

# Lawyers' Rights Watch Canada

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

## **USA: Attack on International Criminal Court**

### **The US must immediately lift sanctions against ICC personnel**

**Statement**  
**29 March 2021**

Lawyers' Rights Watch Canada (LRWC) is deeply concerned about threats and sanctions made in 2020 by the government of the United States (US) against the International Criminal Court (ICC), its personnel, and those cooperating with the Court. On 15 June 2020, then President Donald J. Trump issued Executive Order 13928<sup>1</sup> in violation of US international law obligations. These threats and sanctions must be terminated immediately as they constitute a direct attack on the judicial independence of the ICC, undermine access to justice for victims of atrocity crimes, and contribute to impunity for the perpetrators.<sup>2</sup>

Despite renewed hope with the inauguration of Joseph R. Biden as the 46th President of the US, no meaningful action has yet been taken to rescind or reverse the previous administration's reprisals against the ICC. This statement highlights the context of the current US position towards the ICC and sets out several recommendations for the Biden administration to bring the US in line with its international obligations and to support ongoing global efforts to combat impunity by prosecuting international crimes.

### **Background**

The ICC was established by the *Rome Statute of the International Criminal Court* (Rome Statute)<sup>3</sup> and is a court of competent international jurisdiction. The ICC Prosecutor commenced a preliminary examination into the situation in Afghanistan in 2007 and concluded it in November 2017. The Prosecutor's request for authorization to open an investigation was initially rejected by the Court's Pre-Trial Chamber in its decision of 12 April, 2019.<sup>4</sup> On 5 March 2020, the Appeals Chamber of the ICC authorized the ICC Chief Prosecutor to commence an

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<sup>1</sup> Executive Office of the President, "Blocking Property of Certain Persons Associated with the International Criminal Court," 15 June 2020, available at: <https://www.federalregister.gov/documents/2020/06/15/2020-12953/blocking-property-of-certain-persons-associated-with-the-international-criminal-court>.

<sup>2</sup> UN Office of the High Commissioner for Human Rights, "US attacks against the International Criminal Court a threat to judicial independence – UN experts," Press release, 25 June 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25997&LangID=E>.

<sup>3</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: <https://www.refworld.org/docid/3ae6b3a84.html>.

<sup>4</sup> ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17, available at: <https://www.icc-cpi.int/afghanistan>.

investigation into alleged crimes committed in the territory of Afghanistan since 1 May 2003, “as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation in Afghanistan and were committed on the territory of other States Parties to the Rome Statute since 1 July 2002.”<sup>5</sup> This includes war crimes allegedly committed by members of the US Armed Forces and the Central Intelligence Agency (CIA).

## US threats against the ICC

Prior to the release of the Pre-Trial Chambers’ decision in April 2019, then US Secretary of State, Mike Pompeo, announced the intention of the US to impose visa bans on ICC officials who engaged in any investigation of US citizens for alleged crimes committed in Afghanistan. It was suggested that the US might consider applying similar sanctions to deter investigations into nationals of US allies, including Israel.<sup>6</sup>

On 11 June 2020, two months after the release of the Appeal Chambers’ Decision, former President Trump signed Executive Order 13928 authorizing economic and travel sanctions against ICC personnel involved in the Afghanistan investigation. Sanctions against ICC Chief Prosecutor Fatou Bensouda and Phakiso Mochochoko, head of the Court’s jurisdiction division, were formally announced in September 2020, including the placement of their names on the Specially Designated Nationals and Blocked Persons List (the SDN List). The Order blocks the Prosecutor and Mr. Mochochoko from exercising any rights over property within a US jurisdiction and prohibits US persons or entities from transacting with or providing services to the Prosecutor or Mochochoko without a license from the US government.<sup>7</sup> Along with these sanctions, former Secretary of State, Mike Pompeo, denounced the Court and stated that the US Administration would not cooperate with it.<sup>8</sup>

In response to the US sanctions, 67 ICC States Parties, including allies of the US, issued a joint statement expressing “unwavering support for the court as an independent and impartial judicial institution.”<sup>9</sup> Non-governmental organizations, including LRWC, denounced the US threats and sanctions.<sup>10</sup>

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<sup>5</sup> ICC, “Afghanistan: ICC Appeals Chamber authorises the opening of an investigation,” Press release, 5 March 2020, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1516>.

<sup>6</sup> Human Rights Watch, “Q&A: The International Criminal Court and the United States,” 2 September 2020, available at: <https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states>.

<sup>7</sup> Human Rights Watch, “US Sanctions on the International Criminal Court,” 14 December 2020, available at: [https://www.hrw.org/news/2020/12/14/us-sanctions-international-criminal-court#\\_What\\_does\\_it\\_1](https://www.hrw.org/news/2020/12/14/us-sanctions-international-criminal-court#_What_does_it_1).

