

Mandates of the Special Rapporteur on the independence of judges and lawyers; the Working Group on Arbitrary Detention; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes; the Special Rapporteur on the situation of human rights defenders; the Independent Expert on the promotion of a democratic and equitable international order; the Special Rapporteur on the situation of human rights in the Palestinian territory occupied since 1967; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; and the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights

REFERENCE:
AL USA 15/2020

23 June 2020

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the independence of judges and lawyers; Working Group on Arbitrary Detention; Special Rapporteur on extrajudicial, summary or arbitrary executions; Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes; Special Rapporteur on the situation of human rights defenders; Independent Expert on the promotion of a democratic and equitable international order; Special Rapporteur on the situation of human rights in the Palestinian territory occupied since 1967; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; and Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, pursuant to Human Rights Council resolutions 35/11, 42/22, 35/15, 36/15, 34/5, 36/4, 1993/2A, 40/16, 34/19, 36/7 and 36/10.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the implementation of policies and initiatives aimed at influencing the independence of the International Criminal Court (ICC), an institution created by an international treaty that has 123 State parties and whose role is to seek justice against genocide, war crimes, crimes against humanity, and the crime of aggression.

On 20 March 2019, the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the independence of judges and lawyers sent a joint communication to your Excellency's Government (AL USA 6/2019) expressing their concerns about the remarks made by the former U.S. President's National Security Adviser, Mr. John R. Bolton, and the US Secretary of State, Mr. Michael Pompeo, against the ICC, which appeared to constitute serious threats to, and interference with, the independence of the Court and its judges, prosecutors and staff.

We would like to thank you for your response of 22 July 2019. However, we remain gravely concerned about the persisting threats to the ICC's judicial independence, which have been exacerbated in light of the new developments referred to below.

According to the new information received:

On 5 March 2020, the Appeals Chamber of the International Criminal Court¹ decided to authorise an investigation into alleged war crimes in Afghanistan, including against members of the armed forces of the United States of America and its Central Intelligence Agency. Afghanistan deposited its instrument of accession to the Rome Statute on 10 February 2003. The ICC may therefore exercise its jurisdiction over crimes listed in the Rome Statute committed on the territory of Afghanistan or by its nationals from 1 May 2003 onwards.

On 11 June 2020, in response to the Appeals Chamber decision, the President of the United States of America issued Executive Order 13928 on Blocking Property of Certain Persons Associated with the International Criminal Court.²

The Executive Order considers that “any attempt by the ICC to investigate, arrest, detain, or prosecute any United States personnel without the consent of the United States, or of personnel of countries that are United States allies and who are not parties to the Rome Statute or have not otherwise consented to ICC jurisdiction, constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States”.

The Executive Order declares a national emergency to deal with that threat, and authorises the targeting and sanctioning of individual staff of the ICC engaged in efforts to investigate US and allied personnel, including as part of the Prosecutor's investigation of the situation in Afghanistan.

On the same day, the US Secretary of State told the media at a joint press conference that “*we cannot, we will not stand by as our people are threatened by a kangaroo court*” and announced that “*the Trump Administration is taking the following actions*”:

- a. authorizing the imposition of economic sanctions against ICC officials directly engaged in the ICC efforts to investigate US personnel or allied personnel against that allied state's consent, and against others who materially support such officials' activities; and*
- b. expanding visa restrictions for officials directly engaged in those same investigations, including to their family members.*³

¹ <https://www.icc-cpi.int/Pages/item.aspx?name=pr1516>

² <https://www.whitehouse.gov/presidential-actions/executive-order-blocking-property-certain-persons-associated-international-criminal-court/>

International organizations,⁴ States⁵ and non-governmental organizations⁶ have expressed concerns about E.O. 13928 and the application of unilateral sanctions against ICC officials.

The implementation of E.O. 13928 and the statements made by the US high-ranking officials may have an adverse impact on the work of human rights defenders, civil society organizations, victims' representatives, businesses or others, as they may be forced to refrain from cooperating with the ICC in the pursuit of truth and justice out of fear of the US reprisal.

The E.O. 13928 may also have a strong adverse effect on the interests of victims of atrocity crimes, for many of whom the Court represents the last hope for justice that undermines common endeavor to fight impunity and to ensure accountability for mass atrocities.

