

Lawyers' Rights Watch Canada

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

www.lrwc.org; lrwc@portal.ca; Tel: +1 604 738 0338; Fax: +1 604 736 1175

3220 West 13th Avenue, Vancouver, B.C. CANADA V6K 2V5

26 April 2019

Mr. Donald Tusk, President of the European Council
Council of the European Union
Rue de la Loi/Wetstraat 175B-1048 Brussels
Belgium
Fax: +32 22816934

Ms. Federica Mogherini
High Representative of the Union for Foreign Affairs and Security Policy
Foreign Affairs Council
Rue de la Loi / Wetstraat 200
1049 Brussels
Belgium
Email: federica.mogherini@ec.europa.eu

Dear President and High Representative,

Re: Impunity for war crimes in Afghanistan: Threats & reprisal by the US against the International Criminal Court and its Prosecutor

We write on behalf of Lawyers' Rights Watch Canada (LRWC)¹ to call on European Union (EU) member States to take immediate steps to safeguard the independence and integrity of the International Criminal Court (ICC) and to ensure access to remedies by victims of war crimes in Afghanistan. We recommend that the EU and each EU member State:

1. Insist that the United States (US) halt its threats and reprisals against the ICC and its personnel;
2. Make joint or several referrals of the Situation in Afghanistan to the ICC Prosecutor pursuant to Article 14 of the Rome Statute;
3. Ensure a sufficient budget for the ICC to carry out its mandate fully; and
4. Seek an independent assessment of the functioning of the ICC.

LRWC is gravely concerned about continued threats by the US aimed at preventing or deterring ICC judges, prosecutors, and staff from impartially and independently performing their duties under the Rome Statute. We are aware of the EU statement expressing "serious concern" after the US announcement on 15 March 2019 of measures it intended to take against ICC personnel.² We also note the December 2018 resolution by the Assembly of States Parties (ASP) to the Rome Statute,³ statements by a number of States including several EU member States, and a 22 March 2019 statement by two UN Special Rapporteurs.⁴ Despite these expressed concerns, on 4 April 2019 the US acted on its threats by revoking the US entry visa of the chief Prosecutor of the ICC, Ms. Fatou Bensouda. On 9 April 2019, LRWC expressed grave concern about the threats and the reprisal against the ICC Prosecutor in a letter to the US President, Secretary of State and National Security Advisor.⁵

LRWC's letter reminded the US 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.

EU member States and other States that have ratified, succeeded or acceded to these multilateral treaties are obligated to insist and ensure that all Parties uphold and implement their treaty obligations. They include preventing impunity for these gravely serious international crimes by ensuring prompt and thorough investigation and prosecution of suspected perpetrators.

In response to the 12 April 2019 decision of the ICC Pre-Trial Chamber (PTC) refusing authorization to open an investigation into the Situation in Afghanistan, US President Donald J. Trump issued a statement⁶ applauding the PTC decision and threatening "swift and vigorous response" to "any attempt" at prosecution of "American, Israeli, or allied personnel." A statement by US Secretary of State Michael R. Pompeo on 12 April 2019 appeared to attribute the PTC's decision to his 15 March 2019 announcement⁷ of a policy to deny and revoke US visas for ICC personnel who investigate suspected crimes committed by US nationals.⁸

The *erga omnes* obligations of all States and the repeated US threats highlight the importance that all States Parties to the Rome Statute cooperate with the ICC and fully uphold the purposes of the treaty. This necessity is made more urgent by the PTC's 12 April 2019 decision.⁹ The PTC rejected authorization of an investigation of crimes committed in Afghanistan based not on a lack of jurisdiction or reasonable grounds, but the "extremely limited" prospects for a successful investigation and prosecution, in large part due to a demonstrated and anticipated lack of cooperation from authorities in relevant States. The Office of the Prosecutor (OTP) issued a statement on 12 April 2019 indicating that the office "will further analyse the decision and its implications, and consider all available legal remedies."¹⁰

A growing number of expert commentators have written that the reasoning of the PTC's decision is faulty and suggests capitulation to the lengthy pattern of delay and obstruction by various authorities. They include Afghanistan and the US, and finally the US threats. These factors seriously undermine the ICC's reputation for independence and integrity.

It is crucial that all States Parties to the Rome Statute use all legal and diplomatic means to ensure that the OTP can conduct analysis and consider further action independently and without any form of harassment or intimidation.