<sup>8</sup> Michael R. Pompeo, Secretary of State, Remarks to the Press, Washington, DC, US Department of State, 2 September 2020, available at: <https://2017-2021.state.gov/secretary-michael-r-pompeo-at-a-press-availability-12/index.html>.

<sup>9</sup> Government of Canada et al. Joint Statement in Support of the International Criminal Court, [https://www.international.gc.ca/world-monde/international\\_relations-relations\\_internationales/icc-cpi/2020-06-23\\_icc-cpi.aspx?lang=eng](https://www.international.gc.ca/world-monde/international_relations-relations_internationales/icc-cpi/2020-06-23_icc-cpi.aspx?lang=eng).

<sup>10</sup> LRWC, “USA: Threats and reprisal by USA against the International Criminal Court and its Prosecutor,” Letter to President Donald J. Trump et al, 9 April 2019, available at: <https://www.lrwc.org/threats-and-reprisal-by-usa-against-the-international-criminal-court-and-its-prosecutor/>. Also see International Commission of Jurists, “US must end attacks on International Criminal Court and staff,” Statement, 27 September 2020, available at: <https://www.icj.org/us-must-end-attacks-on-international-criminal-court-and-staff/>.

## History of the US relationship with the ICC

The US has historically supported international criminal justice, yet its position toward the ICC has been equivocal. Despite its participation in the drafting of the Rome Statute, the US was one of seven countries to vote against its adoption by United Nations (UN) General Assembly in 1998.<sup>11</sup> Since that time, the position of the US toward the ICC has fluctuated with each successive president, beginning with the signing of the Rome Statute by the Clinton administration in 2000, followed by the George W. Bush administration's decision not to ratify the Rome Statute in 2002.<sup>12</sup> President Obama's approach was more favourable, including attendance at the annual Assembly of States Parties and cooperation with the ICC on the situation in Darfur.<sup>13</sup> In contrast, the Trump administration actively rejected and undermined the Court and its jurisdiction.

## Legal analysis

### US duty to investigate and prosecute

Under international law, all States have a responsibility to investigate and prosecute, or extradite for prosecution, suspected perpetrators of genocide, war crimes, crimes against humanity, and other international crimes.<sup>14</sup> The crimes identified by the ICC prosecutor's preliminary inquiry for potential prosecution pursuant to Rome Statute, Article 8(2)(c)(i), include war crimes prohibited by the Geneva Conventions and allegedly committed by members of the US armed forces and the CIA in Afghanistan or on the territory of other States Parties to the ICC.<sup>15</sup> The US is a party to the Geneva Conventions and has codified the crimes described therein in Section 18 of the US Code.<sup>16</sup> The US investigated alleged abuses by US personnel in Afghanistan, and a "2014 report by the US Senate Intelligence Committee concluded that the CIA covered up its crimes, including by making false claims to the Justice Department."<sup>17</sup>

### Authority of the ICC

The ICC is a complementary court, intended only for use as a last resort where States are unable or unwilling to hold their own citizens accountable for the most serious crimes under international law.<sup>18</sup> Article 5 of the Rome Statute gives the ICC jurisdiction to investigate and

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<sup>11</sup> American Bar Association, "The US-ICC relationship," ABA, n.d. available at: <https://www.aba-icc.org/about-the-icc/the-us-icc-relationship/>, <https://www.aba-icc.org/about-the-icc/the-us-icc-relationship/>

<sup>12</sup> Coalition for the International Criminal Court, "United States," available at: <https://www.coalitionfortheicc.org/country/united-states>.

<sup>13</sup> American Coalition for the International Criminal Court (AMICC), 2009-2017 Obama Administration, n.d. available at: <https://www.amicc.org/obama-administration>.

<sup>14</sup> International Law Commission, "The Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*)," Chapter VI, Report on the work of the sixty-sixth session (2014), available at: <https://legal.un.org/ilc/reports/2014/english/chp6.pdf>, and <https://www.justsecurity.org/26067/countries-investigate-war-crimes/> and [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule158](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158).

<sup>15</sup> International Criminal Court, "Request for authorisation of an investigation pursuant to article 15", 20 November 2017, ICC-02/17-7-Conf-Ex, available at: [https://www.icc-cpi.int/CourtRecords/CR2017\\_06891.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF),

<sup>16</sup> 18 U.S. Code § 2441 - War crimes, LII, available at: <https://www.law.cornell.edu/uscode/text/18/2441>

<sup>17</sup> United States, and Dianne Feinstein, The Senate Intelligence Committee report on torture: committee study of the Central Intelligence Agency's Detention and Interrogation Program, 9 December 2014, available at: <https://www.intelligence.senate.gov/sites/default/files/documents/CRPT-113s rpt288.pdf>.