Without prejudging the accuracy of the information received, grave alarm is expressed at the policies and initiatives adopted by the Government of the United States of America allegedly aimed at influencing the independence of the ICC and undermining its efforts to investigate, prosecute and sanction genocide, war crimes, crimes against humanity, and crime of aggression, as well as thwarting victims' access to justice. Similarly, we express concern at the potential adverse impact that the implementation of E.O. 13928 may have on human rights defenders, civil society organisations, victims' representatives, businesses and others. Finally, we are seriously concerned about the declaration of a state of emergency in this situation.

We consider that the imposition of unilateral sanctions against judges, prosecutors and staff members of the ICC constitutes not only a clear violation their privileges and immunities, but also a breach of a broad array of human rights and fundamental freedoms of the targeted individuals.

We also would like to recall that the International Criminal Court has jurisdiction in the national territory of Afghanistan, the country having acceded to the Rome Statute

³ <https://www.state.gov/secretary-michael-r-pompeo-at-a-press-availability-with-secretary-of-defense-mark-esper-attorney-general-william-barr-and-national-security-advisor-robert-obrien/>

⁴ The EU High Representative for Foreign Affairs, Mr. Josep Borrell, stressed that “[t]he court [had] been playing a key role in providing international justice and addressing the gravest international crimes – it is a key factor in bringing justice and peace.” The spokesperson for the UN Secretary-General stated on 11 June 2020 that “the need to fight impunity and for justice [remained] unchanged.”

⁵ For instance, Germany, France and Switzerland. See http://www.xinhuanet.com/english/2020-06/13/c_139136014.htm and https://www.swissinfo.ch/eng/international-accountability_switzerland--regrets--us-sanctions-against-icc-employees/45830070

⁶ Human Rights Watch jointly with 55 other non-governmental human rights organizations launched a petition to “Oppose Trump Administration Measures against the International Criminal Court”. The ICC Appeals Chamber’s decision had been earlier assessed by Amnesty International as the “first true hope of justice for the victims of conflict”.

on 10 February 2003, and is therefore mandated to prosecute international crimes committed in Afghanistan that have not been prosecuted by national courts, regardless of the status, nationality or allegiance of the perpetrators. Further, we would like to recall the customary principle of universal jurisdiction, codified in multiple treaties to which the United States are party (including the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Geneva Conventions of 1949), according to which certain crimes, including torture, war crimes and crimes against humanity, can be investigated and prosecuted in any jurisdiction, irrespective of the nationality of the perpetrator.

In connection with the alleged facts and concerns, please refer to the **Annex on Reference to International Human Rights Law**, attached to this letter, which cites international human rights instruments and standards relevant to these allegations.

As it our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and comments that you may have on the above-mentioned allegations.
2. Please provide detailed information on the legal basis for the actions envisaged by Executive Order 13928 against the ICC judges, prosecutors, and personnel, and explain their compatibility with international human rights standards relating to the independence of the judiciary and the fight against impunity for gross human rights violations.
3. Please provide detailed information on the compatibility of Executive Order 13928 with international standards on courts independence and objective investigations and impartial judicial proceedings.
4. Please explain how the measures set out in Executive Order 13928 could be regarded as being in line with international standards governing the personal immunity of judges and prosecutors for legitimate acts undertaken in the exercise of their functions.
5. Please also explain how the aforementioned threats are compatible with a conducive environment for human rights defenders, civil society organisations and victims' representatives for cooperation with the ICC.
6. Please explain how the aforementioned threats are compatible with the customary principle of universal jurisdiction, codified in multiple treaties to which the United States are party (including the CAT and the Geneva Conventions of 1949), according to which certain crimes can be investigated and prosecuted irrespective of the nationality of the perpetrator.

We would appreciate receiving a response within 60 days. Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations. In the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

We are considering to publicly express our concerns in the near future as, in our view, the information available to us is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the human rights implications arising from the implementation of Executive Order 13928. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issues in question.

Please accept, Excellency, the assurances of our highest consideration.

