

**SANCTIONING THE ICC: IS THIS THE RIGHT MOVE  
FOR THE UNITED STATES?**

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**INTRODUCTION**

As the International Criminal Court (ICC) continues to strive for justice for victims of war crimes, the United States has taken measure after measure to ensure that the ICC does not succeed if it ever sets its sights on the United States.<sup>1</sup> Trying to stay out of the jurisdiction of the ICC has proven to be a challenging task since the United States continually

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<sup>1</sup> See Stephen Eliot Smith, *Definitely Maybe: The Outlook for U.S. Relations with the International Criminal Court During the Obama Administration*, 22 FLA. J. INT’L L. 155, 160–66 (2010).

maintains a presence in countries that are within the jurisdictional reach of the ICC.<sup>2</sup> One such country is Afghanistan.<sup>3</sup>

Since 2017, Ms. Fatou Bensouda, former chief prosecutor for the ICC, planned to investigate crimes allegedly committed in connection with the armed conflict in Afghanistan.<sup>4</sup> She focused her investigation “solely upon war crimes and crimes against humanity allegedly committed since May 1, 2003, on the territory of Afghanistan as well as war crimes closely linked to the situation in Afghanistan allegedly committed since July 1, 2002, on the territory of other States Parties to the Rome Statute.”<sup>5</sup> This investigation is long overdue. Even though the investigation is in its very early stages, one thing is very clear: the United States could face liability for the very first time under the ICC due to its actions in Afghanistan during this conflict.<sup>6</sup>

In response to Bensouda’s attempts to launch an investigation into the armed conflict in Afghanistan, the United States has been combative and uncooperative. Before the panel of judges could even rule on her request for an investigation, the United States revoked the prosecutor’s visa.<sup>7</sup> This is not the first attempt by the United States to thwart the investigation of its role in the crimes committed in Afghanistan and it

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<sup>2</sup> *Compare The States Parties to the Rome Statute*, INT’L CRIM. CT., [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) [https://perma.cc/FB8M-FKT8] (last visited Sept. 26, 2021), with *Countries that have Signed Article 98 Agreements with the U.S.*, GEO. UNIV. L. LIBR., <https://guides.ll.georgetown.edu/c.php?g=363527&p=2456099> [https://perma.cc/PW53-7TJN] (last updated Oct. 23, 2018).

<sup>3</sup> *The States Parties to the Rome Statute*, INT’L CRIM. CT., [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) [https://perma.cc/3XTQ-FLNW].

<sup>4</sup> *See Statement of ICC Prosecutor, Fatou Bensouda, Regarding Her Decision to Request Judicial Authorization to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan*, INT’L CRIM. CT. (Nov. 3, 2017), [https://www.icc-cpi.int/Pages/item.aspx?name=171103\\_OTP\\_Statement](https://www.icc-cpi.int/Pages/item.aspx?name=171103_OTP_Statement) [https://perma.cc/KTP2-KREN] [hereinafter Request to Investigate].

<sup>5</sup> *Id.*

<sup>6</sup> Michael Plachta, *ICC Appeals Chamber Authorizes the Prosecutor’s Request to Investigate War Crimes in Afghanistan*, 36 INT’L ENF’T L. REP. 104, 104 (2020) (citing Elian Peltier & Fatima Faizi, *I.C.C. Allows Afghanistan War Crimes Inquiry to Proceed, Angering U.S.*, N.Y. TIMES (Mar. 5, 2020), <https://www.nytimes.com/2020/03/05/world/europe/afghanistan-war-crimes-icc.html> [https://perma.cc/Z4ZP-3YGY]).

<sup>7</sup> Marlise Simons & Megan Specia, *U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes*, N.Y. TIMES (Apr. 5, 2019), <https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html> [https://perma.cc/7AQG-ZGBN].

certainly won't be the last. Recently, President Trump declared a national emergency and established a sanctions program regarding the ICC.<sup>8</sup>

This Comment will evaluate the constitutionality of this sanctions program, established by an Executive Order, when it affects US persons and the effect on members of the ICC. By maintaining such a large international presence, the United States is subject to many expectations, including that it upholds international law. This is especially true when the United States has played such a large role in the ICC's creation.<sup>9</sup> In evaluating the United States' reaction to the opening of an investigation into the criminal activity committed in Afghanistan, this Comment will assess the actions taken by the Trump Administration and propose that instead of combating the goals of the ICC, the new Biden Administration should support the investigation, in accordance with its policy to seek justice internationally for war crimes and crimes against humanity.

Part I of this Comment discusses the unstable relationship between the ICC and the United States during the few presidential administrations since the ICC's creation. This includes discussion of the purpose behind creating the ICC, how the United States reacted to the ICC's creation, and how the United States has tried to evade the ICC's jurisdiction through multiple different avenues. Part II of this Comment will consider the ICC's investigation into the armed conflict in Afghanistan. It will evaluate the ICC's jurisdiction in Afghanistan, the procedural history of the authorization to investigate the alleged criminal acts, and how this jurisdiction and investigation can be applied to the United States even without it being a party to the ICC. Part III of this Comment will reflect on the newest development in the US-ICC relationship: an Executive Order by President Trump establishing a sanctions program that will target members of the ICC. This Comment will assess the applicable law under which President Trump declared this program, the effect on United States persons, and how this program should be considered moving forward.

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<sup>8</sup> Andrew Boyle, *Sanctioning the ICC: A Guide to U.S. Law (Part I)*, OPINIO JURIS (June 18, 2021), <http://opiniojuris.org/2020/06/18/sanctioning-the-icc-a-guide-to-u-s-law-part-i/> [<https://perma.cc/Y7E3-HMV7>].

<sup>9</sup> See Kate Mackintosh, *The USA and ICC: Friends or Foes?*, 43 L.A. LAW. 18, 18 (2020).

## I. HISTORY OF THE ICC AND THE UNITED STATES

The ICC is a relatively new body within the international law world and remains the only permanent international criminal tribunal. The Rome Statute, the founding treaty of the ICC, was finalized in 1998 after years of preparation and a five-week diplomatic conference.<sup>10</sup> The court did not become operational until 2002, however, when the Rome Statute was ratified by sixty states.<sup>11</sup> In these nineteen years, there have been twenty-eight cases before the ICC, thirty-five issued arrest warrants, and eight issued convictions.<sup>12</sup> These actions are exactly what the ICC was created to do: bring justice in the international world for war crimes. This part will discuss the creation and purpose of the ICC and give a deeper dive into the relationship between the ICC and the United States to shed light on the growing tension between the two.

