²⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9) para. 78,

<https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>.

territory is “disputed” or “administered”³⁰—an argument widely rejected by the international community.³¹

If President Biden is serious about his plan to restore the United States’ standing and credibility in the world and to “rebuild strong hemispheric ties based on respect for democracy, human rights, and the rule of law,”³² the administration must demonstrate respect for international law. It can start by issuing a clear and unequivocal policy statement on the illegality of Israel’s settlements. Such a statement should declare the fallacy of the Trump administration’s November 2018 declaration and clarify that the U.S. position is in line with U.N. Security Council resolutions, including Resolution 2334 (2016), which affirm that all Israeli settlements in the West Bank, including East Jerusalem, are illegal.

In line with this policy statement, the State Department and all U.S. agencies should revert to using the correct terminology when referencing the occupied Palestinian territory. The Trump administration removed the word “occupied” from references to Gaza and the West Bank, including East Jerusalem, most notably in the State Department’s annual human rights reports.³³

The Biden administration should also take swift action to ensure that the United States is not lending recognition or support to Israeli settlements. This can begin with reinstatement of the guidelines and restrictions differentiating between Israel and the occupied Palestinian territory in bilateral dealings, which were removed by Trump. Specifically, the administration should reinstate the geographical restrictions on the agreements establishing three U.S.-Israel binational foundations: The Binational Industrial Research and Development Foundation, the Binational Science Foundation, and the Binational Agricultural Research and Development Foundation, thereby ensuring that U.S. funding is not directed to or otherwise used in occupied territory.

Further, the Biden administration should reverse Trump’s guidelines for labeling imports originating in the West Bank and Gaza. Section 304 of the Tariff Act of 1930 provides that, unless excepted, every article of foreign origin (or its container) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, “in such a manner as to indicate to the ultimate purchaser in the United States the

³⁰ Israeli Settlements and International Law, Israel Foreign Ministry website, Nov. 30, 2015, at: <https://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israeli%20settlements%20and%20international%20law.aspx>; see “Occupied Territories” to “Disputed Territories” by Dore Gold, *Jerusalem Center for Public Affairs*, Jan. 16, 2002, <https://www.jcpa.org/il/vp470.htm>.

³¹ See *supra*, note 25.

³² The Power of America’s Example: The Biden Plan for Leading the Democratic World to Meet the Challenges of the 21st Century. Biden-Harris Platform, 2020., <https://joebiden.com/americanleadership/>

³³ See U.S. Human Rights Report *Whitewashes Israel’s Abuses Against Palestinians*, Human Rights Watch, April 24, 2018, <https://www.hrw.org/news/2018/04/24/us-human-rights-report-whitewashes-israels-abuses-against-palestinians>; Compare: U.S. Department of State, Bureau of Democracy, Human Rights and Labor, Country Reports on Human Rights Practices for 2015, Israel and The Occupied Territories, <https://2009-2017.state.gov/j/drl/rls/hrrpt/humanrightsreport//index.htm#wrapper>, and 2019 Country Reports on Human Rights Practices: Israel, West Bank, and Gaza, <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/israel/west-bank-and-gaza>.

English name of the **country of origin** of the article³⁴ (emphasis added). Following the signing of the Declaration of Principles on Interim Self Government between the Palestine Liberation Organization (PLO) and Israel in 1994, the State Department advised the Department of Treasury that goods originating in the “West Bank” or “Gaza” should be marked as such without the word “Israel” appearing anywhere on the marking.³⁵ In 1997, this marking was further revised to “West Bank/Gaza,” to recognize and reaffirm the territorial unity of these two areas.³⁶ Pursuant to the Trump administration’s drive to validate Israel’s illegal annexation of occupied Palestinian territory, in a December 1, 2020 letter to U.S. Customs and Border Patrol, the Department of State issued new guidelines, instructing that goods produced in West Bank settlements were to be marked as “Israel,” “Product of Israel,” or “Made in Israel.”³⁷ The letter also directed that goods produced in the West Bank must be marked differently from those produced in Gaza, prohibiting conjunctive “West Bank/Gaza” markings.³⁸

By identifying goods produced in settlements as “made in Israel,” the Trump administration’s labeling scheme effectively bestows U.S. recognition on Israel’s claim to occupied Palestinian territory. This deceptive labeling scheme serves to defraud U.S.-based consumers, allowing them to believe that goods originating in illegal settlements are actually made in Israel. It also allows settlements to benefit from duty-free treatment under the terms of the U.S.-Israel Free Trade Agreement,³⁹ thereby rendering the United States in violation of its international law obligations not to recognize or render assistance to Israel’s illegal settlements.

What is more, distinguishing products made in the West Bank from those made in Gaza undermines the territorial unity of these areas and reinforces Israeli’s separation and fragmentation policy. This undercuts the United States’ purported support for a “two-state solution.”

The steps outlined above constitute the bare minimum that the Biden administration should do to begin bringing U.S. policies in line with its obligations under international law. The administration, however, should go beyond just reversing Trump administration policies, and take steps to ensure that its statements, policies, and actions in no way provide direct or indirect support for Israel’s settlements.

Toward this end, the United States should further develop its import labeling guidelines to require products originating in Israeli settlements to be marked as such, similar to what the European Union has done.⁴⁰ Notably, the European Court of Justice (ECJ) recently ruled that foodstuff imported

³⁴ 19 U.S.C. 1304 (as amended) 2018, <https://www.govinfo.gov/content/pkg/USCODE-2018-title19/html/USCODE-2018-title19-chap4-subtitleI-I-partI-sec1304.htm>.

³⁵ Federal Register, Country of Origin Markings on Products from the West Bank and Gaza, Notice by the U.S. Customs and Border Protection on 12/23/2020, <https://www.federalregister.gov/documents/2020/12/23/2020-28547/country-of-origin-marking-of-products-from-the-west-bank-and-gaza>

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Office of the United States Trade Representative, Israel Free Trade Agreement, Aug. 19, 1985, <https://ustr.gov/sites/default/files/files/agreements/FTA/israel/Israel%20FTA.pdf>

⁴⁰ EU Commission, Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967, Nov. 11, 2015,

from Israeli settlements must be labeled accordingly for the benefit of consumer protection.⁴¹ Among other things, the ECJ held that “the provision of information to consumers must enable them to make informed choices, with particular regard to health, economic, environmental, social and ethical considerations.” In this regard, the fact that foodstuff may originate in settlements established “as a manifest breach of international law” may be relevant to consumers.⁴² Indeed, failing to label settlement products accordingly is deceptive. Consumers have a right to know where the items they are purchasing originate from and to make an informed decision as to whether to purchase a product made in an illegal settlement. Accurately labeling settlement products is a clear imperative of U.S. law.⁴³ But it also leads to the logical next step of barring such imports altogether, since engaging in trade with illegal settlements serves to legitimize grave violations of international law.

In addition to ensuring that the U.S. government is not aiding or benefiting Israel’s settlements, the National Lawyers Guild urges the Biden administration to ensure that U.S. businesses and organizations too do not support Israel’s illegal settlement enterprise. As recognized in the U.N. Guiding Principles on Business and Human Rights, businesses have the responsibility to respect human rights, which necessarily entails the obligation to avoid causing or contributing to human rights abuses.⁴⁴ This is a responsibility to which the Obama administration urged serious effort and diligence and one that this administration should support and promote.⁴⁵ Businesses that fail to mitigate their contributions to human rights violations and instead, knowingly provide assistance that facilitates, exacerbates, or contributes to a violation are in breach of their obligations under human rights law and are complicit in the violation.⁴⁶ The Biden administration should issue guidance to U.S. businesses and corporations, reasserting the U.S. position on the illegality of Israeli settlements and emphasizing the responsibility of U.S. businesses and corporations to refrain from contributing to human rights abuses.⁴⁷ The Internal Revenue Service should also undertake investigations of U.S. organizations, registered as 501(c)(3) tax-exempt charities, funneling millions of

https://eeas.europa.eu/archives/delegations/israel/documents/news/20151111_interpretative_notice_indication_of_origin_of_goods_en.pdf

⁴¹ Court of Justice of EU Judgement on Labeling of Foodstuffs from Settlements, Nov. 12, 2019, <https://www.un.org/unispal/document/court-of-justice-of-eu-judgement-on-labeling-of-foodstuffs-from-settlements-non-un-document/>; see “EU court rules goods from Israeli settlements must be labeled,” Reuters, Nov. 12, 2019, at: <https://www.reuters.com/article/us-eu-court-israel-settlements/eu-court-rules-goods-from-israeli-settlements-must-be-labeled-idUSKBN1XM1WU>

⁴² *Id.*, at paras. 53-56.

⁴³ *Supra* note 34.

⁴⁴ Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, and Remedy” Framework submitted to the Human Rights Council, 17th Sess., May 30 - June 17, 2011, 11, U.N. Doc A/HRC/17/31 (Mar. 21, 2011), <https://undocs.org/A/HRC/17/31> (“U.N. Guiding Principles”).

⁴⁵ Responsible Business Conduct: First National Action Plan for the United States of America, Dec. 16, 2016, <https://2009-2017.state.gov/e/eb/eppd/csr/naprbc/265706.htm#FACILITATING%20RBC%20BY%20COMPANIES>

⁴⁶ See, e.g., *supra* note 44, U.N. Guiding Principles 22 and 25, at: <https://undocs.org/A/HRC/17/31>.

⁴⁷ For more on how doing business with Israeli settlements contributes to Palestinian human rights abuses, see Human Rights Watch, “Occupation, Inc.: How Settlement Businesses Contribute to Israel’s Violations of Palestinian Rights,” Jan. 19, 2016, <https://www.hrw.org/news/2016/01/19/occupation-inc-how-settlement-businesses-contribute-israels-violations-palestinian>.

dollars into illegal Israeli settlements. A 2015 investigation by the Israeli newspaper *Haaretz* revealed that at least 50 such organizations transferred over \$220 million to Israel's settlement enterprise between 2009 and 2013.⁴⁸

c. U.S. recognition of Israel's annexation of Syrian Golan Heights

On March 25, 2019, a presidential proclamation signed by Donald Trump recognized the occupied Golan Heights as part of Israel.⁴⁹ The directive made the United States the first country in the world to recognize Israeli sovereignty over the region, which is otherwise considered to be Syrian territory.

The Golan Heights is a mountainous region of southwest Syria that Israel occupied, along with the West Bank, Gaza Strip, and the Sinai Peninsula, during the June 1967 war. During the armed conflict that ensued from Israel's invasion, and shortly thereafter, Israel destroyed approximately 200 villages, farms, and built-up areas in the Golan and expelled their population, sparing only five villages (Majdal Shams, Buq'ata, 'Ayn Qunyah, Mas'ade, and al-Ghajar), and approximately 7,000 Syrians.⁵⁰ The rest of the population, somewhere between 70,000 and 130,000 people, were forcibly expelled or otherwise displaced from their homes⁵¹ and have been blocked by Israel from returning ever since.⁵² Today, the number of Syrians populating the five remaining villages in the Golan is roughly 27,000.⁵³

In July 1967, one month after militarily occupying the Golan Heights, Israel began building settlements in the newly occupied territory. By 1980, it had established 30 Jewish Israeli settlements over the ruins of the Syrian villages and farms that it had razed. Then, in 1981, Israel passed

⁴⁸ "Does Your Jewish Charity Donate to the Settlements?" *Haaretz*, Dec. 8, 2015,

<https://www.haaretz.com/does-your-jewish-charity-donate-to-settlements-1.5430962>

⁴⁹ Proclamation on Recognizing the Golan Heights as Part of the State of Israel, Mar. 25, 2019,

<https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-recognizing-golan-heights-part-state-israel/>

⁵⁰ Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories (2001)

<https://unispal.un.org/UNISPAL.NSF/0/9DF193391DD7C18A85256AFC00530DE6>; see also Uri Davis, Working Paper, *The Golan Heights under Israeli occupation 1967-1981*, University of Durham, Centre for Middle Eastern and Islamic Studies, Durham (1983) p.5.

