

Mandates of the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on the situation of human rights in the Palestinian territory occupied since 1967 and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Ref.: AL USA 15/2024
(Please use this reference in your reply)

8 May 2024

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the independence of judges and lawyers; Special Rapporteur on the situation of human rights in the Palestinian territory occupied since 1967 and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolutions 53/12, 1993/2A and 49/10.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **reports that personnel at the International Criminal Court (ICC) are facing harassment and intimidation from US public officials in response to official work by ICC personnel to investigate credible allegations of international crimes.**

The International Criminal Court (ICC) investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression. As a court of last resort, it seeks to complement, not replace, national courts. It is established and governed by an international treaty called the Rome Statute 1998, which has 124 states parties, including the State of Palestine.

According to the information received:

On 3 March 2021, the ICC opened an investigation into possible crimes within its jurisdiction committed in the occupied Palestinian territory, potentially including by Israel, Hamas and other armed Palestinian groups, over possible war crimes. On 17 November 2023, the ICC Prosecutor Karim Khan said this investigation now “extends to the escalation of hostilities and violence since the (Hamas) attacks that took place on 7 October 2023”¹ after his Office received a [referral](#) of the Situation in the State of Palestine from five State Parties.

The office of the ICC Prosecutor issued a statement on 3 May 2024 stating² it was aware of “significant public interest” in its activities and that it sought to “engage constructively with all stakeholders”.

The statement added that the Court's “independence and impartiality are undermined, however, when individuals threaten to retaliate against the Court or against Court personnel”. The statement noted that “Such threats, even not

¹ <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-aa-khan-kc-situation-state-palestine>

² <https://twitter.com/IntlCrimCourt/status/1786316229688414518>.

acted upon, may constitute an offence” against the ICC's “administration of justice”, and thus must be brought to an end.

Reaction in the US administration

Executive officials in the current administration have publicly spoken out against the actions and the anticipated actions of the ICC, and members of the Legislature have issued threats.

- On 29 April the White House Press Secretary stated: “As we have publicly said many times, the ICC has no jurisdiction in this situation, and we do not support its investigation”³.
- On that same day, the US House Speaker Rep. Mike Johnson stated: “It is disgraceful that the International Criminal Court is reportedly planning to issue baseless and illegitimate arrest warrants against Israeli Prime Minister Netanyahu and other senior Israeli officials”. Johnson called for the Biden administration to “immediately and unequivocally demand that the ICC stand down” and “use every available tool to prevent such an abomination”⁴.
- Other US Senators used social media to characterize the ICC actions or anticipated actions as: “A disgusting choice by the ICC”⁵, and action that would “embolden terrorists”⁶; and “outrageous”⁷. The House Foreign Affairs Committee Chair Rep. Michael McCaul announced he expects to see a House version of Sen. Tom Cotton's February 2023 bill⁸ to sanction ICC officials involved in investigating the U.S. and its allies. Other House Representative have called for “strong consequences” from the Biden Administration for the ICC’s anticipated actions.
- Twelve US Republican senators on 24 April 2024 sent a letter to the ICC, warning that the institution would face “severe sanctions” if it issues arrest warrants against Israeli Prime Minister Benjamin Netanyahu and other Israeli officials. In the body of the letter, the signatories wrote, “*Target Israel and we will target you. If you move forward with the measures indicated in the report, we will move to end all American support for the ICC, sanction your employees and associates, and bar you and your families from the United States. You have been warned*”⁹.

³ <https://www.whitehouse.gov/briefing-room/press-briefings/2024/04/29/press-briefing-by-press-secretary-karine-jean-pierre-58/>

⁴ <https://www.speaker.gov/speaker-johnson-statement-on-potential-icc-arrest-warrants-for-netanyahu-israeli-officials/>

⁵ (18) Rick Scott on X: “A disgusting choice by the ICC to bow to the radical anti-Israel movement that wants to destroy the Jewish State. Israel is delivering tons of aid to Gaza every day WHILE fighting Iran-backed terrorism that murdered 1,200+ & is still holding 100+ hostage, including Americans.” / X (twitter.com)