### A. ICC CREATION AND PURPOSE

The idea of an international criminal tribunal is much older than the ICC we have today. In fact, the international community made an attempt near the end of World War II with the Nuremberg Tribunal.<sup>13</sup> The atrocities of World War II prompted the need for the Nuremberg Tribunal to assert justice and perhaps prevent similar brutalities from happening again.<sup>14</sup> The Charter of the Nuremberg Tribunal allowed for the prosecution of individuals involved with crimes against peace, war crimes, and crimes against humanity.<sup>15</sup>

Following the Nuremberg experience, plans for a permanent international tribunal slowed down because of the Cold War.<sup>16</sup> Shifting focus to the Cold War prevented the international community from

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<sup>10</sup> See generally *How the Court Works*, INT'L CRIM. CT., <https://www.icc-cpi.int/about> [<https://perma.cc/E6NN-PFZB>] (explaining the court's purpose and its actions taken to date); Smith, *supra* note 1, at 158.

<sup>11</sup> Smith, *supra* note 1, at 158.

<sup>12</sup> *About the Court*, INT'L CRIM. CT., <https://www.icc-cpi.int/about> [<https://perma.cc/HCG9-FYCF>].

<sup>13</sup> Eric M. Meyer, *International Law: The Compatibility of the Rome Statute of the International Criminal Court with the U.S. Bilateral Immunity Agreements Included in the American Servicemembers' Protection Act*, 58 OKLA. L. REV. 97, 100 (2005).

<sup>14</sup> *Id.*

<sup>15</sup> Joel F. England, *The Response of the United States to the International Criminal Court: Rejection, Ratification or Something Else?*, 18 ARIZ. J. INT'L & COMPAR. L. 941, 942 (2001).

<sup>16</sup> Meyer, *supra* note 13, at 101.

“building on the Nuremberg experience.”<sup>17</sup> It was only after the end of the Cold War that the United Nations Security Council established ad hoc tribunals to confront the atrocities that had taken place in former Yugoslavia and Rwanda.<sup>18</sup> However, the council encountered substantial difficulties in establishing these ad hoc tribunals and realized that they would continue to do so every time a tribunal of this kind was required.

After dealing with the difficulty of establishing ad hoc tribunals for the atrocities that were taking place during conflict, a permanent international criminal tribunal began to look appealing to the international community. Ambassador David Scheffer, head of the US Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court, commented before the Senate Committee on Foreign Relations that the experience with the tribunals for the former Yugoslavia and Rwanda has “convinced us of the merit of creating a permanent court that could be more quickly available for investigations and prosecutions and more cost efficient in its operation.”<sup>19</sup> These remarks were indicative of the views of ICC supporters that establishing a permanent international criminal tribunal would lead to greater efficiency in delivering international justice.<sup>20</sup>

Efficiency, while important to the supporters of the ICC, was not one of the main reasons behind the need for the establishment of a permanent international criminal tribunal. The international community had a more central focus on making sure war criminals would be punished for their crimes.<sup>21</sup> This is clearly emphasized in the Preamble to the Rome Statute which states its resolve “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”<sup>22</sup>

The Rome Statute sets out the organization of the ICC. The court is composed of eighteen judges, six in each of the three departments of pretrial, trial, and appeals.<sup>23</sup> Term limits are nine years and they are non-

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<sup>17</sup> England, *supra* note 15, at 942.

<sup>18</sup> *Id.* at 943.

<sup>19</sup> *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Subcomm. on Int'l Operations of the S. Comm. on Foreign Relations*, 105th Cong. 11–12 (1998).

<sup>20</sup> Meyer, *supra* note 13, at 102.

<sup>21</sup> *Id.*

<sup>22</sup> Rome Statute of the International Criminal Court pmbl., July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

<sup>23</sup> *Id.* art. 36, § 1.

renewable.<sup>24</sup> Pretrial judges authorize and oversee the investigations conducted by the prosecutor's office<sup>25</sup> and issue warrants.<sup>26</sup> Trial judges conduct trials.<sup>27</sup> Appellate judges hear appeals and establish a body of precedent and dissent.<sup>28</sup> Prosecutors initiate and investigate allegations.<sup>29</sup> The prosecutors represent the Assembly of States Parties at trial.<sup>30</sup> The Assembly of States Parties is composed of representatives of the States that are party to the Rome Statute.<sup>31</sup>

In addition to setting out the organization of the ICC, the Rome Statute outlines the Court's jurisdiction, defines the crimes that fall within that jurisdiction, includes the Court's procedural rules, and establishes the mechanisms for states to cooperate with the ICC.<sup>32</sup> Unlike its predecessor ad hoc courts, the ICC is not an organ of the U.N.; as such, its jurisdictional force is based on the consent of States Parties.<sup>33</sup> The Rome Statute gives three ways a case can be brought before the ICC: (1) a state party can refer a case to the prosecutor; (2) the U.N. Security Council can refer a case to the prosecutor; or (3) the prosecutor can initiate an investigation.<sup>34</sup> Unlike States Parties, signatory members, or members who have not yet ratified the Rome Statute, are not legally bound by the provisions within the Rome Statute and only agree to act in good faith "not to defeat the object and purpose of the treaty."<sup>35</sup>

## B. UNITED STATES HAS MIXED RESPONSE TO ICC CREATION

The United States played a large role in bringing about the Rome Statute and eventually the creation of the ICC. Despite this large role and the broad international support for the ICC, the United States had

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<sup>24</sup> *Id.* art. 36, § 9(a).

<sup>25</sup> *Id.* art. 53, §§ 3(a)–(b), art. 56, § 1(b).

<sup>26</sup> *Id.* art. 57, § 3(a).

<sup>27</sup> *See id.* art. 64.

<sup>28</sup> *See id.* art. 83.

<sup>29</sup> *See id.* art. 15.

<sup>30</sup> *See id.* art. 42.

<sup>31</sup> *Id.* art. 112, § 1.

<sup>32</sup> *See id.* pts. 2, 6, 9 (detailing the ICC's jurisdiction, admissibility and applicable law, ICC trial procedure, and international cooperation and judicial assistance with the ICC).

<sup>33</sup> Mark D. Kielsgard, *War on the International Criminal Court*, 8 CUNY L. REV. 1, 5 (2005).

<sup>34</sup> Rome Statute, *supra* note 22, art. 13.