⁵¹ Reports vary on the number of Syrians expelled or displaced as a result of Israel's invasion. The Syrian government maintains that it was about 130,000 (Permanent Mission of the Syrian Arab Republic to the U.N., October 2004, August 2005), while Israel says that it was only 70,000. (U.S. Committee for Refugees, 2002 Country Reports: Syria; Dammers 1998, p.189). Israeli historian Benny Morris writes, 80,000 to 90,000 Syrian civilians "fled or were driven from the Golan Heights." BENNY MORRIS, *RIGHTEOUS VICTIMS* (Vintage Books, 2001) ISBN 978-0-679-74475-7). Al-Marsad, a Syrian human rights organization in the Golan, reports a higher number, stating that more than 130,000 Syrians "were forcibly transferred or displaced from their homes and forbidden from returning." <https://golan-marsad.org/topic/forcible-transfer/>.

⁵² Today, this number is estimated to be roughly half a million. Al-Marsad, *Ownership to Occupation*, May 2012, p. 102, https://golan-marsad.org/wp-content/uploads/2021/01/ownership_to_occupation.pdf.

⁵³ Al-Marsad, *Majority of Syrians continue to refuse Israeli citizenship*, May 2018, archived at:

<https://web.archive.org/web/20200831152446/https://golan-marsad.org/majority-of-syrians-continue-to-refuse-israeli-citizenship/>; see also

https://www.cbs.gov.il/he/publications/doclib/2018/2.%20shnatonpopulation/st02_17.pdf

the Golan Heights Law, extending Israeli law and administration throughout the occupied territory,⁵⁴ effectively annexing it. Immediately, the U.N. Security Council unanimously passed Resolution 497, declaring the Golan Heights Law "null and void and without international legal effect."⁵⁵

As laid out above, annexing occupied territory is proscribed by customary international law. Security threats, an argument often made by Israel, and recently given credence without basis by Secretary of State Antony Blinken,⁵⁶ cannot serve as a justification for annexing the territory of another nation. Indeed, if security considerations were allowed to justify unilateral annexation, there would be no limit on the use and abuse of this pretense for territorial expansion, including against the United States.

Nor does Israel's legal argument—that international law does not prohibit the annexation of territory acquired in a defensive action—have any merit. The absolute prohibition against annexation applies whether the occupied territory was acquired through a war of aggression or a defensive war. The international community prohibited the acquisition of territory by war following the Second World War in order to discourage further conflict by revisionist states. The principle was articulated in the U.N. Charter (1945), in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (1970), and in other international law documents. It was on this basis that the U.N. Security Council called on Israel to withdraw from the Golan Heights in 1967 and why it declared Israel's 1981 Golan Heights law "null and void and without international legal effect." Nowhere in these international legal agreements or resolutions is the application of the principle limited to unlawful force, or to wars of aggression; rather, they refer to any "war" or "force." The logic behind this is fairly straightforward: a norm permitting defensive annexation would be extremely dangerous, tempting states to maneuver their way into a "defensive" war for political and territorial gain.

President Biden must rescind Trump's March 2019 proclamation recognizing Israel's annexation of the Golan, and the administration must refrain from appearing to legitimate Israel's illegal actions. Any recognition of Israel's claim over the Golan (or any other occupied territory) would usher in a new world order in which aggression, military occupation, and annexation create sovereignty. Left to stand, Russian President Vladimir Putin could use the U.S. position vis-à-vis Israel's annexation as a pretext to justify Russia's annexation of Crimea, and China could use it to justify its claims in the South China Sea. This is not the world order we want to encourage or create.

(2) Aid to Palestinians and the Status of Refugees

Prominent humanitarian aid organizations like the United Nations Relief and Works Agency for Palestinian Refugees (UNRWA) and the East Jerusalem Hospital Network, along with smaller organizations advocating for the rights of Palestinians and long targeted by pro-Israel groups, faced immense financial hardship under the Trump administration. In 2018, the Trump administration cut off some \$200 million in aid to the Palestinian Authority after the passage of the Taylor Force

⁵⁴ Israeli Ministry of Foreign Affairs, *Golan Heights Law*, Dec. 14, 1981,

<https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/golan%20heights%20law.aspx>.

⁵⁵ S.C. Res. 497, U.N. Doc. S/RES/497 (Dec. 17, 1981) [https://undocs.org/S/RES/497\(1981\)](https://undocs.org/S/RES/497(1981)).

⁵⁶ Reuters, "After Blinken remarks, Netanyahu says Golan will always be Israel's," Feb. 9, 2021, <https://www.reuters.com/article/israel-usa-golan-int/after-blinken-remarks-netanyahu-says-golan-will-always-be-israels-idUSKBN2A91YH>.

Act. For context, U.S. aid to the Palestinian Authority (PA) currently stands at about \$300 million a year, while annual military aid to Israel has reached \$3.8 billion.

One of the most visible and misguided actions of the Trump administration was its unilateral decision to withhold over \$300 million in aid from UNRWA. Trump made no effort to conceal that the decision was a politically motivated attempt to strong-arm Palestinians into capitulating to Israel's demands, stating, "We're not paying until you make a deal."⁵⁷ This abrupt decision was a radical departure from a policy that had been supported by every U.S. president across party lines in the seven decades since UNRWA's creation. In fact, UNRWA has enjoyed such support from U.S. constituents that it has historically received more donations from U.S. citizens than from any other country, including the entire European Union.⁵⁸

The Trump administration's actions had dire immediate consequences for refugees across the region. UNRWA provides vital life-saving services to Palestinians, which include vaccinations, 114 health clinics that handle 8.5 million patient visits a year, education for half a million stateless refugee children, and assistance for 1.7 million food insecure people.⁵⁹ As the organization scrambled for funds following Trump's announcement, vulnerable populations faced severe scarcity. These conditions were especially acute in Gaza, where 2 million people (half of them children), are forbidden from leaving a tiny strip of land barely twice the size of Washington, D.C. and where 44 percent of adults are unemployed. Over 40 percent of UNRWA's budget went toward providing services to 1.3 million of Gaza's population, including 262,000 children enrolled in 267 UNRWA schools there. In total, UNRWA provides services to over 5 million Palestinian refugees in Gaza, the West Bank, Lebanon, Syria, and Jordan.

One of the motivations behind the Trump administration's decision to withdraw aid to Palestine and thus bring its inhabitants to the brink of social death is the desire to unlawfully deny refugee status to thousands of people who fit within the definition under international law. From its inception, UNRWA was created to provide critical assistance to the over 700,000 Palestinians who were forcibly expelled from their towns and villages by Zionist paramilitaries during and soon after the creation of the state of Israel in 1948.⁶⁰ Since then, Israel has refused to allow Palestinians to return to their homes, thus violating Article 11 of U.N. General Assembly Resolution 194.⁶¹ This is how Israel created the refugee problem that the United States under Trump sought to diminish by attempting to cap the number of Palestinians it officially recognizes as refugees at only 500,000.⁶²

⁵⁷ Times of Israel, *Trump to US Jews: I won't give Palestinians aid until they make a deal with Israel*. Sept. 6, 2018, <https://www.timesofisrael.com/trump-to-us-jews-i-wont-give-palestinians-more-aid-until-theres-a-deal/>

⁵⁸ 2017 Pledges to UNRWA's Programmes (Cash and In-kind) - Overall Donor Ranking, Dec. 31, 2017, https://www.unrwa.org/sites/default/files/overalldonor_ranking.pdf

⁵⁹ UNRWA, "What We do," <https://www.unrwa.org/what-we-do>

⁶⁰ Al Jazeera. *The Nakba did not start or end in 1948*. May 23, 2017, <https://www.aljazeera.com/features/2017/5/23/the-nakba-did-not-start-or-end-in-1948>

⁶¹ G.A. Res. 194, U.N. Doc. A/RES/194 (III) (Dec. 11, 1948), <https://unispal.un.org/DPA/DPR/unispal.nsf/0/C758572B78D1CD0085256BCF0077E51A>

⁶² Haaretz. *Report: Trump to Demand Recognized Palestinian Refugees Be Capped at Tenth of Current Number*. Aug. 31, 2018, <https://www.haaretz.com/us-news/report-trump-to-cap-palestinian-refugees-at-tenth-of-current-number-1.6412962>

Jared Kushner admitted as much during a visit to Jordan in which he pushed for the refugee status of the 2 million Palestinians registered in the country to be dissolved.⁶³

Maintaining the Trump administration's policy would amount to supporting Israel's attempts to erase the vast majority of Palestinian refugees from the historical and contemporary record. The logic is that if the funding to the agency that feeds millions of refugees is stopped, they will no longer be considered refugees, thus paving the way for a deal on Israel's terms. But UNRWA has no authority to give or take away a person's refugee status; it is not a Palestinian agency, but was established by the United Nations through U.N. General Assembly Resolution 302 of 1949. The Biden administration must not further this unethical attempt to leverage humanitarian aid for political gain.

The Biden administration needs to signal a clear departure from these policies that callously disregard the most basic needs of marginalized communities. It must send a strong message to friends and allies across the world that the United States will address the long-term consequences of Trump's policies on the status of both Palestinian refugees and other refugees worldwide whose rights were violated over the past four years. We call on the Biden administration to depart from Trump's track record of targeting vulnerable groups like Palestinian refugees. The devastating impact of these actions cannot be overstated, and it can have far-reaching consequences if other countries should follow suit. Failing to recognize one group's connection to the land—or seeking to obliterate their legal rights as refugees—will undermine the cause of peace and profoundly damage the reputation and standing of the United States in the process. We thus exhort the Biden administration to condemn such a clear attack on the universality of human rights by immediately reinstating aid to UNRWA, which it has promised to do.

(3) Lifting the Illegal Gaza Closure⁶⁴

Israel's near-hermetic seal of the Gaza Strip and the resulting situation it has created, is dire, inhumane, illegal, and must immediately end. We therefore call on the Biden administration to exert utmost pressure on Israel, including by withholding foreign aid, until Israel lifts the illegal closure on Gaza.

Palestinians in Gaza have been subject for 15 years to an illegal closure imposed by the Israeli

⁶³ Al Jazeera. *Trump moving to strip Palestinians of refugee status: report*. Aug 4, 2018,

<https://www.aljazeera.com/news/2018/8/4/trump-moving-to-strip-palestinians-of-refugee-status-report>

⁶⁴ This memo uses the term “closure” to refer to the comprehensive land, sea, and air restrictions that Israel has unlawfully imposed on Gaza. The terms “blockade” and “siege” have also been used to refer to these restrictions. However, blockades and sieges are military tactics aimed at compelling surrender by preventing the adversarial force from receiving weapons that will enhance its combat ability. See Lieutenant Todd A. Wynkoop, JAGC, USN, *The Use of Force Against Third Party Neutrals to Enforce Economic Sanctions Against a Belligerent*, 1995, 42 Naval L. Rev. 91, at 103. Due to the legal status of Gaza as occupied territory, the resulting legal obligations that Israel—the occupying power—has towards the occupied civilian population, and the fact that most of the restrictions that Israel has placed on Gaza and the Palestinian civilians therein have no military justification, these restrictions cannot be considered a blockade or a siege. For more on this, see Gisha - Legal Center for Freedom of Movement, *Gaza Closure Defined: Collective Punishment*, Dec. 2008, <https://www.gisha.org/UserFiles/File/publications/GazaClosureDefinedEng.pdf>; Palestinian Center for Human Rights (PCHR), *The Illegal Closure of the Gaza Strip: Collective Punishment of the Civilian Population*, Dec. 2010, <https://www.pchrgaza.org/files/2010/Illegal%20Closur.pdf>.

authorities. The United Nations, International Committee of the Red Cross (ICRC), and numerous human rights organizations have condemned this closure, which severely restricts the movement of people and goods in and out of Gaza, as a form of collective punishment against a population primarily composed of refugees.⁶⁵ The resulting humanitarian crisis has caused unprecedented levels of hardship for the 2 million residents, half of whom are children.⁶⁶ The punishing closure has affected all social, economic, and political aspects of life for Gaza residents and has led to a tremendous and ongoing loss of human life.⁶⁷ These actions constitute a grave violation of human rights under international law. As a party to the Geneva Conventions, the United States must fulfill the obligations set out in common Article 1—to ensure Israel’s compliance with international law⁶⁸—and under Article 146 of the Fourth Convention, which binds countries to prosecute (or to hand over for prosecution) those accused of committing grave breaches, including wilfully causing great suffering or serious injury to body or health, as with Israel’s inhumane and deadly closure of Gaza.