Other urgent action is also required, because determination of any appeal of the PTC's decision by the OTP will further delay access to remedies for many thousands of civilian victims who have suffered grave international crimes without any form of redress. The PTC decision stated:

A high number of victims of the situation have come forward to present their views on whether the Chamber should authorise the commencement of the Prosecutor's investigation into the situation. Overall, the Court has received a total of 794 representations in Dari and Pashto, as well as Arabic, English and German of which 699 were transmitted to the Pre-Trial Chamber¹⁶ on behalf of the following victims: 668 representations on behalf of 6,220 individuals; 17 representations on behalf of 1,690 families; 13 representations on behalf of several millions of victims, including 26 villages; 17 and 1 representation on behalf of an institution (para 27)¹¹

The PTC decision noted that “680 out of the 699 applications welcomed the prospect of an investigation aimed at bringing culprits to justice, preventing crime and establishing the truth” (Para 87).¹²

On 8 April, the EU Council, in its Conclusions on the Afghanistan Peace Process, stated that it is important that a peace agreement “adheres to the rule of law and respect for the universal human rights of all Afghans...” and “allows for possibilities to ensure accountability, including through transitional justice, and to address the grievances of the victims of the conflict in Afghanistan” (emphasis added).¹³

In a 14 April 2019 press release, the Afghanistan Independent Human Rights Commission (AIHRC) said the PTC’s decision is “a matter of regret for the AIHRC,” stating:

Since the domestic judiciary in Afghanistan has been unwilling or unable to prosecute perpetrators of human rights violations, it is imperative that the ICC should do so, in accordance with its jurisdiction and responsibility, in order to ensure justice, end the culture of impunity and strengthen accountability in the country..... The decision of the ICC ... does not serve the interests of justice; actually, it contributes to culture of impunity.¹⁴

We also note persistent concern about the ICC’s limited resources and capacity to carry out its functions successfully.¹⁵ State Parties to the Rome Statute are responsible to ensure that contributions to the ICC budget are sufficient to ensure that the Court can carry out the full mandate of the Rome Statute in a manner that is recognized as independent, fair and effective. We note the concerns expressed by four former ASP presidents, who on 24 April 2019 recommended an “independent assessment of the Court’s functioning.” The recommended assessment would address all issues facing the ICC so that the Court can answer growing concerns about erosion of the international rule of law and ensure accountability of all perpetrators of international crimes.¹⁶

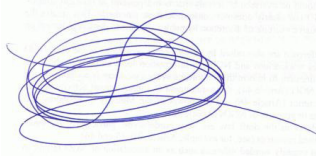
Recommendations

LRWC calls on the EU and each EU member State to:

1. Insist that the US halt threats and rescind reprisals against the ICC and its personnel;
2. Make joint or several referrals of the Situation in Afghanistan to the ICC Prosecutor pursuant to Article 14 of the Rome Statute;
3. Ensure that the ICC has a sufficient budget to carry out its mandate fully; and
4. Call for an immediate independent assessment of the ICC’s functioning so as to ensure the Court’s effectiveness.

Thank you for your continued attention to this serious matter. We look forward to hearing from you as to the EU's actions, and that of each of its member States, to address US threats and reprisals and uphold the integrity and independence of the ICC.

Sincerely,



Gail Davidson
Executive Director, LRWC



Catherine Morris
UN Liaison Director, LRWC



Marjorie Cohn
LRWC Director
Deputy Secretary General, International Association of Democratic Lawyers
Former President, US National Lawyers Guild

Copied to:

Dr. Karin Kneissl
Minister of Foreign Affairs
Federal Ministry for Europe, Integration and Foreign Affairs
Republic of Austria
Minoritenplatz 8, 1010 Vienna
Austria
Fax +43 (0) 50 11 59 – 0; +43 (0)2255 6658; Email: beglaubigungen@bmeia.gv.at

M. Didier J.L. Reynders
Minister of Foreign Affairs
FPS Foreign Affairs, Foreign Trade and Development Cooperation
Kingdom of Belgium
rue des Petits Carmes / Karmelietenstraat 15 1000 Brussels
Belgium
Fax. : +32 (0)2 513 25 97; E-mail : contact.reynders@diplobel.fed.be

Ms. Ekaterina Zakhariyeva
Minister of Foreign Affairs
Republic of Bulgaria
2 Alexander Zhendov Str. Sofia 1113
Bulgaria
Email: priemna@mfa.bg

Ms. Marija Pejčinović Burić

Deputy Prime Minister
Minister of Foreign and European Affairs
Republic of Croatia
Trg N.Š. Zrinskog 7-8, 10000 Zagreb
Fax: +385 (0)1 4551 795, +385 (0)1 4920 149; E-mail: ministarstvo@mvep.hr

Mr. Nikos Christodoulides
Minister of Foreign Affairs
Republic of Cyprus
Presidential Palace Avenue
1447, Nicosia
Cyprus
Fax: +357 22 661881; Email: info@mfa.gov.cy, vracha@mfa.gov.cy, pxiouri@mfa.gov.cy