<sup>35</sup> Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

significant reservations.<sup>36</sup> These reservations included: the pervasive jurisdiction of the Court, failure to provide a ten-year-opt-out period for crimes against humanity and war crimes, an autonomous prosecutor who can (with the consent of two judges) initiate investigations and prosecutions in a politically motivated fashion, the lack of a requirement that the Security Council make a determination prior to bringing a complaint for aggression, the possibility of expanding the subject matter jurisdiction of the Court (to include terrorism and drug crimes), and the prohibition against reservations.<sup>37</sup> There have been many criticisms of the US stance on ratifying the Rome Statute claiming that these reservations are no longer valid due to the way the Court is allowed to operate under the statute.<sup>38</sup> These reservations were based on concerns that the United States would be subject to investigation, that its citizens would be subject to ICC jurisdiction without US consent, and that these investigations could happen for political reasons rather than an actual need for international justice.<sup>39</sup>

However, on December 31, 2000, the last day the Rome Statute was open for signature, US President Bill Clinton instructed Ambassador David Scheffer to sign the Rome Statute, despite these major reservations.<sup>40</sup> Clinton stressed that signing the Rome Statute was necessary to allow the United States to stay in a position where it would be able to “influence the evolution of the court.”<sup>41</sup> Despite signing the Rome Statute, Clinton did not submit the treaty to the Senate for advice and consent, which is necessary for the ratification of the Rome Statute.<sup>42</sup> He advised the upcoming Bush Administration not to ratify the statute immediately.<sup>43</sup> This left an opening for the Bush Administration to either

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<sup>36</sup> England, *supra* note 15, at 941.

<sup>37</sup> Kielsgard, *supra* note 33, at 10. *But cf.* David J. Scheffer, *A Negotiator's Perspective on the International Criminal Court*, 167 MIL. L. REV. 1, 5 (2001) (articulating the United States' concerns regarding the International Criminal Court, but recommending that President Clinton sign the treaty in order to work out its flaws as a signatory and noting that, “[a]s a signatory, the United States now is well armed to improve the treaty regime and advance our commitment to international justice.”).

<sup>38</sup> See Jordan J. Paust, *The U.S. and the ICC: No More Excuses*, 12 WASH. U. GLOB. STUD. L. REV. 563, 579 (2013).

<sup>39</sup> See *id.* at 563.

<sup>40</sup> Associated Press, *Clinton's Words: 'The Right Action,'* N.Y. TIMES (Jan. 1, 2001), at A6.

<sup>41</sup> *Id.*

<sup>42</sup> Statement Authorizing the United States Signing of the Rome Statute of the International Criminal Court, 2000 PUB. PAPERS 2816 (Dec. 31, 2000).

<sup>43</sup> Smith, *supra* note 1, at 161.

continue in the footsteps of the Clinton Administration or go a different direction.

Once the Bush Administration took over, there were heightened tensions between the United States and the ICC.<sup>44</sup> On May 6, 2002, John Bolton, then US ambassador to the U.N., sent a letter to the U.N. Secretary General, Kofi Annan, stating that the United States did not intend to become a party to the treaty and renounced all obligations created by signing the treaty on December 31, 2000.<sup>45</sup> In August 2002, Congress enacted the American Servicemembers' Protection Act (ASPA), which aimed to protect members of the US military from ICC jurisdiction and authorizes the president to use "all means necessary and appropriate" to gain the release of ICC detained American soldiers.<sup>46</sup> Through political intimidation, the United States negotiated about one hundred bilateral "nonsurrender" agreements, where States party to the Rome Statute agreed not to surrender any American citizen who entered their state territory to the ICC.<sup>47</sup> These were all contributing factors to the heightened tensions between the United States and the ICC.

The Obama Administration set a goal to "end hostility towards the ICC and look for opportunities to encourage effective ICC action in ways that promote US interests by bringing war criminals to justice."<sup>48</sup> In accordance with this goal, the Obama Administration voted and lobbied to refer Muammar Gaddafi regime's violent suppression of protestors in Libya to the ICC.<sup>49</sup> The Obama administration still failed to ratify the Rome Statute, however, despite the end of the open hostility towards the court.<sup>50</sup> No administration could move past what it viewed as "flaws" in the Rome Statute and an "open invitation" to prosecute American citizens.<sup>51</sup>

The hostility that the Trump Administration was quick to resort to when it heard rumors of an Afghanistan investigation was not surprising given the history between the United States and the ICC. In 2018, the

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<sup>44</sup> Sara L. Ochs, *The United States, the International Criminal Court, and the Situation in Afghanistan*, 95 NOTRE DAME L. REV. REFLECTION 89, 91 (2019).

<sup>45</sup> Harry M. Rhea, *The United States and International Criminal Tribunals: An Historical Analysis*, 16 ILSA J. INT'L & COMP. L. 19, 35–36 (2009).

<sup>46</sup> See Smith, *supra* note 1, at 162; 22 U.S.C. § 7427(a) (2018).

<sup>47</sup> Ochs, *supra* note 44, at 91–92.

<sup>48</sup> *Id.* at 92.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> See *id.*



Trump Administration announced through National Security Advisor, John Bolton, that the United States is adopting a new policy toward the ICC.<sup>52</sup> Bolton stated that the ICC “has been ineffective, unaccountable, and indeed, outright dangerous.”<sup>53</sup> In addition, Bolton stated, “for all intents and purposes, the ICC is already dead to us.”<sup>54</sup> Experts in the area criticize Bolton’s address because of its many inaccuracies when referencing the court.<sup>55</sup>

### C. US CIRCUMVENTION OF THE ICC

Since the creation of the ICC, the United States has made a number of attempts to stay out of reach of the ICC’s jurisdiction. One of the first attempts was the enactment of the American Servicemember’s Protection Act, hereinafter called ASPA.<sup>56</sup> The ASPA was passed and signed into law on August 2, 2002. The ASPA precludes US participation in U.N. peacekeeping activities unless one of the following conditions exists: US soldiers are expressly exempt from ICC jurisdiction by U.N. resolution, the countries in which the troops are operating are outside the jurisdiction of the ICC, the troops are in countries that have concluded bilateral agreements with the United States exempting them under Article 98(2) of the Rome Statute, or the national interests of the United States justify participation.<sup>57</sup>

ASPA also prohibits other forms of cooperation with the ICC by US courts, local governments, and US agencies. It prohibits any federal, state, or local government from providing support to the ICC;<sup>58</sup> extraditing any person to the ICC;<sup>59</sup> using US funds to assist in the investigating, arresting, detention, or prosecuting of any US citizen by the ICC;<sup>60</sup> and prohibiting any investigative activity of the ICC in the United States and

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<sup>52</sup> John Bolton, National Security Advisor, Protecting American Constitutionalism and Sovereignty from International Threats, (Sept. 10, 2018), <https://www.justsecurity.org/60674/national-security-adviser-john-bolton-remarks-international-criminal-court> [https://perma.cc/66RZ-6EEH].

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See, e.g., Milena Sterio, *The Trump Administration and the International Criminal Court: A Misguided New Policy*, 51 CASE W. RES. J. INT’L L. 201 (2019).

<sup>56</sup> American Servicemembers’ Protection Act (ASPA), 2 U.S.C. §§ 2001–2015.

<sup>57</sup> *Id.* § 2005(b)–(c).

<sup>58</sup> *Id.* § 2004(e).

<sup>59</sup> *Id.* § 2004(d).