The illegal closure has been repeatedly compounded by offensive Israeli military assaults on Gaza and the Palestinian population. Thousands of unarmed civilians, including children, have been killed, wounded, and permanently maimed in these assaults,⁶⁹ which also destroyed much of the critical infrastructure of the territory.⁷⁰ Large-scale military attacks on Gaza in 2008-09, 2012, and 2014 also

⁶⁵ See, e.g., U.N. Special Rapporteur on the Situation of Human Rights in the oPt, Israel’s collective punishment of Palestinians illegal and an affront to justice: UN expert, U.N. Press Release (July 17, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26111&LangID=E>; U.N. Office for the Coordination of Humanitarian Affairs, Statement on Gaza: USG for humanitarian affairs and emergency relief coordinator, Valerie Amos (June 13, 2012), <https://www.ochaopt.org/content/statement-gaza-usg-humanitarian-affairs-and-emergency-relief-coordinator-valerie-amos>; International Committee of the Red Cross, *Gaza closure: not another year!* June 14, 2010, <https://www.icrc.org/en/doc/resources/documents/update/palestine-update-140610.htm>; Al Haq, Al Mezan, PCHR and Aldameer, *Palestinian Human Rights Organizations & Victims’ Communication to the International Criminal Court Pursuant to Article 15 of the Rome Statute Requesting Investigation and Prosecution of The Illegal Closure of the Gaza Strip: Persecution and Other Inhumane Acts Perpetrated against the Civilian Population as Crimes against Humanity*, Nov. 2016, https://www.alhaq.org/cached_uploads/download/alhaq_files/publications/papers/22.Nov.GAZA.CLOSURE.pdf.

⁶⁶ Euro-Med Human Rights Monitor. *Suffocation and Isolation: 15 Years of Israeli Blockade on Gaza* 2020, available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/Gazareporteng.pdf>

⁶⁷ U. N. Office for the Coordination of Humanitarian Affairs: Occupied Palestinian Territory. *Gaza Strip: Snapshot*, February, 2021, <https://www.ochaopt.org/content/gaza-strip-snapshot-february-2021>

⁶⁸ For more on states’ obligation under common Article 1, see Laurence Boisson de Chazournes and Luigi Condorelli, *Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests*, International Review of the Red Cross, No. 837, Mar. 31, 2000, available at: <https://www.icrc.org/en/doc/resources/documents/article/other/57jqcp.htm>.

⁶⁹ B’Tselem, Fatalities Statistics, <https://statistics.btselem.org/en/all-fatalities/by-date-of-incident?tab=charts>

⁷⁰ See, e.g., U.N. Human Rights Council, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, Sept. 25, 2009, A/HRC/12/48, <https://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/a-hrc-12-48.pdf> (“Goldstone Report”); U.N. Human Rights Council, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, June 22, 2015, A/HRC/29/CRP.4, <https://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/ReportCoIGaza.asp> (“2014 Commission of Inquiry”); Al Haq, *Divide and Conquer - A Legal Analysis of Israel’s 2014 offensive against the Gaza Strip*, Feb. 2015, <https://www.alhaq.org/publications/8070.html>.

led to crippling losses for the population, leaving 108,000 Palestinians homeless, displacing almost half a million people, and amounting to a 27 percent decline in the per capita GDP.⁷¹ These unlivable material conditions have led to an unemployment rate of 49 percent by the end of 2020, one of the highest in the world.⁷² According to the Palestinian General Federation of Trade Unions, 90 percent of all Gaza workers either lost their jobs permanently or stopped working for months due to the COVID-19 outbreak, making them unable to provide for their families' basic needs without their typical \$3 dollar daily wage.⁷³ Poverty rates skyrocketed to 56 percent by late 2020, and the cost of lifting the population of Gaza out of poverty has jumped from \$209 million to \$838 million.⁷⁴ These dire conditions are exacerbated by Israel's constant assault on Palestinian livelihood. Among other things, there is near daily fire on Gaza fishers and farmers, land leveling operations, military raids, and herbicides sprayed on agricultural land.⁷⁵

The water supply in Gaza is scarce, polluted and mostly unsuitable for public use. Over 96 percent of the water from Gaza's only water aquifer is unfit for public consumption. Further, Israel's restrictions on the import of materials into Gaza has left Palestinians unable to address the sanitation infrastructure. As a result, over 100 million liters of raw or partly treated sewage is dumped into the Mediterranean Sea every day. The dilapidated sanitation system, the prevalence of contaminated water and sewage, and the lack of clean drinking water has caused a surge of water-borne diseases and other life-threatening illnesses, particularly amongst children.⁷⁶

The healthcare sector has been especially affected by the unlawful closure, leading to increased rates of chronic illness and preventable deaths.⁷⁷ Shortages of medicines, medical equipment, hospital infrastructure, and providers have left Gaza with a crippled healthcare sector to serve an already vulnerable population.

⁷¹ Al Haq. *Divide and Conquer: A Legal Analysis of Israel's 2014 Military Offensive Against the Gaza Strip*. 2015, https://www.alhaq.org/cached_uploads/download/alhaq_files/publications/DIVIDE.AND.CONQUER.pdf;

€ Euro-Med Human Rights Monitor. *Suffocation and Isolation: 15 Years of Israeli Blockade on Gaza* 2020
⁷² U. N. Conference on Trade and Development. *Israeli occupation cost Gaza \$16.7 billion in past decade*. Nov. 25, 2020, <https://unctad.org/news/israeli-occupation-cost-gaza-167-billion-past-decade-unctad-estimates>.

⁷³ Euro-Med Human Rights Monitor. *Suffocation and Isolation: 15 Years of Israeli Blockade on Gaza* 2020, <https://reliefweb.int/sites/reliefweb.int/files/resources/Gazareporteng.pdf>, at pp. 32-33.

⁷⁴ *Id.*

⁷⁵ U.N. OCHA estimates that there were 248 attacks on Gaza fishers between January and October of 2018 and 2019, <https://www.ochaopt.org/content/gaza-s-fisheries-record-expansion-fishing-limit-and-relative-increase-fish-catch-shooting>; see Al-Mezan Center for Human Rights, *Farming in a Buffer Zone: The conditions Gaza farmers face under closure, 2018-2020*"

<https://www.mezan.org/en/uploads/files/16142371071857.pdf>; see also Al-Mezan Center for Human Rights, "Human rights groups to Israel: Halt aerial herbicide spraying in Gaza Strip amid critical coronavirus outbreak," April 6, 2020, <https://reliefweb.int/report/occupied-palestinian-territory/human-rights-groups-israel-halt-aerial-herbicide-spraying-gaza>

⁷⁶ See Rand Corporation, *The Public Health Impact of Gaza's Water Crisis*, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR2500/RR2515/RAND_RR2515.pdf; see also Alliance for Water Justice in Palestine, *Water as a weapon against Palestinians*, July 21, 2020, <https://www.waterjusticeinpalestine.org/blog/2020/7/21/water-as-a-weapon-against-palestinians>

⁷⁷ World Health Organization, *Right to Health in the occupied Palestinian territory*, 2018, Oct. 9, 2019, available at: <https://reliefweb.int/report/occupied-palestinian-territory/who-right-health-occupied-palestinian-territory-2018>.

This health crisis has been alarmingly exacerbated by the outbreak of the COVID-19 pandemic, as Palestinians in Gaza have experienced high contagion rates and COVID-related deaths.⁷⁸ Despite this, the Israeli authorities that control virtually every aspect of life in Gaza have continued to fail to provide an adequate vaccine distribution, a situation that experts have characterized as medical apartheid.⁷⁹ The conditions that Palestinians in Gaza are forced to live under are not only inhumane and unjust, but illegal under international law. The Biden administration must immediately call for an end to the illegal Gaza closure; should Israel fail to abide by this demand, the administration must withhold all funding for Israel pending compliance.

(4) United States-Palestine Bilateral Relations

The Biden administration has an opportunity to not only restore, but to fundamentally reset U.S. diplomatic relations with Palestine. To do so, the administration must signal to the Palestinians a sincere respect for Palestinian aspirations for freedom, human rights and dignity – respect that goes beyond mere lip service and is manifested in policy. Practically, this means that the Biden administration must refrain from undermining the right and the ability of the PLO or PA to represent and politically advocate for the realization of those aspirations.

Two specific laws currently undercut that ability and must be addressed – the Promoting Security and Justice for Victims of Terrorism Act (PSJVTA) and the Taylor Force Act.

a. Background

On December 22, 1987, Congress enacted the Anti-Terrorism Act (ATA), declaring the PLO to be a terrorist organization and a threat to the interests of the United States and its allies, and stating that the PLO should not benefit from operating in the United States.⁸⁰ Section 1003 of the act, among other things, specifically prohibited the PLO from establishing or maintaining an office or presence in the United States.⁸¹ Six years later, following the signing of the Oslo Accords between Israel and the PLO in 1993, Congress passed the Middle East Peace Facilitation Act authorizing then-President Bill Clinton to suspend section 1003 of the ATA if the president certified that doing so advanced the national interest and that the PLO was abiding by its Oslo Accords commitments.⁸² Congress subsequently authorized the suspension in annual appropriations riders.⁸³

⁷⁸ U. N. Office for the Coordination of Humanitarian Affairs: Occupied Palestinian Territory. *COVID-19 Emergency Situation Report*, February, 2021, <https://www.ochaopt.org/content/covid-19-emergency-situation-report-28>.

⁷⁹ Science, The Wire. *Israel Is Demonstrating Medical Apartheid, Not Vaccine Leadership*. Jan. 1, 2021, available at: <https://science.thewire.in/health/israel-is-demonstrating-medical-apartheid-not-vaccine-leadership/>; Al Jazeera, *COVID-19 vaccinations are proof of Israel's medical apartheid*. March 23, 2021, available at: <https://www.aljazeera.com/opinions/2021/3/23/covid-19-vaccinations-are-proof-of-israels-medical-apartheid>

⁸⁰ Anti-Terrorism Act of 1987, Pub. L. No. 100-204, §§1002 – 1005, 101 Stats. 1407, <https://www.govinfo.gov/content/pkg/STATUTE-101/pdf/STATUTE-101-Pg1331.pdf>

⁸¹ *Id.* at §1003

⁸² Middle East Peace Facilitation Act of 1993, Pub.L. No. 103-125, §3(b)(2), (d)(2), 107 Stat. 1309, 1310, <https://www.govinfo.gov/content/pkg/STATUTE-107/pdf/STATUTE-107-Pg1309.pdf>.