Diego García-Sayán
Special Rapporteur on the independence of judges and lawyers

Elina Steinerte
Vice-Chair of the Working Group on Arbitrary Detention

Agnes Callamard
Special Rapporteur on extrajudicial, summary or arbitrary executions

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Mary Lawlor
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Michael Lynk
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Fionnuala Ní Aoláin
Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Nils Melzer

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Fabian Salvioli

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Alena Douhan

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Annex

Reference to international human rights law

The independence of the judiciary is prescribed, inter alia, in the International Covenant on Civil and Political Rights (ICCPR), ratified by the United States of America on 8 June 1992, and the Basic Principles on the Independence of the Judiciary.

Article 14 of the ICCPR establishes the right to fair proceedings before a competent, independent and impartial tribunal established by law. In this regard, General Comment No. 32 (2007) of the United Nations Human Rights Committee notes that the element of independence requires the judiciary to be free from political interference by the executive branch, as well as the legislature. The Committee notes in particular that a situation where the executive is able to control or direct the judiciary is incompatible with the notion of an independent tribunal (General Comment No. 32, para. 19).

The Basic Principles on the Independence of the Judiciary provide that it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary (principle 1); that the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason (principle 2); and that there shall not be any inappropriate or unwarranted interference with the judicial process (principle 4).

The Guidelines on the Role of Prosecutors provide that States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability (principle 4). The standards referred to above refer to the obligations of governmental and other institutions to protect and promote the independence of the judiciary and the prosecution service. They also apply, mutatis mutandis, to the work carried out by international judges and prosecutors in the legitimate exercise of their functions.

We consider that the enforcement of E.O. 13928 and the imposition of unilateral sanctions against judges, prosecutors and staff members of the ICC may also result in the violation of a number of human rights and fundamental freedoms included in the ICCPR, including the prohibition of punishment for acts that did not constitute a crimes at the moment of their commission (art. 15); fair trial guarantees, in particular the right to due process and the presumption of innocence (art. 14 (2) to (7)); the right to freedom of movement (art. 12) and the right to privacy and family life (art. 17).

In addition, we wish to recall that, as established by in *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, in cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate, prosecute, and punish those responsible. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist

international judicial organs competent in the investigation and prosecution of these violations (principle 4). To that end, where it is so provided for in an applicable treaty or other international legal obligations, States should provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to, and protection of, victims and witnesses (principle 5).

In relation to the potential adverse impacts on human rights defenders, civil society organisations and victims' representatives who might be discouraged from cooperating with the ICC, I would like to refer your Excellency's Government to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the UN Declaration on Human Rights Defenders. In particular, I would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels and that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms. Furthermore, I would like to bring to your attention Article 9, paragraph 4, point a) of the UN Declaration on Human Rights Defenders, reaffirming the right of everyone, individually and in association with others, to unhindered access to and communication with international bodies. Actions that hinder or restrict the ability of individuals and organisations to cooperate with the ICC would appear to violate Article 9 of the Declaration.

Furthermore, we would like to draw your Excellency Government's attention to Human Rights Council's resolution 12/2, which urges Governments to prevent and refrain from all acts of intimidation or reprisal against those who, *inter alia*, avail or have availed themselves of procedures established under the auspices of the United Nations for the protection of human rights and fundamental freedoms, and all those who have provided legal or other assistance to them for this purpose. In this regard, the Human Rights Council condemns all acts of intimidation or reprisal by Governments and non-State actors against individuals and groups who seek to cooperate or have cooperated with the United Nations, its representatives and mechanisms in the field of human rights.

In relation to the interests of victims of atrocity crimes, ICC plays a vital role in ensuring that victims of human rights violations have access to effective remedies and protection; that perpetrators of human rights violations are brought to justice; and that anyone suspected of a criminal offence receives a fair trial in accordance with international standards. As the ICC is a court of last resort, undermining its legitimacy by threatening judges and prosecutors may well block access to justice and accountability that otherwise are not attainable at the respective national levels.

We would also like to recall that proper regulation of a State of Emergency is an important dimension of a rule of law response to exceptional or crisis situations. International human rights treaties including Article 4 of the International Covenant on Civil and Political Rights affirm the right of derogation in the context of emergency to the extent "strictly required by the exigencies of the situation". (A/HRC/40/52 Add.1 para

14). Before a State invokes a derogation, two fundamental conditions must be met: the situation must amount to an emergency which threatens the life of the nation, and the State must have officially proclaimed a state of emergency.” (A/HRC/37/52, para.10)