<sup>60</sup> *Id.* § 2004(f).

its territory.<sup>61</sup> ASPA further prohibits the transfer of any classified national security information and law enforcement information to the ICC.<sup>62</sup>

To put the United States even further from the reach of the ICC, one of the ASPA exceptions listed above is that a country can sign a bilateral agreement (BIA) in order to exempt all US troops from ICC jurisdiction.<sup>63</sup> This is another attempt at placing the United States in a place of immunity. In August 2002, with the enactment of the ASPA, the United States began actively seeking these agreements with both parties and nonparties to the Rome Statute.<sup>64</sup> The thought behind these BIAs is attributable to Article 98(2) of the Rome Statute. Article 98(2) reads:

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.<sup>65</sup>

Essentially, this portion of the Rome Statute specifies that if a State has already entered into other treaty agreements with other States, the ICC cannot proceed with a request for surrender if that State has already agreed to ask for permission before surrendering a person.

Before the adoption of the Rome Statute, many States had already entered into other treaty agreements such as extradition treaties or Status of Forces Agreements (SOFAs).<sup>66</sup> SOFAs are mostly concerned with the legal issues that come with allowing foreign militaries to operate in a host country.<sup>67</sup> The Rome Statute aimed to avoid conflicts with already existing State agreements.<sup>68</sup> The international agreements mentioned in Article 98(2) are what the United States claims to include BIAs.<sup>69</sup> There are criticisms of this interpretation and experts claim that “international agreements” was meant to encompass existing agreements not future ones.<sup>70</sup>

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<sup>61</sup> *Id.* § 2004(h).

<sup>62</sup> *Id.* § 2006(b).

<sup>63</sup> *Id.* § 2007(c).

<sup>64</sup> Meyer, *supra* note 13, at 99.

<sup>65</sup> Rome Statute, *supra* note 22, art. 98, § 2.

<sup>66</sup> See Chimène Keitner, *Crafting the International Criminal Court: Trials and Tribulations in Article 98(2)*, 6 UCLA J. INT'L L. & FOREIGN AFFS. 215, 232–35 (2001).

<sup>67</sup> See Meyer, *supra* note 13, at 110.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 111.

Despite growing skepticism over their validity, the United States has been successful in obtaining signed BIAs. Over ninety countries have signed BIAs since the United States enacted the ASPA.<sup>71</sup> Over forty of these countries are States Parties.<sup>72</sup> There are three different types of BIAs depending on the State's wishes. The first type of BIA binds both parties to an agreement not to turn over each other's nationals to the ICC without the consent of the other party.<sup>73</sup> The second type involves the United States retaining the ability to turn over the other party's nationals to the ICC, but it is not reciprocated for US nationals.<sup>74</sup> The last type is for states that have not ratified or signed the Rome Statute.<sup>75</sup> These BIAs contain a provision "requiring those states not to cooperate with efforts of third states to surrender persons to the [ICC]."<sup>76</sup>

In addition to the ASPA and corresponding BIAs, the United States has taken other measures to politically deter the ICC from investigating crimes that implicate US nationals. On April 4, 2019, the Trump Administration revoked the visa of the prosecutor initiating the prosecution of crimes committed in connection with the armed conflict in Afghanistan.<sup>77</sup> Not one month before, Secretary of State Mike Pompeo announced that, "except to the extent otherwise required by the U.N. Headquarters Agreement, the United States would impose visa restrictions on 'those individuals directly responsible for any ICC investigation of US personnel.'"<sup>78</sup> Only one week after the prosecutor's visa was revoked, the request to investigate the situation in Afghanistan was denied.<sup>79</sup>

The actions taken by the Trump Administration and its predecessors, are strong-arm attempts to politically influence the investigations that the ICC approves in order to avoid possible prosecution of American citizens involved in States party to the Rome Statute. There

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<sup>71</sup> See *Countries that have Signed Article 98 Agreements with the U.S.*, *supra* note 2.

<sup>72</sup> See *id.*

<sup>73</sup> Meyer, *supra* note 13, at 116.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 116–17.

<sup>76</sup> *Id.*

<sup>77</sup> Marlise Simons & Megan Specia, *supra* note 7.

<sup>78</sup> *The Trump Administration Revokes the ICC Prosecutor's U.S. Visa Shortly Before the ICC Pre-Trial Chamber Declines to Authorize an Investigation into War Crimes in Afghanistan*, 113 AM. J. INT'L L. 625, 625 (2019) (quoting U.S. Dep't of State Press Briefing, Remarks to the Press (Mar. 15, 2019), <https://2017-2021.state.gov/remarks-to-the-press-6/index.html> [<https://perma.cc/4LTK-4Q9Y>]).

<sup>79</sup> *Id.*

is no doubt that there are more attempts to come as the ICC undertakes the Afghanistan investigation.

Given the history of the relationship between the United States and the ICC, it is difficult to think of the future ahead of the ICC as it investigates the atrocities committed in Afghanistan. Despite the constant pressure from the United States against these investigations and the ICC itself, Prosecutor Bensouda and the ICC have decided to continue on their course to find justice for the people involved in the atrocities committed in the armed conflict in Afghanistan.

## II. ICC INVESTIGATION INTO AFGHANISTAN

Since the United States has opposed the ICC on many occasions, it came as no surprise when the United States pushed back against the investigation into the crimes committed in Afghanistan. The preliminary examination of the situation in Afghanistan has been ongoing since 2007. Since Ms. Fatou Bensouda, former head of the Office of the Prosecutor (OTP), announced in 2017 that she planned to file a request to investigate the situation, she and the ICC have been under personal attack by the United States.<sup>80</sup> This Part will discuss the jurisdiction of the ICC and its ability to investigate the United States in connection with the armed conflict in Afghanistan as well as what this means for the United States and its attempts to avoid the ICC's jurisdiction.

### A. JURISDICTION OF THE ICC

After reading the history of the ICC and the United States, it might be unclear how the ICC is able to subject the United States to its jurisdiction if it has not ratified the Rome Statute. Once a country has ratified the Rome Statute, it is subject to the court's jurisdiction over genocide, crimes against humanity, war crimes, and in some circumstances acts of aggression, committed either by its nationals or on its territory.<sup>81</sup> However, there are three ways in which the ICC cannot exercise its jurisdiction: (1) if the state concerned is already investigating the alleged crimes, (2) if there has been an investigation and the state has decided not to prosecute, or (3) if a trial has already occurred—unless it is

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<sup>80</sup> See Request to Investigate, *supra* note 4.