⁸³ *See, e.g.*, Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, §539(d), 111 Stat. 2386, 2417–18 (authorizing six-month waiver if President certified it was “important to the national security interests of the United States”),

In 2017, Congress placed additional conditions on the suspension of section 1003, authorizing the president to issue a waiver only if the president could certify that the PLO had not obtained formal standing in the United Nations or any specialized agency outside of an agreement with Israel, and had not taken any action to prompt the International Criminal Court (ICC) to investigate Israeli nationals for crimes allegedly committed against Palestinians.⁸⁴ On September 10, 2018, the Trump administration ordered the PLO to close its Washington office. Although the PLO was not in compliance with the 2017 waiver provision by virtue of the fact that it had secured statehood recognition at the United Nations, joined various international agencies, and continued to press the ICC to open an investigation into Israeli crimes, the Trump administration cited Palestinian refusal to restart negotiations with Israel as the primary reason for shuttering the PLO office.⁸⁵

On October 3, 2018, Congress passed the Anti-Terrorism Clarification Act of 2018 (ATCA),⁸⁶ largely in response to a U.S. federal lawsuit against the PLO -- *Waldman v. PLO* -- that was dismissed on jurisdictional grounds. *Waldman* was brought by 11 families of U.S. citizens wounded or killed in various attacks against Israeli targets between 2000 and 2005.⁸⁷ On appeal from a \$655.5 million jury award, the United States Court of Appeals for the Second Circuit dismissed the lawsuit for lack of personal jurisdiction.

Congress attempted to remedy the issue of personal jurisdiction with ATCA by, among other things, providing that a defendant consents to personal jurisdiction in U.S. federal court for lawsuits related to international terrorism if the defendant accepts U.S. foreign aid from any of three accounts from which money to the PA/PLO typically flows. Following the passage of this act, Palestinians announced they would forgo receiving financial assistance from the United States, including security assistance,⁸⁸ effectively ending U.S. bilateral aid to the Palestinians.⁸⁹ Belatedly recognizing the

<https://www.congress.gov/105/plaws/publ118/PLAW-105publ118.pdf>; Department of State, Foreign Operations, and Related Programs Appropriations Act, 2012, Pub. L. No. 112-74, div. I, §7086(b), 125 Stat. 786, 1164, 1265 (authorizing six-month waiver if the President certified that Palestinians had not obtained member state standing in the United Nations or any similar agency outside of agreement with Israel), <https://www.govinfo.gov/content/pkg/PLAW-112publ74/pdf/PLAW-112publ74.pdf>.

⁸⁴ Department of State, Foreign Operations, and Related Programs Appropriations Act, 2017, Pub. L. No. 115-31, div. J, §7041(l)(2)(B), 131 Stat. 135, 589, 667-68, <https://www.congress.gov/115/plaws/publ31/PLAW-115publ31.pdf>.

⁸⁵ See, e.g., Laurie Kellman, *Trump closing PLO mission in pro-Israel move*, AP NEWS, Sept. 10, 2018, <https://apnews.com/article/22ab439a410042169cf96b0612fb8e5a>; see also U.S. Department of State Press Statement, “Closure of the PLO Office in Washington,” Sept. 10, 2018, archived at: <https://2017-2021.state.gov/closure-of-the-plo-office-in-washington/index.html>

⁸⁶ Anti-Terrorism Clarification Act of 2018, Pub. L. No. 15-253, 132 Stat. 3183, codified at 18 U.S.C. §2334(e), <https://www.congress.gov/115/plaws/publ253/PLAW-115publ253.pdf>.

⁸⁷ *Waldman v. Palestine Liberation Organization*, 835 F.3d 317, 322 (2d Cir. 2016), cert. denied sub nom. *Sokolow v. Palestine Liberation Organization*, 138 S. Ct. 1438 (2018), <https://www.scotusblog.com/wp-content/uploads/2017/03/16-1071-op-bel-2d-cir.pdf>

⁸⁸ Tovah Lazaroff, et al., *U.S. funding for Palestinian security services ends*, JERUSALEM POST, Jan. 31, 2019 <https://www.jpost.com/israel-news/us-funding-for-palestinian-security-services-set-to-end-today-579360>

⁸⁹ Matthew Lee, *In a twist, Trump fights to keep some Palestinian aid alive*, ASSOCIATED PRESS, Nov. 30, 2018; <https://www.nbcnews.com/politics/politics-news/twist-trump-fights-keep-some-palestinian-aid-alive-n942106>

potential negative consequences of ending security assistance to the Palestinian Authority, Congress and the Trump administration began to look for a fix.⁹⁰

b. Promoting Security and Justice for Victims of Terrorism Act

In December 2019, Congress passed the Promoting Security and Justice for Victims of Terrorism Act (PSJVTA).⁹¹ PSJVTA replaced certain provisions in ATCA that triggered consent to personal jurisdiction for terrorism-related offenses when a defendant accepts U.S. foreign aid. In place of that provision, PSJVTA provides that the following three actions trigger consent to personal jurisdiction:

- making payments to individuals imprisoned for “terrorist acts” against Americans or to families of individuals who died while committing “terrorist acts” against Americans;
- maintaining or establishing any PA/PLO office, headquarters, premises, or other facilities or establishments in the United States; or
- conducting any activity (other than some specifically exempted) on behalf of the PA or PLO, while physically present in the United States

Unlike ATCA, which did not name specific entities, PSJVTA expressly applies its new jurisdictional triggers to the PA and PLO, exclusively.⁹² While purportedly legislated to address the common obstacle for ATA claims -- i.e. the constitutional barriers to the federal courts’ ability to exercise personal jurisdiction over foreign defendants -- the PSJVTA goes beyond an attempt to obtain compensation for victims’ families and reverts to a 1980s approach of treating the PLO as a terrorist organization without national representative character. Delegitimization of the PLO has a negative impact on human rights advocacy by serving to validate or rationalize Israel’s violations of Palestinian rights as necessary security measures. It also further erodes the credibility of the United States as a party interested in peace and justice for both Israelis and Palestinians.

The extent to which Congress can provide by statute that a foreign entity is deemed to consent to personal jurisdiction is thus far untested but likely unconstitutional.⁹³ For nearly 80 years, the touchstone of the personal-jurisdiction analysis has been the question of whether a defendant has “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.”⁹⁴ Congress’ attempts to bypass this requirement with amendments to the ATA that trigger automatic consent to jurisdiction upon engagement in unrelated activities do not comport with due process protections. While a defendant can certainly consent to personal jurisdiction, the government cannot coerce defendants into giving

⁹⁰ Scott R. Anderson, *Congress Has (Less Than) 60 Days to Save Israeli-Palestinian Security Cooperation*, LAWFARE BLOG, Dec. 7, 2018,

<https://www.lawfareblog.com/congress-has-less-60-days-save-israeli-palestinian-security-cooperation>.

⁹¹ §903 of the Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, 133 Stat. 3082,

<https://www.congress.gov/116/plaws/publ94/PLAW-116publ94.pdf>

⁹² *Id.* § 2334(e)(5)

⁹³ At the time of this writing, two courts have granted plaintiffs’ motions to proceed with jurisdictional discovery into the areas specified in the PSJVTA, without reaching the question of constitutionality.. *See Estate of Klieman v. Palestinian Auth.*, Civil Action No. 04-1173 (PLF), 2020 U.S. Dist. LEXIS 227476, at *1 (D.D.C. Dec. 2, 2020); and *Shatsky v. PLO*, No. 18-cv-12355 (MKV), 2021 U.S. Dist. LEXIS 23565 (S.D.N.Y. Feb. 8, 2021).

⁹⁴ *International Shoe Co. v. Washington*, 326 U. S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945) (citation and internal quotation marks omitted).

up such constitutional protections.⁹⁵ Moreover, it is well settled that a condition attached to government benefits is unconstitutional if it forces the recipient to relinquish a constitutional right that is not reasonably related to the purpose of the benefit.⁹⁶ This concept applies to jurisdiction.⁹⁷ Thus, the PSJVTA's application of a consent provision to PLO/PA permission to operate in the United States constitutes an unconstitutional condition that will render the PSJVTA unable to withstand judicial scrutiny.⁹⁸

Even if the PSJVTA were constitutionally sound, it is politically and diplomatically problematic, and an obstacle to the administration's stated intentions of restoring credible U.S. relations with the Palestinians.⁹⁹ The Biden administration has already announced an intention to allow the PLO mission to reopen its office in Washington D.C.¹⁰⁰ In order for this to be a credible invitation to the Palestinians for diplomatic re-engagement, the application of the PSJVTA must be suspended, which President Biden can do.

The Constitution vests the president with the authority to conduct diplomacy on behalf of the United States.¹⁰¹ That authority includes determining whether to recognize a foreign entity as a sovereign and the degree of relations the United States should maintain with it. That authority also includes the power to receive and expel foreign representatives, and to determine the scope of their diplomatic activities in the United States. Congress cannot constitutionally intrude upon the president's ability to conduct foreign relations, including facilitating relations with the PLO in the United States.¹⁰² Because the PSJVTA politicizes and obstructs the ability of the executive to conduct diplomacy with Palestine, President Biden would be well within his authority to issue an executive order bypassing the consent provisions of the PSJVTA and allowing the PLO mission to operate within the United States without triggering personal jurisdiction.

⁹⁵ *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604, 133 S. Ct. 2586, 2594, 186 L. Ed 2d 697 (2013).

⁹⁶ See *Dolan v. City of Tigard* 512 U.S. 374, 385 (1994) ("Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right... in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property" (citations omitted)).

⁹⁷ Cf. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 893, 108 S. Ct. 2218, 2221 (1988) (Ohio statute permanently tolling limitations period as to foreign corporations that do not consent to general jurisdiction of state's courts unconstitutional); *In re Asbestos Products*, 384 F. Supp. 3d 532, 542 (2019) (applying doctrine of unconstitutional conditions to Pennsylvania business registration statute that conferred consent to general personal jurisdiction in exchange for ability to do business in the state.)

⁹⁸ Cf. Supplemental Brief of Defendants-Appellees in Response to the Amicus Curiae Brief of the United States, *Estate of Klieman v. Palestinian Auth.*, 923 F.3d 1115 (D.C. Cir. 2019) (No. 15-7034), 2019 WL 1399559 at *9 ("[B]ecause it coerces the surrender of Defendants' jurisdictional due process protections, ATCA Section 4 imposes an unconstitutional condition on benefits - financial aid, a Section 1003 waiver - that the United States might choose to offer.").

⁹⁹ Edith M. Lederer, *Biden announces restoration of U.S. relations and aid to Palestinians*, ASSOCIATED PRESS, Jan. 27, 2021,

<https://www.latimes.com/world-nation/story/2021-01-27/u-s-announces-restoration-of-relations-with-palestinians>.

¹⁰⁰ *Id.*

¹⁰¹ Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995, 20 Op. O.L.C. 253, 267 (1996).

