

Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations

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9 April 2019

President Donald J. Trump
President of the United States of America
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

The Honorable Michael R. Pompeo
US Secretary of State
United States of America
Harry S. Truman Building
2201 C Street Northwest, Room 7226
Washington, DC 20520

The Honorable John R. Bolton,
National Security Advisor
United States of America
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. President, Mr. Secretary and Mr. Ambassador,

Re: Threats and reprisal by USA against the International Criminal Court and its Prosecutor

We write on behalf of Lawyers' Rights Watch Canada (LRWC), a committee of lawyers who promote human rights and the rule of law. LRWC is a non-governmental organization (NGO) in Special Consultative Status with the Economic and Social Council (ECOSOC) of the United Nations (UN).*

LRWC is gravely concerned by threats made by United States (US) Secretary of State Mike Pompeo and US National Security Advisor John Bolton against the International Criminal Court (ICC). On 10 September 2018, Mr. Bolton made explicit threats against ICC judges, prosecutors, or personnel if they investigated war crimes alleged to have been committed by US military or intelligence personnel in Afghanistan, or war crimes allegedly committed by Israeli forces or other US allies.¹ Mr. Bolton also stated that the US would "take note if any countries cooperate with ICC investigations of the United States and its allies, and we will remember that cooperation when setting US foreign assistance, military assistance, and intelligence sharing levels." On 25 September 2019, President Donald J. Trump asserted in the UN General Assembly that the ICC "has no jurisdiction, legitimacy and no authority."² On 15 March 2019, Mr. Pompeo announced a policy to deny and revoke US visas for ICC

* This letter has been endorsed by the International Association of Democratic Lawyers (IADL), a non-governmental organization in consultative status with ECOSOC and UNESCO. IADL members include lawyers and lawyers' organizations in more than 90 countries. See <https://iadllaw.org/>.

personnel who investigate suspected crimes committed by US nationals. Mr. Pompeo stated that this policy may also be extended to ICC investigations into suspected crimes by Israeli or other US-allied personnel.³ On 4 April 2019, the US revoked the entry visa of the chief Prosecutor of the International Criminal Court, Ms. Fatou Bensouda.

These threats and the reprisal against Ms. Bensouda appear to be in response to the 20 November 2017 request of the ICC Office of the Prosecutor (OTP) for authorization from the ICC Pre-Trial Chamber (PTC) to proceed with an investigation of the Situation in Afghanistan since 1 July 2002.⁴ A decision on the OTP's request is still pending. As a result of the OTP's preliminary examination, commencing in 2006, the OTP reported having "a reasonable basis to believe that, at a minimum, the following crimes within the Court's jurisdiction have occurred:... war crimes of torture, outrages upon personal dignity and rape and other forms of sexual violence, by members of the US armed forces on the territory of Afghanistan and members of the CIA in secret detention facilities both in Afghanistan and on the territory of other States Parties, principally in the 2003- 2004 period." The OTP has also stated that should authorization to open an investigation be granted, there could also be an assessment "concerning allegations made against special forces of certain international forces operating in Afghanistan... and any other alleged crimes that may occur after the commencement of the investigation." Afghanistan has been a State Party to the Rome Statute since 19 February 2003. The US war in Afghanistan commenced in 2001 and continues with thousands of US and allied troops (14,000 US troops and 8,600 allied troops) and the CIA carrying out military and other activities in Afghanistan with little US judicial scrutiny or public oversight. The US threats against the ICC and countries that may cooperate with the Court may impede Afghanistan's ability to provide the cooperation necessary for a proper investigation by the OTP.

Mr. Pompeo's statement also referred to "suspected crimes by Israeli or other US-allied personnel." On 1 January 2015, Palestine formally accepted the jurisdiction of the ICC over alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014."⁵ On 2 January 2015, the Government of Palestine acceded to the Rome Statute. Since 16 January 2015, the OTP has been conducting a preliminary examination of alleged crimes in the occupied Palestinian territory.⁶ If the OTP finds that the preliminary examination indicates reasonable grounds that crimes within ICC jurisdiction had been committed, the OTP would then seek authorization from the Pre-Trial Chamber (PTC) to open an investigation. Two other significant developments have occurred regarding the OTP's preliminary examination. On 22 May 2018, the OTP received a referral from Palestine "to investigate, in accordance with the temporal jurisdiction of the Court, past, ongoing and future crimes within the court's jurisdiction, committed in all parts of the territory of the State of Palestine."⁷ Because Palestine has acceded to the Rome State, no authorization from the PTC is needed to open an investigation on this matter. On 13 July 2018, the PTC made an order that the court registry establish "a system of public information and outreach activities for the benefit of the victims and affected communities in the situation in Palestine" and "create an informative page on the Court's website, especially directed to the victims of the situation of Palestine."⁸

The threats by the US since 10 September 2018 are explicitly aimed at intimidating the Court and obstructing or preventing examinations or investigations into matters within its jurisdiction, including war crimes and crimes against humanity. These threats constitute a dangerous assault on the independence of the judiciary and on international human rights law, international humanitarian law,

and the rule of law.