<sup>81</sup> See Rome Statute, *supra* note 22, arts. 5, 12.

determined that the state is unwilling or unable to investigate or prosecute the alleged crimes.<sup>82</sup>

These criteria reflect one of the most vital components of the ICC's jurisdiction: the principle of complementarity. Complementarity is the idea that the jurisdiction of the ICC is complementary to national criminal justice systems. This means that a case is only admissible within the jurisdiction of the ICC when states with jurisdiction in the matter are unwilling or unable to prosecute.<sup>83</sup> This principle is new to the world of international criminal tribunals. The International Criminal Tribunals for the Former Yugoslavia and Rwanda actually operated in the opposite way, as they had primary jurisdiction, which means that their jurisdiction took precedence over that of the affected nation's.<sup>84</sup>

The subject matter jurisdiction of the ICC applies to individuals for the following crimes including genocide, crimes against humanity, aggression, and war crimes.<sup>85</sup> Also, the temporal jurisdiction restricts the ICC from investigating any of the above crimes retroactively.<sup>86</sup> Consequently, the ICC will only have jurisdiction over crimes committed after July 1, 2002—the date the ICC was operational.<sup>87</sup> For states that ratify the Rome Statute after that date, the ICC will only have jurisdiction over crimes committed after the state becomes a party, unless the state consents to the ICC's jurisdiction.<sup>88</sup> There is no statute of limitations on the crimes that are within the court's jurisdiction.<sup>89</sup>

Even if jurisdiction and admissibility are satisfied, the prosecutor does not have unrestricted authority to open an investigation. The prosecutor may begin preliminary examinations when they receive adequate information, but a panel of three judges in the pre-trial chamber must authorize a full investigation.<sup>90</sup> In fact, most cases are a result of

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<sup>82</sup> *Id.* art. 17, § 1.

<sup>83</sup> *See id.*; Johan D. van der Vyver, *Personal and Territorial Jurisdiction of the International Criminal Court*, 14 EMORY INT'L L. REV. 1, 70 (2000).

<sup>84</sup> *See* U.N. Secretary-General, *Rep. on the Establishment of an International Tribunal (Tribunal) for the Prosecution of Persons Committing International Humanitarian Crimes in Former Yugoslavia*, art. 9, § 2, U.N. Doc. S/25704 (May 3, 1993); S.C. Res. 955, art. 8, § 2 (Nov. 8, 1994).

<sup>85</sup> Rome Statute, *supra* note 22, art. 5, § 1.

<sup>86</sup> *Id.* art. 11, § 1.

<sup>87</sup> *See id.*

<sup>88</sup> *Id.* art. 11, § 2, art. 12, § 3.

<sup>89</sup> *Id.* art. 29.

<sup>90</sup> *Id.* art. 15, §§ 1–4.

referrals from States Parties and not from motions made by the prosecutor.<sup>91</sup>

Another way that a case can come to the ICC is if the U.N. Security Council acts under Chapter VII of the U.N. Charter and refers the case to the ICC where it finds that there is a threat to international peace and security.<sup>92</sup> In these circumstances, the Security Council is not restricted to nationals or territories of States Parties, as having determined to act to maintain or restore international peace and security, it is empowered to impose all necessary measures on U.N. member states, including an ICC investigation.<sup>93</sup> This method of referral has been used two times so far: the 2005 referral of the situation in Darfur, Sudan, following reports of mass crimes including potential genocide there,<sup>94</sup> and the 2011 referral of Libya.<sup>95</sup>

However a case comes to the ICC, the territorial jurisdiction of the court means that any US national suspected of egregious crimes committed on a territory under investigation by the court falls under the court's jurisdiction.<sup>96</sup> As discussed above, the United States has taken many actions to avoid the territorial jurisdiction of the ICC. These actions were done through bilateral agreements and the passage of the ASPA.

None of these precautions change the straightforward principle of territorial jurisdiction, whereby a US or other national that commits a crime on foreign soil is subject to that nation's courts. Additionally, none of these precautions change the application of universal jurisdiction, whereby any state can prosecute an individual on its territory for war crimes, crimes against humanity, torture, and genocide, regardless of nationality or where the crimes were committed.

## B. AUTHORIZED INVESTIGATION INTO AFGHANISTAN

After a long period of preliminary examinations beginning in 2007, the OTP announced in its 2016 report on preliminary examinations

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<sup>91</sup> See *id.* art. 13.

<sup>92</sup> *Id.* art. 13(b).

<sup>93</sup> U.N. Charter art. 39.

<sup>94</sup> Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2005).

<sup>95</sup> Press Release, Security Council, In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters, U.N. Press Release SC/10187 (Feb. 26, 2011).

<sup>96</sup> Mackintosh, *supra* note 9, at 20.

that it has a reasonable basis to seek Pre-Trial Chamber (PTC) authorization for an investigation into allegations of war crimes committed by the United States—primarily from 2003 to 2004, but in some cases as recently as December 2014.<sup>97</sup>

Beginning in 2001, after the 9/11 attacks in Washington, D.C., and New York City, the United States launched air strikes and ground operations against the Taliban, which was suspected of harboring Osama Bin Laden, leader of the Islamic militant group Al Qaeda.<sup>98</sup> The Taliban was subsequently expelled from power by the end of 2001 and was replaced by an interim governing authority.<sup>99</sup> Despite these efforts, hostilities continued in the southern and eastern areas of Afghanistan with the Taliban regaining their influence since 2003.<sup>100</sup> After 2005, the conflicts intensified and continued to spread into the northern and western parts of Afghanistan.<sup>101</sup> International forces who had deployed to support the Government of Afghanistan ended their combat missions in 2014.<sup>102</sup>

Specifically regarding the United States and the Central Intelligence Agency's (CIA) involvement in the conflict, the report states that "members of US armed forces appear to have subjected at least 61 detained persons to torture, cruel treatment, outrages upon personal dignity on the territory of Afghanistan between 1 May 2003 and 31 December 2014."<sup>103</sup> Additionally, the report found that the CIA was responsible for subjecting at least twenty-seven more individuals to the above crimes with the addition of rape.<sup>104</sup> The OTP found that these crimes were not a few isolated incidents by certain individuals, but rather part of CIA-approved interrogation techniques to extract important information out of detainees.<sup>105</sup>

The report also indicated that there was little to no evidence that the United States had willfully exercised its jurisdiction in prosecuting these individuals for committing these crimes in Afghanistan.<sup>106</sup>

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<sup>97</sup> See OFFICE OF THE PROSECUTOR, INT'L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2016 ¶¶ 198, 204, 211 (2016), [https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf) [<https://perma.cc/FM9X-MZS8>].

<sup>98</sup> *Id.* ¶ 195.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* ¶¶ 195–96.

<sup>101</sup> *Id.* ¶ 196.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* ¶ 211.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* ¶ 212.

<sup>106</sup> *Id.* ¶ 220.