Mr. Tomáš Petříček
Minister of Foreign Affairs
Czech Republic
Ministry of Foreign Affairs
Loretánské náměstí 5
118 00 Praha 1, Czech Republic
Email: epodatelna@mzv.cz

Mr. Anders Samuelsen
Minister of Foreign Affairs
Kingdom of Denmark
Ministry of Foreign Affairs
Asiatisk Plads 2
DK -1448 Copenhagen
Email: udenrigsministeren@um.dk

Mr. Sven Mikser
Minister of Foreign Affairs
Republic of Estonia
Islandi väljak 1, 15049 Tallinn
Estonia
E-mail: Sven.Mikser@mfa.ee, Paul.Teesalu@mfa.ee

Mr. Timo Soini
Minister of Foreign Affairs
Office of the Minister for Foreign Affairs
PO Box 23
00023
Government
Finland
Email: umi@formin.fi, riikka.taivassalo@formin.fi, keijo.karjalainen@formin.fi

M. Jean-Yves Le Drian
Minister of Europe and Foreign Affairs
Republic of France
37, Quai d'Orsay - 75007 Paris
France

Mr. Heiko Maas
Federal Minister of Foreign Affairs
Federal Republic of Germany
Werderscher Markt 1
10113 Berlin
Fax: +49-(0)3018 17-3402

Mr. Georgios Katrougalos
Minister of Foreign Affairs
Hellenic Republic
1st Vas. Sofias Av.
106 71 Athens
Greece
Fax: +30 210 368 1717

Mr. Péter Szijjártó
Minister of Foreign Affairs and Trade for Hungary
H-1027 Budapest, Bem rakpart 47.
Fax: +36-1-212-5918; Email: peterszijjarto@mfa.gov.hu

Mr. Simon Coveney
Minister for Foreign Affairs and Trade
Republic of Ireland
Iveagh House
80, St. Stephens Green
Dublin 2
D02 VY53
Email: simon.coveney@oireachtas.ie

Mr. Enzo Moavero Milanesi
Minister of Foreign Affairs and International Cooperation
Republic of Italy
Piazzale della Farnesina, 1 00135 Roma
Fax: (+39) 06 3236210
Email: ministero.affariesteri@cert.esteri.it

Mr. Edgars Rinkēvičs
Minister of Foreign Affairs
Republic of Latvia
K. Valdemāra iela 3, Rīga LV-1395
Latvia
Fax: +371 67 22 27 62; Email: mfa.cha@mfa.gov.lv

Mr. Linas Antanas Linkevičius
Minister of Foreign Affairs
Republic of Lithuania
J.Tumo-Vaižganto Str. 2, LT-01511 Vilnius
Lithuania
Fax: +370 5 231 3090; Email: minister@urm.lt, ttsd@urm.lt

Mr. Jean Asselborn
Minister for Foreign and European Affairs
Grand Duchy of Luxembourg
9, rue du Palais de Justice
L-1841 Luxembourg
Luxembourg
Fax: (+352) 223144; Email: boite.officielle@mae.etat.lu

Hon. Carmelo Abela
Minister for Foreign Affairs and Trade Promotion
Republic of Malta
Palazzo Parisio
Merchants Street
Valletta, VLT 1171
Malta
E-mail: carmelo.abela@gov.mt, arthur.garrard@gov.mt

Mr. Stef Blok
Minister of Foreign Affairs
Kingdom of the Netherlands
P.O. Box 20061
2500 EB The Hague
The Netherlands
Fax: + 31 (0)70 348 48 48

Mr. Jacek Czaputowicz
Minister of Foreign Affairs
Republic of Poland
al. J. Ch. Szucha 23, 00-580 Warsaw
Poland

Dr. Augusto Santos Silva
Minister of Foreign Affairs
Portuguese Republic
Largo do Rilvas
1399-030 Lisbon
Portugal

Mr. Teodor-Viorel Meleşcanu
Minister of Foreign Affairs for Romania
Aleea Alexandru nr. 31, Sector 1, 011822 Bucharest
Romania
Fax: +40 21 319 68 62; E-mail: opinia_ta@mae.ro

Mr. Miroslav Lajčák
Minister of Foreign and European Affairs
The Slovak Republic
Hlboká cesta 2
833 36 Bratislava 37
Slovak Republic
Fax: + 421 2 5978 3009
E-mail: kami@mzv.sk

Mr. Miroslav Cerar Jr.
Deputy Prime Minister and Minister of Foreign Affairs
Republic of Slovenia
Prešernova cesta 25
SI-1001 Ljubljana
P.P. 481
Slovenia
Fax: +386 1 478 2340; Email: miro.cerar@gov.si, gp.mzz@gov.si