⁶ (18) Elise Stefanik on X: “The ICC is propping up Hamas by attempting to punish the only democracy in the Middle East just for defending itself against barbaric terrorism. This action by international bureaucrats would embolden radical terrorists and encourage more carnage. The US must stand with our...” / X (twitter.com)

⁷ (18) Rep. Anthony D’Esposito on X: “Any attempt by the ICC to arrest the democratically elected leadership of Israel is outrageous. The ICC should focus on apprehending the leadership of Hamas that is currently hiding in tunnels and using civilians as human shields. @POTUS: now is the time to stand with Israel...” / X (twitter.com)

⁸ <https://www.cotton.senate.gov/news/press-releases/cotton-colleagues-introduce-bill-to-sanction-the-international-criminal-court>

⁹ <https://www.politico.com/f/?id=0000018f-4e0e-d759-a9ff-ff4ee9420000>

While we do not wish to prejudge the accuracy of these allegations, we express our serious concern at reports that personnel at the ICC are facing harassment and intimidation from public officials in the US administration and Legislature which goes beyond the accepted limits of freedom of expression under international human rights law.

We are concerned that the mandate and actions of the ICC have been publicly smeared by American government officials following decisions the ICC made to investigate credible allegations of international crimes. We take this opportunity to highlight that according to international standards, it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary, including by protecting it from intimidation and political interference, and to ensure that lawyers (including prosecutors) are able to perform all of their professional functions without intimidation, hindrance, harassment, improper interference or sanctions.

We would like to recall with urgency that Special Procedures mandate-holders have raised concerns about war crimes, crimes against humanity, direct and public incitement to genocide, and risks of genocide several times in the past months, reminding all governments they have a duty to prevent genocide¹⁰, an obligation to “ensure respect” for international humanitarian law, and a duty to investigate and prosecute international crimes. Furthermore, in a letter sent on 23 March 2023 to the ICC, mandate-holders expressed “concern for the pervasive impunity and ever-deteriorating human rights situation in the occupied Palestinian territory, owing to acts that may amount to widespread and systemic violations of international law committed by various actors”.¹¹

In that letter as well, mandate-holders noted that “Expediting justice is a crucial step to end impunity and restore international law and a human rights-based order, as the last bastion to stop the spirals of violence and the risks this poses for Palestinians and Israelis alike. With the legal instruments at our disposal, we have a shared institutional and moral duty to act to counter these spirals, ensure that past atrocities do not go unpunished and that new ones are prevented.”

The harassment and intimidation of Court officials is of special concern when it comes from government officials. Some of these statements by government officials, may amount to interference in the independence the judiciary and improper interference in the legal profession. Politicians and public officials “play an important role in shaping the media agenda, public debate and opinion and that, as a result, ethical behaviour and attitudes on their part, including in their public communications, are essential for promoting the rule of law, the protection of human rights, and for ensuring public trust in democratic systems of governance”¹².

We recall in addition that public officials should not make statements that are likely to promote intolerance, discrimination or dis/misinformation and should, instead, take advantage of their leadership positions to counter these social harms and to promote intercultural understanding and respect for diversity. We would like to

¹⁰ <https://www.ohchr.org/en/press-releases/2023/11/gaza-un-experts-call-international-community-prevent-genocide-against>.

¹¹ <https://www.ohchr.org/sites/default/files/documents/countries/palestine/2023-03-23-Letter-ICC-Palestine.pdf>

¹² 2021 JOINT DECLARATION ON POLITICIANS AND PUBLIC OFFICIALS AND FREEDOM OF EXPRESSION

highlight that the exercise of the rights provided for under article 19 of ICCPR carry with it special duties and responsibilities, in this instance, we highlight the respect of the rights or reputations of others.

Threats against justice operators, including at the international level, can diminish the rule of law, jeopardize the judges' and lawyers' personal and professional interests, and undermine judicial independence.

Threats create a hostile environment for the ICC as it seeks to play its important role in the international legal system. If confirmed, the lack of protection from harassment suffered by lawyers and judges exercising their functions described in the allegations would amount to a breach of a number of international and regional standards relating to the right to a fair trial.

In connection with the above 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 is 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/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information on the measures taken to protect and ensure the respect of justice operations, including those at international level, in your country.
3. Please provide information on the measures taken to cooperate with the ICC.