Subsequently, the OTP filed a request for authorization of an investigation on November 20, 2017. Under the Rome Statute, the OTP can initiate investigations on its own, within an ongoing preliminary examination, subject to obtaining the authorization of the PTC.<sup>107</sup> Thus the PTC is vested with a specific, fundamental, and decisive filtering role in the context of proceedings under Article 15, unlike scenarios where the situation is referred to the court by a State or the Security Council.

In deciding whether to approve the investigation, the PTC found three facts important to its decision: (1) the significant time gap between the crimes and the request for an investigation, (2) the lack of cooperation throughout the preliminary examination, and (3) the likelihood that both relevant evidence and suspects are still available and within reach of the prosecutor's investigative efforts.<sup>108</sup> Ultimately, despite the Chamber's decision that there is a reasonable basis to assume that these crimes happened and that the court does have jurisdiction over these crimes, the difficulty in obtaining evidence and cooperation from parties involved would prove to be a significant challenge to any investigation by the prosecutor.<sup>109</sup> The PTC concluded its decision to deny the request by stating that the investigation "would result in creating frustration and possibly hostility vis-a-vis the Court and therefore negatively impact its very ability to pursue credibly the objectives it was created to serve."<sup>110</sup>

The denial came only weeks after Secretary of State Mike Pompeo stated that Washington may deny visas to the court's staff and judges involved with prosecuting or ruling on war crimes involving Americans.<sup>111</sup> Additionally, only eight days before the decision, the United States revoked the prosecutor's US visa.<sup>112</sup> Despite the decision to deny the request and the pressure being exhibited by the United States in opposition of the pursuit of an investigation, the OTP continued her pursuit of an investigation and appealed the PTC's decision.

In her request to appeal, the prosecutor noted that this was the first time the court had found a reasonable basis to believe that crimes within

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<sup>107</sup> Rome Statute, *supra* note 22, art. 15, § 3.

<sup>108</sup> Situation in the Islamic Republic of Afghanistan, ICC-02/17, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶ 91 (Apr. 12, 2019), [https://www.icc-cpi.int/CourtRecords/CR2019\\_02068.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF) [<https://perma.cc/AN2W-D828>] [hereinafter Denial of Investigation].

<sup>109</sup> *Id.* ¶ 96.

<sup>110</sup> *Id.*

<sup>111</sup> See Marlise Simons & Megan Specia, *supra* note 7.

<sup>112</sup> Compare *id.* with Denial of Investigation, *supra* note 108.



the court's jurisdiction were committed and that potential cases would be admissible but did not allow for an investigation.<sup>113</sup> One commentator, Kevin Heller, found that if the decision stood, it would produce several negative results including: (1) the Taliban's crimes being uninvestigated and unpunished; (2) the evisceration of the prosecutor's *proprio motu* power; (3) the encouragement of states, particularly powerful ones, to be as uncooperative with the ICC as possible.<sup>114</sup> Fortunately enough for the prosecutor, the PTC approved the request for leave to appeal their decision.

After a three-day hearing on the issues regarding the appeal, the Appeals Chamber decided unanimously to authorize the prosecutor to begin an investigation into the alleged crimes committed during the armed conflict in Afghanistan.<sup>115</sup> The Appeals Chamber held that the PTC erred by making any evaluation of whether an investigation would serve the interests of justice.<sup>116</sup> Furthermore, the Appeals Chamber found that the PTC wrongly evaluated whether an investigation in this situation would serve the interests of justice.<sup>117</sup>

The Appeals Chamber found that remanding the decision would be a waste of judicial resources and subsequently amended the decision to authorize an investigation. The decision was based on evidence that PTC had already concluded that there is a sufficient basis to believe that these crimes happened, and they occurred within the jurisdiction of the court.<sup>118</sup> This is a historic decision because it's the first time that the United States and its citizens have been implicated for grave international crimes committed on the territories of State Parties to the Rome Statute.<sup>119</sup>

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<sup>113</sup> Situation in the Islamic Republic of Afghanistan, ICC-02/17, Request for Leave to Appeal the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan" ¶ 1 (June 7, 2019), [https://www.icc-cpi.int/CourtRecords/CR2019\\_03060.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_03060.PDF) [<https://perma.cc/EW62-HA7L>].

<sup>114</sup> Kevin Heller, *One Word for the PTC on the Interests of Justice: Taliban*, OPINIO JURIS (Apr. 13, 2019), <http://opiniojuris.org/2019/04/13/one-word-for-the-ptc-on-the-interests-of-justice-taliban/> [<https://perma.cc/88SY-K4LX>].

<sup>115</sup> Press Release, Afghanistan: ICC Appeals Chamber Authorizes the Opening of an Investigation (Mar. 5, 2020), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1516> [<https://perma.cc/E8AK-YM42>].

<sup>116</sup> Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, Judgment on the Appeal Against the Decision on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶ 37 (Mar. 5, 2020), [https://www.icc-cpi.int/CourtRecords/CR2020\\_00828.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF) [<https://perma.cc/43VC-SUGR>].

<sup>117</sup> *Id.* ¶ 49.

<sup>118</sup> *Id.* ¶ 54.

<sup>119</sup> Plachta, *supra* note 6, at 104.

## C. IMPLICATIONS FOR THE UNITED STATES

Now that the decision has been made to allow an investigation into the alleged war crimes committed by the United States and others during the armed conflict in Afghanistan, it's clear that this case will be difficult for the prosecutor to investigate. However, given the amount of time that the OTP has put into establishing a case, it's obvious that the prosecutor has every intention of pushing through all the obstacles and intimidations that have already surfaced in the short time that the investigation has been in effect. As far as what this means for the United States, there is absolutely no guarantee that the prosecutor will be able to secure enough evidence to prosecute any US citizen or even be able to obtain a warrant for the arrest of a US citizen. However, the possibility of prosecution hangs over the head of the United States.

Despite the efforts taken by the United States to shield itself from the jurisdiction of the ICC, it is apparent that the ICC still finds that it has jurisdiction over the individuals from the United States that were involved in the crimes committed in the armed conflict in Afghanistan. Many scholars disagree as to whether these efforts taken preclude the ICC from exercising jurisdiction over US citizens.<sup>120</sup> Since the investigation is in its early stages, it's unclear how the ICC will deal with the US attempts at shielding its soldiers from being liable for actions taken in countries that are party to the Rome Statute.

However, there are a few options that the United States could use in response to this investigation: deny jurisdiction based on a lack of consent, challenge jurisdiction based on the doctrine of complementarity, refute jurisdiction as precluded by SOFAs with Afghanistan, or comply with the investigation.<sup>121</sup> The first three options have been supported by scholars and commentators as more likely to be adopted by the United States.<sup>122</sup> As previously discussed, the strong and heated response given by the Trump Administration after the announcement of the ICC's intention to investigate the crimes committed in Afghanistan, the fourth option seems less likely to be adopted by the United States. However, given the recent 2020 change of administration, complying with the

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<sup>120</sup> Michael Plachta & Joseph Rychlak, *The ICC Prosecutor's Request to Investigate the Situation in Afghanistan: A Threat or Opportunity?*, 33 INT'L ENF'T L. REP. 423, 425 (2017).