Mr. Josep Borrell Fontelles
Minister of Foreign Affairs, European Union and Cooperation
Kingdom of Spain
Sede Palacio de Santa Cruz
Plaza de la Provincia, 1
28071 Madrid
Spain
Fax: 91 394 86 20; Email: informae@maec.es, se.aex@maec.es

Ms. Margot Wallström
Deputy Prime Minister
Minister for Foreign Affairs
Kingdom of Sweden
Herkulesgatan 17
SE 103 33 Stockholm
Email: ud.registrator@regeringskansliet.se

Rt. Hon. Jeremy Hunt
Secretary of State for Foreign and Commonwealth Affairs
United Kingdom
House of Commons, London, SW1A 0AA
UK
Email: huntj@parliament.uk

References

- ¹ Lawyers' Rights Watch Canada (LRWC) is a committee of lawyers who promote international human rights and the rule of law through education, research and advocacy. LRWC is an NGO in Special Consultative Status with the Economic and Social Council (ECOSOC) of the United Nations (UN).
- ² European Union External Action, Statement by the Spokesperson on the International Criminal Court, 15 March 2019, at https://eeas.europa.eu/delegations/iran/59733/statement-spokesperson-international-criminal-court_en.
- ³ ICC-ASP/17/Res.5, Strengthening the International Criminal Court and the Assembly of States Parties, Adopted at the 13th plenary meeting on 12 December 2018 by consensus, ICC-ASP/17/20. The resolution states that the ASP is “gravely concerned by attempts at intimidation to deter cooperation,” and calls on all States Parties “to intensify their efforts to promote universality,” “to continue to express their political and diplomatic support to the Court...[and] “to strengthen their efforts to ensure full and effective cooperation with the Court,” at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/RES-5-ENG.pdf.
- ⁴ "US 'threats' against International Criminal Court must stop, say UN experts," by Michel Forst, Special Rapporteur on the situation of human rights defenders; and Diego García-Sayán, Special Rapporteur on the Independence of Judges and Lawyers, 22 March 2019. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24392&LangID=E>.
- ⁵ LRWC, Threats and reprisal by USA against the ICC and its Prosecutor, 9 April 2019, at <https://www.lrwc.org/threats-and-reprisal-by-usa-against-the-international-criminal-court-and-its-prosecutor/>.
- ⁶ The United States White House, Statement from the President, 12 April 2019, at <https://www.whitehouse.gov/briefings-statements/statement-from-the-president-8/>
- ⁷ Michael R. Pompeo, Secretary of State, Remarks to the Press, 15 March 2019, <https://www.state.gov/secretary/remarks/2019/03/290394.htm>. Also see the threat of US National Security Advisor John Bolton in his speech to the Federalist Society, TravelWireNews, 10 September 2018, <https://travelwirenews.com/full-text-of-john-boltons-speech-to-the-federalist-society-1084024/>.
- ⁸ US Department of State, Statement by Secretary Pompeo, 12 April 2019, at <https://pbs.twimg.com/media/D394WhiX4AAQZqx.png:large>.
- ⁹ “ICC judges reject opening of an investigation regarding Afghanistan situation,” ICC, 12 April 2019, at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1448>. See the decision: *Situation in the Islamic Republic of Afghanistan, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, ICC-02/17, International Criminal Court (ICC), 12 April 2019, at https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF.
- ¹⁰ “Statement of the Office of the Prosecutor following the decision of Pre-Trial Chamber II concerning the Situation in Afghanistan,” ICC, 12 April 2019, at <https://www.icc-cpi.int/Pages/item.aspx?name=190412-otp-stat-afghanistan>.
- ¹¹ ICC-02/17, 12 April 2019, *supra* note 9, at para 27.
- ¹² *Ibid*, para 87.
- ¹³ Council of the European Union, Council conclusions on Afghanistan's Peace Process, Foreign Affairs Council, 8 April 2019, <https://www.consilium.europa.eu/media/39011/st07978-en19.pdf>.
- ¹⁴ Afghanistan Independent Human Rights Commission, Press release on the rejection of the International Criminal Court Prosecutor's request to investigate into the situation in Afghanistan, 14 April 2019, at <https://www.aihrc.org.af/home/press-release/8090>.
- ¹⁵ ICC-02/17, 12 April 2019, *supra* note 9, at para. 95-15; International Coalition for the ICC, “A sufficient budget”, n.d., at <http://www.coalitionfortheicc.org/fight/state-support/sufficient-budget>
- ¹⁶ Prince Zeid Raad Al Hussein, Bruno Stagno Ugarte, Christian Wenaweser, and Tiina Intelman, “The International Criminal Court Needs Fixing, *Atlantic Council*, 24 April 2019, at <https://www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing>.