¹⁰² See Statutory Restrictions on the PLO's Washington Office, Slip Op. O.L.C. (Sept. 11, 2018), <https://www.justice.gov/olc/file/1356291/download>.

c. Taylor Force Act

In March 2018, Congress enacted, and Trump signed into law, the Taylor Force Act.¹⁰³ Named after a military veteran who was killed in a 2016 stabbing attack in Tel Aviv, the Act restricts bilateral Economic Support Fund (ESF) aid to the PLO/PA unless the administration certifies that the Palestinians:

- are taking credible steps to end acts of violence against Israeli citizens and U.S. citizens that are perpetrated or materially assisted by individuals under their jurisdictional control, such as the March 2016 attack that killed former U.S. Army officer Taylor Force, a veteran of the wars in Iraq and Afghanistan;
- have terminated payments for acts of terrorism against Israeli citizens and U.S. citizens to any individual, after being fairly tried, who has been imprisoned for such acts of terrorism and to any individual who died committing such acts of terrorism, including to family members of such individuals;
- have revoked any law, decree, regulation or document authorizing or implementing a system of compensation for imprisoned individuals that uses the sentence or period of incarceration of an individual imprisoned for an act of terrorism to determine the level of compensation paid, or have taken comparable action that has the effect of invalidating any such law, decree, regulation, or document; and
- are publicly condemning such acts of violence and are taking steps to investigate or are cooperating in investigations of such acts to bring the perpetrators to justice.¹⁰⁴

The Taylor Force Act, similar to PSJVTA, is another piece of legislation aimed at sanctioning the PLO/PA for alleged support of terror. In mandating an end to PLO/PA payments to the families of Palestinians killed or imprisoned by Israel, the Taylor Force Act fails to recognize that Israel readily labels Palestinians as “terrorists” and denies them any kind of due process. Further, the Act does not distinguish between Palestinians who may have carried out attacks against civilians, and the majority of Palestinians killed or imprisoned as a consequence of Israel’s systemic denial of their basic rights, including due process and fair trial guarantees.¹⁰⁵ An estimated 20 percent of the Palestinian population in the occupied Palestinian territory—over 800,000, including thousands of minors—have been detained and imprisoned by Israel since 1967.¹⁰⁶ Between 2017 and 2019 alone, Israeli forces arrested 5,000 Palestinian minors between the ages of 12 and 18.¹⁰⁷ Some of those arrested are held for months and even years without ever being charged with a crime, much less

¹⁰³ Taylor Force Act, Title X of the Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, 132 Stat. 1143 (2018), <https://www.congress.gov/115/plaws/publ141/PLAW-115publ141.pdf>.

¹⁰⁴ *Id.*, at Sec. 1004(a)(1)(A)-(D).

¹⁰⁵ U.N. Human Rights Council, *Report of the U.N. High Commissioner for Human Rights*, U.N. Doc. A/HRC/37/42 (Feb. 21, 2018), <https://www.un.org/unispal/wp-content/uploads/2018/07/A-HRC-37-42.pdf>.

¹⁰⁶ See PLO Negotiations Affairs Department, Political Prisoners, <https://www.nad.ps/en/our-position/political-prisoners> (accessed March 21, 2021); Haaretz, “Over 800,000 Palestinians Imprisoned by Israel Since 1967, says Erekat,” Apr. 17, 2014, <https://www.haaretz.com/.premium-800-000-palestinians-jailed-since-67-1.5245393>.

¹⁰⁷ Elior Levy, *Tired and afraid, Palestinian children report brutal IDF arrests*, YNET NEWS, Dec. 4, 2020, https://www.ynetnews.com/magazine/article/rJkJ3GN5w?utm_source=ynetnews.com&utm_medium=social&utm_campaign=twitter&utm_term=rJkJ3GN5w.

tried. Those Palestinians who are charged are tried in Israel's military court system where they are afforded less rights than Israeli citizens who are adjudicated in Israel's civilian court system, and where the conviction rate is nearly 100 percent.¹⁰⁸

In addition to the aforementioned problems with the Act, its underlying suggestion that PLO/PA payments incentivize Palestinians to carry out attacks against Israelis is racist and trivializes the Palestinian freedom struggle. It implies, among other things, that Palestinians sacrifice their lives in exchange for financial compensation as opposed to in response to Israeli oppression. It also disregards the fact that Israel frequently exacts forms of collective punishment on the families of those accused of terrorism—punishment which can involve the demolition of the family home, rendering elderly parents, siblings, spouses, and children homeless.¹⁰⁹ PLO/PA subsidies to families does not compensate for the trauma or the financial loss of having a home demolished.

Finally, the legislation undermines the Palestinian leadership in a way that hinders the ability of the Biden administration to bring parties together and carry out foreign policy objectives. United States relations with Palestine should be truly bilateral—separate from the state of relations between the Palestinians and Israel. State Department spokesperson Ned Price said on February 2, 2021 that the Biden administration wants to renew humanitarian aid to the Palestinians quickly because Trump's suspension of aid "didn't achieve political progress or compromises from the Palestinian leadership and only harmed the Palestinian people."¹¹⁰ In line with this statement, the Biden administration should work with Congress to repeal the Taylor Force Act. In the interim, the administration should notify Congress, in writing, that the criteria laid out in Sec. 1004(a)(1) of the Act for making the relevant funds available to the Palestinians cannot be fairly or accurately verified. Specifically, Sec. 1004(a)(1)(b) requires the Secretary of State to verify that the PLO/PA

have terminated payments for acts of terrorism against Israeli citizens and United States citizens to any individual, *after being fairly tried*, who has been imprisoned for such acts of terrorism and to any individual who died committing such acts of terrorism, including to a family member of such individuals;

(emphasis added). As laid out above, Palestinians arrested and tried by Israel are systemically and systematically denied fair trials. Moreover, Palestinians killed by Israeli forces are readily labeled terrorists, with little or no evidence, or even in spite of evidence to the contrary.¹¹¹

(5) Undermining International Law and Multilateralism: Attacks on the International Criminal Court

¹⁰⁸ Human Rights Watch, Israel and Palestine, Events of 2019, *Arbitrary Detention and Detention of Children*, <https://www.hrw.org/world-report/2020/country-chapters/israel/palestine#> (accessed March 22, 2021).

¹⁰⁹ See, e.g., U.N. Human Rights Council, *Situation of human rights in the Occupied Palestinian Territory, including East Jerusalem, with a focus on collective punishment*, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, U.N. Doc. A/HRC/44/60 (Dec. 22, 2020), <https://undocs.org/A/HRC/44/60>.

¹¹⁰ U.S. Department of State, Department Press Briefing, Feb. 2, 2021, <https://www.state.gov/briefings/departments-press-briefing-february-2-2021/#post-215827-ISRAELPALESTINIAN TERRITORIES>.

¹¹¹ See, e.g., Oren Ziv, *WATCH: Forensic analysis undermines Israeli police narrative of checkpoint killing* +972MAGAZINE, Feb. 23, 2021, <https://www.972mag.com/forensic-ahmad-erekat-killing/>.

The United States must fundamentally reassess its position toward the International Criminal Court (ICC) and international justice. While the April 2, 2021 revocation of Trump’s executive order sanctioning the ICC is a welcome step, the United States needs to do more. Specifically, it should cease its opposition to the investigation of war crimes and crimes against humanity in Palestine (as well as in Afghanistan/U.S. torture), and instead of attacking the ICC, the United States should consider ratifying the Rome Statute.

a. Background

The ICC is an independent judicial institution mandated to investigate and prosecute individuals responsible for the most serious crimes of international concern. The Rome Statute grants the Court jurisdiction over genocide, crimes against humanity and war crimes committed on the territory or by a national of a State Party to the ICC.¹¹² The United States—and only six other countries, including Israel and China—objected to the inclusion of this provision in the statute in 1998, wanting instead to limit the reach of the ICC to nationals of States Parties, but its position was roundly rejected.¹¹³ For the past 23 years, Israel, like the United States, has been on notice that the ICC is mandated to exercise jurisdiction over non-State Party nationals who commit the most serious crimes on the territory of any of the 123 ICC States Parties.

Since 2015—and despite the multiple threats to cut funding to the PA or otherwise punish Palestinians if Palestine acceded to the Rome Statute—Palestine has been a State Party to the ICC, having vested the Court with jurisdiction over crimes committed on its territory or by its nationals since June 13, 2014. On January 16, 2015, Prosecutor Fatou Bensouda opened a preliminary examination into the “Situation in the State of Palestine” and on May 22, 2018, the State of Palestine referred the situation to the Office of the Prosecutor for investigation in accordance with Article 14 of the Rome Statute. On March 3, 2021, Bensouda announced the formal opening of an investigation.

As soon as the preliminary examination was opened, Israel and the United States—from Secretary of State Michael Pompeo and former National Security Advisor John Bolton, up to President Trump—increased attacks on Palestinian civil society supporting the ICC proceedings, cut funding to the PA,¹¹⁴ and began to threaten punishment or sanctions against the ICC itself.¹¹⁵ As the rhetoric

¹¹² Rome Statute, Art. 11 (2)(a) and (b).

¹¹³ The final vote on the Rome Statute was 120-7-21. The United States signed the Statute in December 2000, but President George W. Bush made clear the U.S. did not intend to proceed with ratification.

¹¹⁴ See, e.g., *US weighs cutting aid to Palestinians over ICC move*, ASSOCIATED PRESS, Jan. 5, 2015, <https://www.foxnews.com/politics/us-weighs-cutting-aid-to-palestinians-over-icc-move>. See also Sec. 4(a) *supra*.

¹¹⁵ See, e.g., Secretary Pompeo Remarks at State Department (video at approximately 5:20-5:50), Mar. 15, 2019 (announcing visa “restrictions on those individuals directly responsible for any ICC investigation of US personnel,” which “may also be used to deter ICC efforts to pursue allied personnel including Israelis, without ally’s consent), <https://www.c-span.org/video/?458825-1/secretary-pompeo-announces-visa-restrictions-international-criminal-court-probes-us-military>; Remarks by National Security Advisor Ambassador John Bolton to the Zionist Organization of America, 5 Nov. 2018, <https://www.whitehouse.gov/briefings-statements/remarks-ambassador-john-bolton-zionist-organization-america/> (after claiming “(f)irst, the global governance apostles go after Israel. Then, they come for the United States,” derides membership “of the so-called ‘State of Palestine’” at the ICC, and touts the U.S. closure of the PLO offices in Washington, D.C. as an apparently retaliatory action for Palestinians’ efforts to seek justice

grew more specific, U.N. officials and civil society raised concerns about U.S. interference in independent judicial proceedings.¹¹⁶ These threats turned into action with Donald Trump's issuance of Executive Order 13928, which declared any investigation of U.S. personnel or its allies—specified by U.S. officials to be Israel—by the ICC, to be a “national emergency.” The purported “national emergency” provided the justification for sanctioning non-U.S. citizens involved in these investigations, for severe civil and criminal penalties to be pursued against anyone (including U.S. citizens) providing “services” or other forms of support to designated persons, and for visa restrictions to be imposed on ICC staff and their families. The Order was breathtaking in its effect and constituted a direct assault on the rule of law, as it interfered with the independence of lawyers, the prosecutor, and the judiciary. Despite widespread condemnation of Executive Order 13928, on September 2020, the United States designated Prosecutor Bensouda (a national of The Gambia) and ICC senior staffer Phakiso Mochochoko (a national of Lesotho) for sanctions—a measure that was blasted as undemocratic and dangerous by bar associations in the United States and abroad, including the American Bar Association,¹¹⁷ United Nations officials,¹¹⁸ U.S. allies,¹¹⁹ former U.S.

and accountability at the ICC, as well as the defunding of both the PA and UNRWA). *See also* Trump “peace plan,” calling on Palestinians to “dismiss all pending actions, against the State of Israel, the United States and any of their citizens before the International Criminal Court, the International Court of Justice, and all other tribunals.” Peace to Prosperity, Jan. 2020 at 39, https://www.jewishvirtuallibrary.org/jsource/Peace/trump_plan.pdf.

The opening of the Palestine preliminary examination coincided with the advancement of the Prosecutor's preliminary examination in the Situation of Afghanistan, which focuses on U.S. torture on the territory of Afghanistan and other ICC States Parties as well as crimes by the Taliban and Afghan National Forces. It should be noted that Israeli and U.S. citizens are not the only non-State Party nationals currently under examination or investigation. The Prosecutor is examining the conduct of Russian nationals on the territory of both Georgia and Ukraine, as well as senior officials in Myanmar (a non-State Party) for crimes arising out of the deportation of Rohingya people to Bangladesh.