<sup>121</sup> Brittney A. Dimond, *When the ICC Comes Knocking, the United States Should Welcome It with Open Arms*, 28 WASH. INT'L L.J. 181, 206 (2019).

<sup>122</sup> *Id.* at 190.

investigation may still be a viable option depending on President Joe Biden's policies.

Denying jurisdiction based on lack of consent relies on the international idea that states must expressly consent to a rule of law before it can be applied to them.<sup>123</sup> It is customary to show consent through an agreement between two parties or a sufficiently long-standing practice among sovereign nations that ultimately creates an international custom.<sup>124</sup> Applied to the case at hand, it simply amounts to the idea that the United States has not ratified the Rome Statute and therefore should not be subject to its jurisdiction.<sup>125</sup>

However, denying jurisdiction relies on the fact that the United States has not expressly consented to the ICC's jurisdiction. There is an argument to be made that the United States has implicitly consented to the fact that the ICC has jurisdiction over individuals that operate within the borders of a State party to the Rome Statute.<sup>126</sup> This is evidenced by the fact that the United States was aware of all the provisions of the Rome Statute that indicated the ICC had jurisdiction over all conduct that occurred within the territory of a State Party yet continued to maintain a presence in States that are party to the Statute.<sup>127</sup> Furthermore, the United States could have implicitly recognized the legitimacy of the ICC's jurisdiction over non-member states when it sought BIAs with states that are party to the Rome Statute, which in this case is Afghanistan.<sup>128</sup>

Challenging jurisdiction based on the doctrine of complementarity relies on the important aforementioned principle of complementarity.<sup>129</sup> If the United States can show that they have begun investigations, if they have not already adequately investigated the conduct at issue, then they would be triggering the doctrine of complementarity jurisdiction and it would ensure that the United States would be able to investigate and

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<sup>123</sup> *Id.* (citing Joshua Wood, *What is Customary International Law*, RULE L. INST. AUSTL., (Mar. 14, 2017), <https://www.ruleoflaw.org.au/what-is-customary-international-law/> [perma.cc/44UD-3WRS]).

<sup>124</sup> *Id.* at 190.

<sup>125</sup> *Id.* at 191.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* (citing Brett Schaefer, *How the U.S. Should Respond to ICC Investigation into Alleged Crimes in Afghanistan*, THE HERITAGE FOUND. (Nov. 15, 2017), <https://www.heritage.org/courts/report/how-the-us-should-respond-icc-investigation-alleged-crimes-afghanistan> [https://perma.cc/H3KX-ETJZ]).

<sup>129</sup> Rome Statute, *supra* note 22, art. 1.

prosecute their own citizens.<sup>130</sup> However, the prosecutor made clear in her request for authorization of an investigation that she had at that time found no clear and convincing evidence that the United States had taken adequate measures to address the crimes that she is attempting to address through her investigation.<sup>131</sup> Challenging the ICC's jurisdiction seems to be the best option if the United States wants to avoid an ugly confrontation with the ICC and still support its efforts in achieving international justice.<sup>132</sup>

Refuting jurisdiction as precluded by SOFAs with Afghanistan is the most time sensitive and difficult to bring to fruition. This option rests on the idea that because Afghanistan signed the BIAs and SOFAs with the United States, it relinquished all territorial jurisdiction over American Soldiers.<sup>133</sup> This is both part of the reason why the prosecutor could have jurisdiction over American Soldiers as well as why the prosecutor could not have jurisdiction over American Soldiers. The reason why it could help prove why the prosecutor has jurisdiction over US citizens is that since Afghanistan has relinquished all ability to prosecute American citizens that may commit crimes within their borders, they are unable to prosecute.<sup>134</sup> This would trigger the doctrine of complementarity, meaning that since Afghanistan is unable to prosecute these crimes that were allegedly committed, jurisdiction would be transferred to the ICC.<sup>135</sup>

Conversely, the reason why the ICC could not have jurisdiction over American Soldiers in light of the BIAs and SOFAs is because Afghanistan relinquished its right to jurisdiction and therefore has no ability to transfer that jurisdiction to the ICC.<sup>136</sup> The possible lack of jurisdiction rests on the timing of the agreements that Afghanistan entered into. Afghanistan ratified the Rome Statute on May 1, 2003, which had occurred after they had entered into the SOFA with the United States.<sup>137</sup> This theory is contested because it relies on the understanding that ICC

<sup>130</sup> Jennifer Trahan, *It's High Time for the US to Conduct Complementarity As To Crimes in Afghanistan*, OPINIO JURIS (Nov. 5, 2017), <http://opiniojuris.org/2017/11/05/its-high-time-for-the-us-to-conduct-complementarity-as-to-crimes-in-afghanistan/> [https://perma.cc/X59F-3ZLU].

<sup>131</sup> Denial of Investigation, *supra* note 108, at paras. 78–79.

<sup>132</sup> *But see* Trahan, *supra* note 130.

<sup>133</sup> U.S. DEP'T OF STATE, 20520, INT'L SEC. ADVISORY BD.: REPORT ON STATUS OF FORCE AGREEMENTS 42 (Jan. 16, 2015), <https://2009-2017.state.gov/documents/organization/236456.pdf> [https://perma.cc/3FAR-YMBX].

<sup>134</sup> *Id.*

<sup>135</sup> Rome Statute, *supra* note 22, art. 17.

<sup>136</sup> Michael A. Newton, *How the International Criminal Court Threatens Treaty Norms*, 49 VAND. J. TRANSNAT'L L. 371, 406–07 (2015).

<sup>137</sup> *Id.* at 427.

authority is exclusively derived from the delegation of state jurisdiction,<sup>138</sup> where other scholars believe that ICC authority is derived from universal jurisdiction.<sup>139</sup> However, such a challenge would need to be made to the PTC immediately in order to prevent the Court from moving forward with the investigation.<sup>140</sup>

Complying with the investigation is certainly the most far-fetched of all the options, but it is always worth mentioning. Complying with the ICC could further so many objectives for the United States. First, it could help emphasize that the United States is once again an international body that seeks justice for the wrongs committed on an international scale. The United States has always held itself out to be a defender of justice for victims of war crimes but by going against the ICC while it is attempting to bring such justice makes the stance of the United States that much more hypocritical.<sup>141</sup>

Second, compliance in this particular situation would further justify the US reason for not ratifying the Rome Statute.<sup>142</sup> One of the aforementioned reasons for the United States not ratifying the Rome Statute was because it would leave Americans as political targets for prosecution.<sup>143</sup> Since the United States has already purported to have investigated these crimes and punished those responsible, the concern the United States has about these crimes shows that the ICC's concern about these crimes is not politically motivated.<sup>144</sup>

The third and final reason why compliance would be in the best interest of the United States is that it would have more control over how and maybe even what information is given to the ICC in regard to the investigation as it applies to the US citizens that are implicated.<sup>145</sup> It is more difficult to access information if the United States resists, but there is no guarantee that the information won't eventually fall into the prosecutor's hands.<sup>146</sup>

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<sup>138</sup> *Id.* at 408, 429.