We would appreciate receiving a response within 60 days. Past this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and 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 may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

Please be informed that a letter on this subject matter has been also sent to the Permanent Mission of Israel.

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

Margaret Satterthwaite
Special Rapporteur on the independence of judges and lawyers

Francesca Albanese
Special Rapporteur on the situation of human rights in the Palestinian territory
occupied since 1967

Ben Saul
Special Rapporteur on the promotion and protection of human rights and fundamental
freedoms while countering terrorism

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw the attention of your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above. In particular, we would like to highlight the relevant provision of the International Covenant on Civil and Political Rights (ICCPR), which the United States of America ratified on the 8 June 1992, the Convention on the Elimination of Racial Discrimination (CERD), ratified by the United States of America on 21 October 1994, as well as the Universal Declaration of Human Rights, which reflects customary international law.

Further, the CERD Committee has noted that the chapeau of article 4 incorporates the obligation to take "immediate and positive measures" to eradicate incitement and discrimination, a stipulation that complements and reinforces obligations under other articles of the Convention to dedicate the widest possible range of resources to the eradication of hate speech. In general recommendation no. 32 (2009) on the meaning and scope of special measures in the Convention, the Committee summarized "measures" as comprising "legislative, executive, administrative, budgetary and regulatory instruments...as well as plans, policies, programmes and regimes". (CERD/C7GC/35, paragraph 10).

The Committee has recalled the mandatory nature of article 4, and observed that during the adoption of the Convention, it "was regarded as central to the struggle against racial discrimination", an evaluation which has been maintained in Committee practice. CERD noted article 4 also underlined "the international community's abhorrence of racist hate speech, understood as a form of other-directed speech which rejects the core human rights principles of human dignity and equality and seeks to degrade the standing of individuals and groups in the estimation of society" (CERD/C7GC/35, paragraph 10).

As it relates the right to a fair trial, article 14(1) of the ICCPR sets out a general guarantee of equality before courts and tribunals and the right of every person to a fair and public hearing by a competent, independent and impartial tribunal established by law. In addition, article 14 of the ICCPR encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law. Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice; and provides a set of procedural guarantees that must be made available to all persons, including the right of accused persons to have access to, and communicate with, a counsel of their own choosing.

In its general comment no. 32 (2007), the Human Rights Committee explained that the right to communicate with counsel enshrined in article 14(3)(b) requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. She should also be able "to advise and to represent persons charged with a criminal offense in accordance with generally recognized professional ethics without restrictions, influence, pressure or undue

interference from any quarter” (CCPR/C/GC/32, para. 34).

We also bring to your attention the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (A/HRC/22/17/Add.4), which recalls that “under international human rights standards, which are intended to guide legislation at the national level, expression labeled as “hate speech” can be restricted under articles 18 and 19 of the International Covenant on Civil and Political Rights on different grounds, including respect for the rights of others, public order, or national security. States are also obliged to “prohibit” expression that amounts to “incitement” to discrimination, hostility or violence (art. 20, para. 2, of the Covenant and, under some different conditions, art. 4 of the International Convention on the Elimination of All Forms of Racial Discrimination)”. The Plan of Action, proposes a six-part threshold test was proposed for expressions considered as criminal offenses:

(a) Context: Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group, and it may have a direct bearing on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated;

(b) Speaker: The Speaker’s position or status in the society should be considered, specifically the individual’s or organization’s standing in the context of the audience to whom the speech is directed;

(c) Intent: article 20 of the International Covenant on Civil and Political Rights anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the Covenant, as this article provides for “advocacy” and “incitement” rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.

(d) Content and form: The content of the speech constitutes one of the key foci of the court’s deliberation and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed;

(e) Extent of the speech act: Extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used, for example by a single leaflet or broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work) is circulated in a restricted environment or widely accessible to the general public;

(f) Likelihood, including imminence: Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in

inciting actual action against the target group, recognizing that such causation should be rather direct.

Finally, we would like to bring attention to the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Milan, Italy), 26 August-6 September 1985).

Principle 2 provides 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 4 states that there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

Principle 6 entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.