¹¹⁶ *See, e.g.*, Mandates of the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on the independence of judges and lawyers *Communication to the United States*, AL USA 6/2019, Mar. 20, 2019,

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24471>; Center for Constitutional Rights, *Complaint Against the United States of America: Interference with Judicial Proceedings at the International Criminal Court*, to U.N. Special Rapporteur on the Independence of Judges and Lawyers, June 5, 2019, https://ccrjustice.org/sites/default/files/attach/2019/06/5%20June%202019_Special%20Rapp%20letter%20ICC_final.pdf;

¹¹⁷ Statement of ABA President Patricia Lee Refo Re: U.S. Sanctions on International Criminal Court Staff, American Bar Association, Sept. 17, 2020, <https://www.americanbar.org/news/abanews/aba-news-archives/2020/09/presidential-statement-icc/>; Statement Condemning the Implementation of Sanctions against Senior Staff of the International Criminal Court, New York City Bar Association, Nov. 30, 2020, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/condemning-the-implementation-of-sanctions-against-senior-staff-of-the-international-criminal-court>; IBA calls on states to push back against US sanctions on ICC Prosecutor and official, International Bar Association, Sept. 3, 2020,

<https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=A061140F-DD9B-465A-91EE-206769F89DB9>

¹¹⁸ US attacks against the International Criminal Court a threat to judicial independence – UN experts, Office of the High Commissioner for Human Rights, June 25, 2020,

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25997&LangID=E>.

¹¹⁹ “We remain committed to an international rules-based order,” Statement in support of the International Criminal Court (ICC) following the release of the US Executive Order of 11 June 2020, June 23, 2020,

government officials and retired military;¹²⁰ legal experts, academics and institutions; and human rights organizations, faith-based groups and other non-governmental organizations.¹²¹ In January 2021, a U.S. district court ruled that the Order likely violates the First Amendment and issued a preliminary injunction against its enforcement.¹²²

For more than two months, calls upon the Biden administration to rescind the Order and related sanctions¹²³ were met with statements that the matter was under review.¹²⁴ Even if delayed and failing to acknowledge the harm done to victims, advocates, the ICC and its staff and the rule of law writ large, we welcome the April 2, 2021 decision by the administration to rescind the “inappropriate” executive order and end the sanctions and visa restrictions against ICC personnel.¹²⁵

endorsed by 67 ICC States Parties,

<https://onu.delegfrance.org/We-remain-committed-to-an-international-rules-based-order>; SStatement by Ambassador Christoph Heusgen on behalf of 74 StatesParties to the Rome Statute in support of the International Criminal Court on the occasion of the ICC Report to the General Assembly, Nov. 2, 2020, <https://new-york-un.diplo.de/un-en/news-corner/-/2411644>.

¹²⁰ Wesley K. Clark, The United States has Nothing to Fear from the ICC, FOREIGN POLICY, July 2, 2020, <https://foreignpolicy.com/2020/07/02/the-united-states-has-nothing-to-fear-from-the-icc/>; Buchwald, et al., Former Officials Challenge Pompeo’s Threats to the International Criminal Court, JUST SECURITY , Mar. 18, 2020, <https://www.justsecurity.org/69255/former-officials-challenge-pompeos-threats-to-the-international-criminal-court/>.

¹²¹ [Statement of Lawyers & Legal Scholars Against US Sanctions on ICC Investigators of Atrocities](https://www.opiniojuris.org/2020/06/30/statement-against-us-sanctions-on-icc-investigations/), June 2020, <https://www.opiniojuris.org/2020/06/30/statement-against-us-sanctions-on-icc-investigations/>; In Face of Attacks, Support the ICC’s Independence, Integrity and Mandate, Open letter to President Kwon, July 17, 2020, <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/in-face-of-attacks-support-the-icc-s-independence-integrity-and>; Non-Governmental Organizations, Faith-Based Groups, Legal Professionals, Experts, and Former Government Officials Unequivocally Oppose U.S. Sanctions Against the International Criminal Court, Sept. 21, 2020, <https://static1.squarespace.com/static/577d646ff5e231af02679e31/t/5f68e21b53f2314986b7a8cf/1600709147055/WICC+Statement+on+US+Sanctions+NEW.pdf>.

¹²² OSJI et al. v. Trump et al., 20-civ-8121, Opinion and Decision (S.D.N.Y. Jan. 4, 2021), <https://www.justiceinitiative.org/uploads/ce49dde6-803e-41c0-895e-c99ee00a6402/SDNY-ICC-EO-preliminary-injunction-01042020.pdf>.

¹²³ NGOs to Biden: support access to justice for all by rescinding Trump-era executive order impeding ICC’s work, January 27, 2021, <https://www.fidh.org/en/region/americas/usa/ngos-to-biden-support-access-to-justice-for-all-by-rescinding-trump>; More than 80 Non-Governmental Organizations, Faith-Based Groups, and Academic Institutions Call for the Biden Administration to Repeal ICC Sanctions, Feb. 17, 2021, <https://www.hrw.org/news/2021/02/17/more-80-non-governmental-organizations-faith-based-groups-and-academic-institutions>.

¹²⁴ See Simon Lewis, Biden administration to review sanction on International Criminal Court officials, Reuters, Jan. 26, 2021, <https://www.reuters.com/article/us-usa-biden-icct-idUSKBN29V2NV>; Report of the Working Group on the Universal Periodic Review, United States of America, Addendum: Views on the conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/46/15/Add.1, Mar. 4, 2021, para. 20 (“The decision of the prior Administration to impose these sanctions will be reviewed as we determine next steps.”), <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session46/Pages/ListReports.aspx>

¹²⁵ U.S. State Department, Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court, Press Statement, Antony J. Blinken, Secretary of State, Apr. 2, 2021,

b. The Biden administration's response to the opening of an investigation into the Situation of Palestine

The ICC has opened an investigation into the Situation in Palestine, not because of anti-Israel bias,¹²⁶ but because there exists sufficient evidence of war crimes and crimes against humanity that have been and continue to be committed against Palestinian civilians on a daily basis and on a massive scale. Despite this fact, the United States has taken unprecedented measures that run contrary to basic rule-of-law principles in order to shield Israeli nationals from investigation at the ICC—measures that include, but are not limited to, the recently rescinded executive order. In all of its statements criticizing the ICC, the United States has never called upon Israel to cease the commission of international crimes against Palestinians nor to initiate full, transparent, independent and credible investigations into widespread and systematic violations of international law. If Israel wants to avoid its nationals being investigated and prosecuted by the ICC, it has two choices: prevent its nationals from committing genocide, crimes against humanity and war crimes on the territory of Palestine, or if such crimes have been committed, carry out genuine investigations and, if warranted, prosecutions in national courts of its nationals who bear the greatest responsibility for such crimes.¹²⁷ It has done neither. And the United States has repeatedly protected Israel and Israeli officials from facing any real accountability, whether diplomatically at the U.N. Security Council or the U.N. Human Rights Council, or legally with the filing of amicus briefs and suggestions of immunity in U.S.-based civil litigation.¹²⁸

The Biden administration's response to recent decisions at the ICC is troubling, as it calls into question the United States' respect for the independence of the judiciary, prosecutors and international courts writ large. On February 5, 2021, following a yearlong review of submissions by the Prosecutor, the referring state, victims and more than 40 amicus briefs from states, legal experts, civil society and former U.S. government officials, the ICC Pre-Trial Chamber issued a reasoned decision in which it found that the Court could exercise jurisdiction over the territory of Palestine (Gaza and West Bank, including East Jerusalem) by virtue of Palestine being a State Party to the

<https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/>.

¹²⁶ See, e.g., 2014 Commission of Inquiry, *supra* note 70; Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Oct. 19, 2016, A/71/554,

<https://unispal.un.org/DPA/DPR/unispal.nsf/0/C2D85EFC99C1698785258059004EBF1B>; U.N. Human Rights Council, Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory, Mar. 18, 2019, A/HRC/40/CRP.2,

https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session40/Documents/A_HRC_40_74_CR_P2.pdf. Report on the United Nations High Commissioner for Human Rights, Israeli settlements in the

Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan, Jan. 30, 2020, A/HRC/43/67,

<https://www.un.org/unispal/document/israeli-settlements-in-the-opt-and-in-the-occupied-syrian-golan-report-of-the-un-high-commissioner-for-human-rights-a-hrc-43-67/>.

¹²⁷ See Rome Statute, Art. 17(1) (determining a case inadmissible if it is being investigated or prosecuted “by the State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”). Article 17(2) provides that domestic proceedings that were conducted “for the purpose of shielding the person concerned from criminal responsibility” or that were “not being conducted independently or impartially” will not be sufficient to render an ICC investigation inadmissible.

¹²⁸ See, e.g., “U.S. casts lonely vote against establishing war crimes inquiry into Gaza,” A. Kane, *Mondoweiss*, July 24, 2014; *Doğan v. Barak*, Brief For The United States of America as Amicus Curiae Supporting Affirmance, 9th Cir.: 16-56704, July 27, 2017.

Rome Statute.¹²⁹ In response, the State Department expressed “serious concerns” about the ICC’s “attempts” to exercise jurisdiction over Israeli citizens.¹³⁰ Following the Prosecutor’s March 3, 2021 announcement that she was opening a formal investigation, Secretary of State Blinken stated the United States is “firmly oppose[d]” to the decision and wrongly stated that the “ICC has no jurisdiction over this matter.”¹³¹ Disregarding the substantial evidence of war crimes and crimes against humanity committed by Israeli actors since June 13, 2014, on the territory of Palestine that underpinned the Prosecutor’s decision to investigate, Secretary Blinken dismissed efforts to hold Israeli actors accountable as no more than “actions that seek to target Israel unfairly.” The Secretary of State reiterated in his announcement revoking Executive Order 13928 that the United States continues to “disagree strongly” with ICC actions.

The opposition expressed and false information shared by the U.S. Secretary of State about the Court’s jurisdiction is even more dangerous in the current environment. Israel has denounced fact- and law-based decisions taken at the ICC as “pure antisemitism” and has undertaken a full-scale campaign against Palestinian human rights advocates. This campaign has ranged from false smears of “terrorism” to death threats against ICC staff and advocates supporting Palestinian victims.¹³²

c. Recommendations

Secretary Blinken recently pledged that the United States will “stand against human rights abuses wherever they occur, regardless of whether the perpetrators are adversaries or partners.”¹³³ A reset of the U.S. relationship with the ICC on the Palestine investigation is an opportunity to demonstrate that this pledge is more than just rhetoric. Following the dangerous precedent set by the Trump-era executive order, the Biden administration must affirmatively acknowledge the independence of the ICC, its judges and prosecutors, and desist from making statements that call into question the

¹²⁹ Situation in the State of Palestine, Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine,’ ICC-01/18, Feb. 5, 2021, https://www.icc-cpi.int/CourtRecords/CR2021_01165.PDF.

¹³⁰ U.S. State Department, Opposing International Criminal Court Attempts to Affirm Territorial Jurisdiction Over the Palestinian Situation, Press Statement, Ned Price, Department Spokesperson, Feb. 5, 2021, <https://www.state.gov/opposing-international-criminal-court-attempts-to-affirm-territorial-jurisdiction-over-the-palestinian-situation/>. The fact that the State Department spokesperson had issued a statement praising the ICC verdict to convict a Ugandan former LRA commander just the day before is further proof of U.S. double standards and discrimination against Palestinian victims in their efforts to access justice.

¹³¹ U.S. State Department, The United States Opposes the ICC Investigation into the Palestinian Situation, Press Statement, Antony J. Blinken, Secretary of State, Mar. 3, 2021, <https://www.state.gov/the-united-states-opposes-the-icc-investigation-into-the-palestinian-situation/>.