<sup>18</sup> Rome Statute, *supra* note 3.

prosecute relevant crimes committed by or on the territory of any of the 123 States Parties to the Rome Statute.<sup>19</sup> Afghanistan is a State Party, and a failure of Afghanistan's government to investigate and prosecute Article 5 crimes committed on its territory engages the authority and jurisdiction of the Court to do so.

In its preliminary examination, the Office of the Prosecutor found

a reasonable basis to believe that war crimes [were committed] by members of the United States ("US") armed forces on the territory of Afghanistan, and by members of the US Central Intelligence Agency ("CIA") in secret detention facilities in Afghanistan and on the territory of other States Parties to the Rome Statute, principally in the period of 2003-2004.<sup>20</sup>

Article 17 of the Rome Statute sets out the circumstances by which the Court may exercise jurisdiction over a case.<sup>21</sup> Despite US rejection of the ICC's authority, US authorities have demonstrated ongoing unwillingness to investigate and prosecute these crimes, thereby giving the ICC jurisdiction to do so.

#### **Threats and sanctions violate US international obligations**

The US threats and sanctions against the ICC and its personnel violate US obligations under the *Charter of the United Nations* (UN Charter) to promote and encourage respect for human rights and uphold international law.<sup>22</sup> As a permanent member of the Security Council, the US has a duty to uphold this principle to the highest degree.<sup>23</sup> Order 13928 and the sanctions imposed by it contravene these principles and suggest that the US is unwilling to uphold human rights consistently.

The ICC condemned the US sanctions as a violation of the rule of law,<sup>24</sup> which the UN defines as:

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.<sup>25</sup>

The *Universal Declaration of Human Rights* states that the rule of law is "the foundation of freedom, justice and peace in the world"<sup>26</sup> and is essential for the protection of human rights.<sup>27</sup>

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<sup>19</sup> *Ibid.*

<sup>20</sup> Request for authorisation of an investigation pursuant to article 15", 20 November 2017, ICC-02/17-7-Conf-Exp, para. 4, available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-7-Red>.

<sup>21</sup> Rome Statute, *supra* note 3.

<sup>22</sup> UN, *Charter of the United Nations*, 24 October 1945, available at: <https://www.un.org/en/charter-united-nations/>.

<sup>23</sup> UN Charter, *supra* note 22, article 24.

<sup>24</sup> International Criminal Court, "International Criminal Court condemns US economic sanctions," Press Release, 2 September 2020, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1535>.

<sup>25</sup> UN, "What is the Rule of Law?" available at: <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>.

<sup>26</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html>.

International human rights law, international humanitarian law, and the rule of law cannot be selectively ignored. The US sanctions against the ICC violate *erga omnes* obligations to ensure accountability for international crimes. The purpose of Executive Order 13928 is to thwart legitimate investigation of war crimes committed in Afghanistan. This abuse of law has the effect of fostering impunity for perpetrators of the most serious crimes of international concern. Such impunity has the effect of emboldening international crime and puts all individuals and nations at risk of violence, injustice and insecurity.

## **Recommendations**

LRWC welcomes the announcement of the Biden administration on 26 January 2021 that it would support reforms “to help the [ICC] better achieve its core mission of punishing and deterring atrocity crimes” and would review the sanctions put in place under Executive Order 13928.<sup>28</sup> More than two months have passed since the Biden Administration took office. These illegitimate sanctions continue to undermine the rule of law and the independence of the Prosecutor and the ICC. Chief Prosecutor Bensouda completes her nine year term on 15 June 2021 and there is no indication that the sanctions against her will be lifted or whether they will be applied to her successor. LRWC urges the President of the US and other relevant US authorities to:

1. Immediately rescind Executive Order 13928 and remove all sanctions against ICC Chief Prosecutor Fatou Bensouda, the ICC’s head of Jurisdiction, Complementary, and Cooperation Division, Phakiso Mochochok and any other person connected to the ICC or its investigation into Afghanistan;
2. Remove all barriers obstructing the administration of justice at the ICC and the independence of the Office of the Prosecutor;
3. Establish a cooperative relationship with the ICC and its personnel that respects the international rule of law and the duty of all States to uphold *erga omnes* obligations to prosecute international crimes.

*Lawyers’ Rights Watch Canada (LRWC) is a committee of lawyers and human rights defenders who promote international human rights, the independence and security of human rights defenders, the integrity of legal systems, and the rule of law. LRWC has Special Consultative Status with the Economic and Social Council of the UN.*

## **Further information:**

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<sup>27</sup> *Supra*, note 25.

<sup>28</sup> Simon Lewis, "Biden administration to review International Criminal Court officials," Reuters, 26 January 2021, available at: <https://www.reuters.com/article/us-usa-biden-icct-idUSKBN29V2NV>.