The 1948 *Universal Declaration of Human Rights*⁹ describes the rule of law as essential to ensuring rights, the recognition of which is the “foundation of freedom, justice and peace in the world.” The maintenance of the rule of law internationally depends on all States and all international organizations upholding international law, including customary international law and treaty law, in clear and robust ways. We draw your government’s attention the UN Secretary General’s 2004 definition of the rule of law: “... a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”

We remind your government that the purpose of the ICC, established by the Rome Statute, is to prosecute the most serious international crimes, including war crimes, crimes against humanity and genocide. The duty to prevent and enforce accountability for these crimes is a customary international law obligation owed to all humankind (*erga omnes*). To fulfill that obligation, States that have ratified the Rome Statute, the Genocide Convention, the UN Convention against Torture (UNCAT) and the Geneva Conventions have adopted the duty to prosecute suspects irrespective of where the alleged offence occurred or the nationality of the suspect(s) or victim(s). Prevention or obstruction of the examination or investigation of such crimes and prosecution of suspects by the ICC or other court having jurisdiction contravenes the *erga omnes* obligations of States as well as the relevant treaty obligations and the rule of law. The US has been a State Party to the Genocide Convention since 1998 and the UNCAT since 1994, and a High Contracting Party to the Geneva Conventions since 1955.

On 22 March 2019, the UN Special Rapporteur on Human Rights Defenders and the UN Special Rapporteur on the Independence of Judges and Lawyers expressed deep concern and called for a halt to the US government’s threats against the ICC, stating that: "In order to guarantee effective and equal access to justice and a fair trial in accordance with international standards, the judicial system and individual judges must be independent and free from any improper interference."¹⁰

LRWC joins the UN Special Rapporteurs and others¹¹ in cautioning the US to withdraw and refrain from threats directed at or capable of restricting the ability of ICC judges, prosecutors, and other personnel to carry out their judicial, prosecutorial and administrative duties free from interference, harassment, threats or reprisals.

We look forward to your response.

Sincerely,



Gail Davidson
Executive Director, LRWC



Catherine Morris
UN Liaison Director, LRWC

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References

¹ Full text of John Bolton's speech to the Federalist Society, TravelWireNews, 10 September 2018, <https://travelwirenews.com/full-text-of-john-boltons-speech-to-the-federalist-society-1084024/>.

² UN General Assembly, United States of America, H.E. Mr. Donald Trump, President, 25 September 2018, Statement Summary, <https://gadebate.un.org/en/73/united-states-america>. See the full text, available at: <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny/>.

³ Michael R. Pompeo, Secretary of State, Remarks to the Press, 15 March 2019, <https://www.state.gov/secretary/remarks/2019/03/290394.htm>.

⁴ International Criminal Court, "The Prosecutor of the International Criminal Court, Fatou Bensouda, requests judicial authorisation to commence an investigation into the Situation in the Islamic Republic of Afghanistan, 20 November 2017, <https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh>.

⁵ International Criminal Court, Preliminary examination: Palestine, <https://www.icc-cpi.int/palestine/>.

⁶ For more information about the preliminary examinations, please see the text and links at *ibid*.

⁷ The State of Palestine, Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute, 15 May 2018, https://www.icc-cpi.int/itemsDocuments/2018-05-22_ref-palestine.pdf.

⁸ International Criminal Court, Pre-Trial Chamber, Situation in the State of Palestine, Decision on: Information and Outreach for the Victims of the Situation, No. ICC-01/18, 13 July 2018, available at: https://www.icc-cpi.int/CourtRecords/CR2018_03690.PDF.

⁹ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Preamble, "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."

¹⁰ Office of the UN High Commissioner for Human Rights, "US 'threats' against International Criminal Court must stop, say UN experts," 22 March 2019,

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24392&LangID=E>.

¹¹ On 18 March 2019 Canada issued a brief statement in response to the US action stating that, “Canada firmly supports the rules-based international order and the multilateral institutions that underpin it. We are proud to support the International Criminal Court and the important work that it does. The court is essential to investigating and prosecuting the most serious crimes of international concern. Personnel of the International Criminal Court should not be targeted for the important work that they do.” The Government of Canada’s statement is available at: <https://www.canada.ca/en/global-affairs/news/2019/03/statement-on-the-international-criminal-court.html>. For a summary of other expressions of concern by States and organizations as of 18 March 2019, see the International Coalition for the ICC, <http://www.coalitionfortheicc.org/visa-ban-on-icc-personnel>