¹³² See, e.g., Smear campaigns will not derail our work in support of victims of international crimes, FIDH, May 12, 2020,

<https://www.fidh.org/en/issues/international-justice/fidh-smear-campaigns-will-not-derail-our-work-in-support-of-victims>; Al-Haq Condemns Attempt to Smear Al-Haq, Its Staff, and Partners in Recent Report, Al-Haq, May 11, 2020, <https://www.alhaq.org/advocacy/16854.html>; Thomas Escritt, *Dutch investigate death threats against Palestinian ICC activist*, REUTERS, Aug. 11, 2016, <https://www.reuters.com/article/us-warcrimes-icc-death-threats/dutch-investigate-death-threats-against-palestinian-icc-activist-idUSKCN10M1G5>.

¹³³ U.S. State Department Secretary Antony J. Blinken on Release of the 2020 Country Reports on Human Rights Practices, Mar. 30, 2021, <https://www.state.gov/secretary-antony-j-blinken-on-release-of-the-2020-country-reports-on-human-rights-practices/>.

legitimacy of ICC proceedings. It should cease speaking of “peace” and “justice” as binary choices rather than mutually reinforcing principles. The administration should also make clear to its Israeli counterparts and their supporters in Congress that any legislation to hinder Palestinians’ access to justice or threats against individuals involved in or supporting legal proceedings will not be countenanced. Furthermore, it should affirmatively support victims and their advocates and denounce smear campaigns against them. Finally, the administration should constructively engage with the Court and take steps to ratify the Rome Statute.

(6) The Weaponization of Antisemitism for Political Gain

The United States has experienced an outburst of antisemitic vitriol and even murderous attacks since Donald Trump took office in 2017, from “Jews will not replace us” chants in Charlottesville to vandalism to synagogue shootings. This atmosphere of hate was abetted by Trump’s own dog whistles, invoking stereotypes of Jews and coddling white supremacists, for whom antisemitism has always been a core tenet, linked to other forms of racism.

But Trump’s December 11, 2019 Executive Order 13899 on Combating Anti-Semitism,¹³⁴ ostensibly aimed at countering antisemitism, did not target these real manifestations of hatred. Instead, it is another link in a decades-long campaign to falsely conflate political speech critical of Israel or Zionism with antisemitism and thereby stigmatize and suppress advocacy for Palestinian rights.

a. New name for an old campaign

The campaign began with invention and promotion of a so-called “new antisemitism”—a term coined in the 1960s alleging that criticism of the self-described Jewish state stemmed from hatred of Jews and not from Israel’s discriminatory treatment of non-Jewish citizens, its ongoing occupation and creeping annexation of territories conquered in war, and its refusal to accept responsibility for the expulsion of Palestinians from their homeland or recognize their right to return.

More recently, the deflection evident in “new antisemitism” has evolved into an intensely lobbied formal redefinition of the term, now known as the International Holocaust Remembrance Alliance (IHRA) “Working Definition of Antisemitism”¹³⁵—which Executive Order 13899 mandates federal agencies consider in applying anti-discrimination laws.

The IHRA document opens with a vague and convoluted definition of antisemitism. It then cites 11 “examples” of what “could be” considered antisemitic, some of which could also be, and typically are, common political criticisms of Israeli policy. They include: “Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor”; and “[d]rawing comparisons of contemporary Israeli policy to that of the Nazis. Another example, “[a]pplying double standards by requiring of [Israel] a behavior not expected or demanded of any other democratic nation,” is clearly false, as human rights advocates are prolific in their criticism of violations in many countries. Moreover, this example ignores the obvious reason that Israel often is a focus of U.S. progressives—no other country comes close to receiving the amount

¹³⁴ Exec. Order No. 13899, 84 Fed. Reg. 68779 (Dec. 11, 2019), <https://www.federalregister.gov/documents/2019/12/16/2019-27217/combating-anti-semitism>.

¹³⁵ International Holocaust Remembrance Alliance “Working Definition of Antisemitism,” <https://www.holocaustremembrance.com/working-definition-antisemitism>

of military support provided by the United States. Thus, it is only natural to examine the uses to which the aid is put. U.S. law, in fact, requires it.¹³⁶

These examples in particular have been widely analyzed and roundly criticized, mainly for the chilling effect they have on protected speech.¹³⁷

An earlier version of the “working definition” was introduced in 2005 through the European Union’s Monitoring Center on Racism and Xenophobia, which later dropped it when it became clear the definition was being abused to suppress speech.¹³⁸ The IHRA, a previously obscure educational body, resuscitated the redefinition in 2016 with slight amendments, and the U.S. State Department posted it.¹³⁹ Governments are being pressured to officially adopt it—some European countries have, but with a wide range of understandings as to how they intend to use it.

b. Redefinition used as a tool to repress critical speech

Even before IHRA took up the mantle, advocates for Palestinian rights on U.S. campuses reported hundreds of cases in which they were subjected to undue scrutiny, censorship, restrictions on their work, and even penalties.¹⁴⁰ Today, shadowy groups, supported by Israel-aligned groups, regularly dox Palestinian students and their supporters with the declared goal of destroying their academic and future careers.¹⁴¹

¹³⁶ See, e.g., the Arms Export Control Act [22 U.S.C. 2751] *et seq.*,

<https://www.law.cornell.edu/uscode/text/22/2751>, especially the section known as the Leahy Law, which opens: “No assistance shall be furnished under this Act or the Arms Export Control Act to any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights.” <https://www.law.cornell.edu/uscode/text/22/2378d>

¹³⁷ A lengthy, academic “Expert Opinion” by Peter Ullrich, published by the Rosa Luxemburg Stiftung, March 2019, in Germany, where the IHRA definition has achieved the most heightened legal status, finds that “systematic gaps, lack of clarity in formulations, contradictory and error-prone application in practice, and an unclear legal status” of the document “cause confusion;” and that it “provides a gateway for the stigmatization and public disadvantaging of disfavored positions in the Israeli-Palestinian conflict. In view of its quasi-legal status, this must be regarded as a threat to freedom of speech.”

https://www.rosalux.de/fileadmin/rls_uploads/pdfs/rls_papers/Papers_3-2019_Antisemitism.pdf. See also an analysis by Rebecca Ruth Gold, “Defining Antisemitism by Erasing Palestinians,” in *The Political Quarterly*, Vol. 91, Issue 4, Oct.-Dec. 2020, which finds: “Neither the definition nor the accompanying examples explicitly advocate for the censorship of Israel-critical speech, yet the chilling of speech has been its widespread effect. It describes itself as a ‘legally non-binding working definition’, yet this apparent caveat has turned out to be more of an evasion in practice. Since there are few, if any, precedents for such a quasi-legal document in the context of defining racism, the meaning of both ‘legally non-binding’ and ‘working definition’ have had to be determined in practice. This trial-and-error approach has resulted, predictably, in numerous errors, false accusations, and instances of censorship.”

<https://onlinelibrary.wiley.com/doi/full/10.1111/1467-923X.12883>.

¹³⁸ See Palestine Legal. *Backgrounder on Efforts to Redefine Antisemitism as a Means of Censoring Criticism of Israel*, January 2020,

<https://palestinelegal.org/redefinition-efforts>

¹³⁹ Office of the Special Envoy to Monitor and Combat Anti-semitism, *Defining Anti-Semitism*,

<https://2017-2021.state.gov/defining-anti-semitism/index.html>.

¹⁴⁰ Palestine Legal. *The Palestine Exception to Free Speech*, 2015,

<https://palestinelegal.org/the-palestine-exception>.

¹⁴¹ See Josh Nathan-Kazis, *Canary Mission Blacklist Funded By Jewish Federation*, FORWARD, Oct. 3, 2018, the first in a series of articles exposing one such group’s operations and the funders behind it.

<https://forward.com/news/411355/revealed-canary-mission-blacklist-is-secretly-bankrolled-by-major-jewish>

More and more ordinary people in the United States, however, including Jews, are voicing sharp criticism of Israel's policies and its makeup as they learn the truth about Israel's colonization of Palestinian land, ethnic cleansing, and the apartheid reality it has created on the ground. The increased knowledge that the narrative they have been fed is false and that Israel's brutality is being supported by and financed with U.S. aid has naturally led to increased support for Palestinian rights.

At root, all these efforts to redefine antisemitism to include criticism of Israel are meant to unconstitutionally chill, if not actually suppress, such expression. The Biden administration should hold fast to its declarations, and to the statement in the 2020 Democratic Party platform vowing to uphold "the Constitutional right of our citizens to free speech."¹⁴²

c. Jewish scholars dissent, propose a better definition

Executive Order 13899 was the Trump administration's response to the successful efforts of the ACLU and other free speech defenders, including many U.S. Jews who consider it their moral duty to oppose Israeli policies, in thrice stymieing passage by Congress of the Anti-Semitism Awareness Act,¹⁴³ which would have enshrined the redefinition in statute.¹⁴⁴

Given the flaws in the IHRA redefinition of antisemitism, it should not form the basis for legal policies or campus speech codes. Even Kenneth S. Stern, principal author of the original version in 2005, now fervently agrees. As Congress was debating the proposed Act in December 2016, Stern wrote in a *New York Times* op-ed: "The worst remedy is to prohibit speech deemed offensive, disparaging or bigoted that would otherwise be protected by the First Amendment." He further stated that the purpose of the definition he formulated was "intended for data collectors writing reports about anti-Semitism in Europe. It was never supposed to curtail speech on campus."¹⁴⁵

In response to the serious problems with and widespread criticism of the IHRA redefinition, a group of more than 200 scholars working in the fields of Jewish and antisemitism studies, Holocaust history, Israel, Palestine, and Middle East studies, on March 24, 2021, released an alternative document—the Jerusalem Declaration on Antisemitism.¹⁴⁶ The Jerusalem Declaration sets forth a clear, simple, and straightforward definition of antisemitism, similar to what appears in many dictionaries: "Antisemitism is discrimination, prejudice, hostility or violence against Jews as Jews (or Jewish institutions as Jewish)." Adopting a format similar to that of IHRA, it then sets forth 15 examples of what may, and more importantly, what does not constitute antisemitism; many examples directly contradicting the IHRA formulations. The scholar authors of the Jerusalem Declaration affirm the view set forth herein—that no definition of antisemitism is designed to be a legal or quasi-legal instrument of any kind. Indeed, no definition should be codified into law or otherwise used to restrict the legitimate exercise of academic freedom, free speech, or open public debate that falls within

¹⁴² 2020 Democratic Party Platform,

<https://www.demconvention.com/wp-content/uploads/2020/07/2020-07-21-DRAFT-Democratic-Party-Platform.pdf>, at page 80.

¹⁴³ <https://www.congress.gov/bill/116th-congress/senate-bill/852/text> was the most recent version. House and Senate bills were introduced in the 114th, 115th, and 116th Congresses.

¹⁴⁴ ACLU's letter opposing the 115th Congress version of the bill:

https://www.aclu.org/sites/default/files/field_document/anti-semitism_awareness_act_hill_letter_6.4.18.pdf

¹⁴⁵ Kenneth Stern, *Will Campus Criticism of Israel Violate Federal Law?* NEW YORK TIMES, Dec. 12, 2016,

<https://www.nytimes.com/2016/12/12/opinion/will-campus-criticism-of-israel-violate-federal-law.html>.

¹⁴⁶ Jerusalem Declaration on Antisemitism, <https://jerusalemdeclaration.org/>.

the limits laid down by laws governing hate crime.¹⁴⁷

(7) Anti-BDS Legislation

We welcome recent indications that the new administration will not follow through with former Secretary of State Mike Pompeo's lame-duck declaration that advocacy for boycott, divestment, or sanctions (BDS) to press for Israeli policy changes is antisemitic, or his call for the creation of a blacklist aimed squarely at prominent, respected international human rights organizations.¹⁴⁸

While the Biden administration has signaled acknowledgment that BDS implicates First Amendment protections, the administration's faulty association of BDS with antisemitism is baseless and harmful.¹⁴⁹

We urge the administration to abandon the defamatory treatment of what is in fact a non-violent strategy designed to promote Palestinian human rights and self-determination, a strategy that not only constitutes protected speech under the Constitution but is in line with a long history of such methods used in struggles for justice in our country and around the world.

- a. Boycotts are political speech and therefore must be accorded the highest level of First Amendment protection

Boycott and divestment campaigns in pursuit of political aims are an integral part of U.S. history. From the original Boston Tea Party protest have followed other transformative campaigns such as the Montgomery bus boycott against racial segregation, the grape boycott in support of farm labor rights, boycotts of companies and institutions enabling South African apartheid, and current divestment campaigns against fossil fuel and private prison companies. All of these boycotts were controversial when first proposed by small groups of partisans. Eventually, all came to win widespread public and bipartisan political support.

The constitutional protection due a political boycott was articulated in the landmark Supreme Court case, *NAACP v. Claiborne Hardware Co.*¹⁵⁰ In that case, a local NAACP branch boycotted white

¹⁴⁷ Cf. A Palestinian Civil Society Critique of the Jerusalem Declaration on Antisemitism, Mar. 25, 2021, <https://bdsmovement.net/A-Palestinian-Civil-Society-Critique-JDA> [welcoming the Jerusalem Declaration as an alternative to the "fraudulent" IHRA definition, but criticizing, among other things, the continued focus on Israel/Palestine and Zionism, thereby unjustifiably coupling anti-Jewish racism with the struggle for Palestinian liberation.]

¹⁴⁸ Lahav Harkov, *Pompeo: US to recognize BDS movement as antisemitic*, JERUSALEM POST, Nov. 19, 2020, <https://www.jpost.com/breaking-news/pompeo-us-to-withdraw-funding-from-groups-with-ties-to-cancer-bds-649581>

¹⁴⁹ At his confirmation hearing, Secretary of State Blinken signaled that he would oppose measures to sanction those who boycott Israel, stating, "I fully respect the First Amendment rights of Americans to say what they believe." Blinken went on to say, however, that he and President Biden are "resolutely opposed" to BDS because it "unfairly and inappropriately singles out Israel and creates a double standard that we do not apply to other countries." *Blinken confirmed as US secretary of state; vowed to consult with Israel on Iran*, Jan. 26, 2021, <https://www.timesofisrael.com/blinken-confirmed-as-us-secretary-of-state-vowed-to-consult-with-israel-on-iran/>

¹⁵⁰ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

merchants to pressure elected county officials to adopt racial justice measures. The merchants sued NAACP for interference with business. The U.S. Supreme Court found that “the boycott clearly involved constitutionally protected activity” through which NAACP “sought to bring about political, social, and economic change.” It concluded that the boycott constituted a political form of expression, protected by the First Amendment rights to speech, assembly, association, and petition.

It is a stunning inversion of free speech principles to make allegedly “politically motivated” boycotts a singular target of government repression, as has been repeatedly attempted in proposed but unsuccessful legislation in the last three Congresses.¹⁵¹ Regrettably, on the state legislative level, efforts to penalize supporters of BDS have been more successful, although the laws that have been challenged have been rightly struck down by federal courts, citing *Claiborne*.¹⁵² It is precisely the boycotts’ political dimension that requires heightened First Amendment protection for those who engage in such activity. As the Supreme Court pointed out in *Claiborne*, a political boycott, like other forms of speech concerning public issues, “occupies the highest rung of the hierarchy of First Amendment values.”¹⁵³

b. Boycotts against companies and institutions complicit in Israel’s human rights violations are not discriminatory

As it became clear that direct penalization by denying state contracts or investments with entities or individuals advocating or adhering to boycotts of Israel is unconstitutional on its face, legislative drafters began to disguise the violation by deeming such boycotts “discriminatory,” invoking anti-bias laws that bar disparate treatment based on race, color, religion, gender, or nationality.

In fact, boycott and divestment campaigns in support of Palestinian rights are directed not against classes of people, but against Israeli policies that are themselves discriminatory and that violate international law. Proponents of BDS strategies invariably emphasize that their target is not Jewish people, or even Israelis, as individuals, but companies and institutions complicit in serious human rights abuses. Boycott and divestment campaigns in support of Palestinian rights in no way discriminate against individuals based on their national origin, ethnicity, religion, or other protected characteristics; they are undertaken to challenge Israeli policies and laws that in fact discriminate against people based on ethnicity and religion.

To portray such a struggle for human rights as “anti-Jewish” is itself an expression of bigotry and especially offensive given the many Jewish people in this country who are well-represented among critics of Israel. In Israel itself, Jewish and Palestinian citizens who seek to change what they view as their government’s increasingly undemocratic agenda and harmful policies have joined the call for boycotts, at risk to themselves because Israeli courts have so far allowed to stand a law punishing

¹⁵¹ See the most recent versions, introduced in the 116th Congress, of the Israel Anti-Boycott Act, H.R.5595, <https://www.congress.gov/bill/116th-congress/house-bill/5595/text>; and the Combating BDS Act, incorporated into S.1, passed by the Senate in 2019 before stalling in the House: <https://www.congress.gov/bill/116th-congress/senate-bill/1/text>

¹⁵² Most recently, in the first such case reaching the appeals level, a district court’s upholding of an Arkansas law was overturned: *Arkansas Times v. University of Arkansas*, No. 19-1378 (Feb. 12, 2021), <https://237995-729345-1-raikfcquaxqncofqfm.stackpathdns.com/wp-content/uploads/2021/02/artkimes.pdf>; For a full survey of state anti-boycott laws, see <https://legislation.palestinelegal.org/#states-list>.

¹⁵³ *Claiborne*, at p. 913, quoting *Carey v. Brown*, 447 U. S. 455, at p. 467.

calls for boycott of the country or even West Bank settlements only.¹⁵⁴

c. Israel is “singled out” by defenders of its abuses, not by its critics

Secretary Blinken’s assertion that BDS “singles out Israel,”¹⁵⁵ implying that it does so for nefarious reasons, is both factually backward and legally irrelevant. First, Palestinian human rights proponents generally *do* engage in protests against human rights abuses by many other countries, including the United States, because they believe struggles for justice, liberation and peace are indivisible.¹⁵⁶ Notwithstanding, it is only natural for people of conscience to prioritize causes where they can more easily make a difference or those that especially affect them. Without the uniquely massive economic, military and diplomatic support of the U.S. government, Israel could not pursue its oppressive occupation, settlement policies, and armed aggression. To insist that human rights advocates give equal attention to all instances of injustice can paralyze movements for justice to the point where they could not effectively oppose any. Finally, the call for international support of the Palestinian freedom struggle, particularly through BDS, comes from Palestinian civil society. Such a call is missing from many other cases of rights violations around the world.

Since the call for BDS originated with Palestinian civil society groups in the occupied Palestinian territory, within Israel, and around the world,¹⁵⁷ “it is only logical that Palestinians and those who stand in solidarity with their struggle orient their struggle towards Israel, the party that denies Palestinians their freedom, and not towards North Korea, for example,” according to the BDS National Committee, the Palestinian civil society coalition that guides the global campaign.¹⁵⁸ “The South African liberation movement also targeted the regime of oppression that they lived under, naturally, not the ones in Cambodia or Honduras at the time.”¹⁵⁹

Instead of condemning a movement that advocates for time-honored, nonviolent tactics in pursuit of freedom, human rights, and equality, the Biden administration should reassess the ways in which the United States singles out Israel for unquestioned economic and political support, shielding it from accountability and enabling it to continue violating the rights of the Palestinian people.

Under the U.S. Constitution, statutes and case law, the United States or a state may establish classifications of people vulnerable to discrimination (e.g., based on their race, religion, or national origin) for the purpose of protecting their civil rights in such areas as public accommodations,

¹⁵⁴ The Association for Civil Rights in Israel, similar to the U.S. ACLU, was prominent in challenging Israel’s anti-boycott law. See Association for Civil Rights in Israel. *High Court of Justice Refuses to Invalidate Anti-Boycott Law*, April 16, 2015, <http://www.acri.org.il/en/2015/04/16/hcj-boycott-law/>.

¹⁵⁵ The Times of Israel. *Blinken confirmed as US secretary of state; vowed to consult with Israel on Iran* Jan. 26., 2021, <https://www.timesofisrael.com/blinken-confirmed-as-us-secretary-of-state-vowed-to-consult-with-israel-on-iran/>.

¹⁵⁶ See, e.g., U.S. Campaign for Palestinian Rights: <https://uscpr.org/learn/togetherwise/>; the BDS National Committee statement in solidarity with BLM, <https://www.pjcv.org/palestine-stands-in-solidarity-with-black-americans/>; Palestinian Youth Movement statement in solidarity with Standing Rock, <https://palestinyouthmovement.com/from-standing-rock-to-palestine>; Code Pink issues and campaigns: https://www.codepink.org/issues_campaigns

¹⁵⁷ Palestinian Civil Society Call for BDS, July 9, 2005, <https://bdsmovement.net/call>

¹⁵⁸ FAQs: Understanding BDS, <https://bdsmovement.net/faqs#collapse16242>.

¹⁵⁹ *Id.*

employment, housing, and education. But the Supreme Court has held that the government may bar speech targeting people on the basis of a protected classification only if it amounts to an established exception to free speech, such as “fighting words” or direct incitement to violence. To single out these classifications as a basis for punishing speech hostile to them would be unconstitutional, viewpoint-based discrimination.¹⁶⁰

In other words, Blinken’s allegation that BDS singles out Israel or its supporters, even if true, should not have any legal consequences and must not lead to penalties of any sort.

d. The Biden administration should take a stand against the chilling of protected speech

Even without a threat of punishment, to mischaracterize a form of highly protected speech as inherently antisemitic reflects the steady stream of disinformation by groups and individuals that seek to chill speech critical of Israel and supportive of Palestinian equality and self-determination.

Regardless of one’s views on Israel and Palestine or on the merits of non-violent strategies involving boycott and divestment to support Palestinians’ struggle for freedom, justice and equality, legislation penalizing boycotts of Israel must be rejected as a blatantly unconstitutional means to inhibit protected speech. Likewise, efforts to tar such strategies as anti-Jewish or invalid because they imply an imaginary double standard must be recognized as unconstitutional chilling of speech.

The National Lawyers Guild calls on the Biden administration to refrain from statements or actions condemning or otherwise stigmatizing BDS. Further, we call on President Biden to issue a declaration affirming that civil society-organized boycotts for justice, as well as other non-violent tactics and strategies aimed at the policies of a country, including Israel, are a form of highly protected speech that will be honored and respected by this country’s government.

Conclusion

The policy recommendations made herein represent the minimum required to reverse the damage done by the Trump administration and begin to bring United States policy and practice on Palestine and Israel in line with international law. While it is understandable and appropriate that the primary focus of the Biden administration is currently on the eradication of the COVID-19 virus, at the same time, the United States cannot turn its back on the atrocities, including war crimes, enabled by U.S. policies, particularly its decades-long policy of shielding Israel from accountability. Thus, the United States has a legal and moral responsibility to act expeditiously.

It has long been obvious to anyone paying attention that U.S. policy on Palestine and Israel does not match its rhetoric nor the ideals that it claims to stand for—freedom, human rights, and democracy. The Biden administration has an opportunity and an obligation to correct course and to pursue policies grounded in integrity, human rights, equality, and respect for the rule of law.

¹⁶⁰ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-93, 112 S.Ct. 2538, 2547-49, 120 L.Ed. 2d 305, 323-24 (1992), <https://supreme.justia.com/cases/federal/us/505/377/>.