<sup>139</sup> Carsten Stahn, *Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine—A Reply to Michael Newton*, 49 VAND. J. TRANSNAT'L L. 443, 449 (2015).

<sup>140</sup> Rome Statute, *supra* note 22, art. 12.

<sup>141</sup> Dimond, *supra* note 121, at 202.

<sup>142</sup> *Id.* at 203.

<sup>143</sup> Kielsgard, *supra* note 33, at 10.

<sup>144</sup> Dimond, *supra* note 121, at 204.

<sup>145</sup> *Id.* at 205.

<sup>146</sup> *Id.*

Proceeding with this investigation is not an immediate condemnation of any American soldiers. How the United States reacts to this investigation is extremely important and will impact how it is viewed within the international context. The United States has already taken a very harsh stance against this investigation and those harsh responses may have significant consequences.

### III. US SANCTIONS

Since the recent developments in the ICC's investigation into the crimes committed in Afghanistan, the United States has taken a hostile approach to Ms. Fatou Bensouda and other officials involved in the investigation. This hostility is not surprising, considering the history between the two, but now the US approach is affecting its own citizens. In targeting the ICC, the United States is taking extreme measures to ensure it is not implicated in the crimes committed in Afghanistan. This Part will discuss the sanctions program and national emergency that the Trump Administration declared, how this program affects not only those investigating, but those even associated with the ICC, and how this approach is contrary to all the international work that the United States has done in the pursuit of international justice.

#### A. OPERATIVE LAW AND PURPOSE

On June 11, 2020, President Donald Trump issued an executive order declaring a national emergency and established a sanctions program against ICC officials, others who assist with the Afghanistan investigation, and those who support the ICC.<sup>147</sup> The Executive Order alone does not put anyone on the sanction list but puts forth a sanction program that will be used to name targeted individuals.<sup>148</sup> Through the executive order, the Secretaries of State and Treasury have the authority to freeze the US assets of foreign citizens who have materially supported or directly participated in the ICC's investigations of US personnel or the personnel of certain US allies.<sup>149</sup> Additionally, the named individuals are unable to travel to the

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<sup>147</sup> Exec. Order No. 13,928, 85 Fed. Reg. 36,139, (June 11, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-06-15/pdf/2020-12953.pdf> [<https://perma.cc/D6KN-V38Q>] [hereinafter Executive Order].

<sup>148</sup> *Id.* at 36,140.

<sup>149</sup> *Id.*

United States.<sup>150</sup> It also bars other individuals—including US citizens and residents—from transacting with or providing goods or services to the foreign citizens whose assets the government has frozen.<sup>151</sup>

The law that President Trump invoked to establish this sanctions program is the International Emergency Economic Powers Act (IEEPA).<sup>152</sup> This law was created back in 1977 in response to Watergate and was meant to reign in the power of the executive by limiting its ability to operate under National Emergency powers in perpetuity, while allowing Congressional oversight of foreign affairs.<sup>153</sup> However, this law has since turned into a tool that presidents have continued to use boundlessly.<sup>154</sup> President Trump has taken the use of this law past the point of what it was intended to do.<sup>155</sup>

The IEEPA is one of over 136 emergency powers at the Executive's disposal that Congress has delegated over the years.<sup>156</sup> Emergency powers used by the president are subject to procedural requirements imposed by the National Emergencies Act (NEA).<sup>157</sup> So in order for President Trump to enact a sanctions program under the IEEPA, he was required to declare a national emergency under the NEA.<sup>158</sup> Additionally, the NEA is the reason he was required to write an executive order that is published in the Federal Register.<sup>159</sup>

In order to establish this sanctions program, the IEEPA requires that there be “an unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.”<sup>160</sup> Thus, in President Trump's Executive Order establishing the sanctions program, he states:

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 36,139.

<sup>153</sup> Adam M. Smith, *Dissecting the Executive Order on Int'l Criminal Court Sanctions: Scope, Effectiveness, and Tradeoffs*, JUST SEC. (June 15, 2020), <https://www.justsecurity.org/70779/dissecting-the-executive-order-on-intl-criminal-court-sanctions-scope-effectiveness-and-tradeoffs/> [<https://perma.cc/4T46-VXZV>].

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> BRENNAN CENTER FOR JUSTICE, A GUIDE TO EMERGENCY POWERS AND THEIR USE (N.Y.U., rev. ed. 2019), <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use> [<https://perma.cc/Y2JC-WRS9>].

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> 50 U.S.C. §1701.

I therefore determine 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.<sup>161</sup>

The issuance of this Executive Order to accomplish President Trump's goal of fighting the ICC investigation has turned the heads of many scholars in this area. In fact, it elicited a lawsuit filed by the Open Society Justice Initiative and a group of prominent international lawyers.<sup>162</sup>

## B. US PERSONS AFFECTED BY SANCTION PROGRAM

Now that the sanctions program has been established, the government can announce that a relevant target is sanctioned at any time.<sup>163</sup> Since the program was created, two names have been added to the sanctions list: Fatou Bensouda and Phakiso Mochochoko.<sup>164</sup> Ms. Fatou Bensouda is the former prosecutor for the ICC that was heading the investigation into the crimes committed in Afghanistan and the latter is the current Director of the Jurisdiction, Complementarity and Cooperation Division at the ICC.

The Executive Order "blocks" any property of certain groups of people associated with the names on the sanction list.<sup>165</sup> "Blocking" is a synonym for freezing, which means that the property owners still have ownership, but cannot access it.<sup>166</sup> The blocking applied through the Executive Order applies to property that is within the US or that is under the control of a US person on or after the time when an individual is sanctioned.<sup>167</sup>

"United States person" might seem like a precise term, but in fact, it encompasses more than the average person would assume. "United

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<sup>161</sup> Executive Order, *supra* note 147, at 36,139.

<sup>162</sup> Complaint, Open Soc'y Just. Initiative v. Trump, (No. 1:20CV08121), 2020 WL 5836982 (S.D.N.Y.).

<sup>163</sup> See Executive Order, *supra* note 147.

<sup>164</sup> U.S. DEPT. OF TREAS., BLOCKING PROPERTY OF CERTAIN PERSONS ASSOCIATED WITH THE INTERNATIONAL CRIMINAL COURT DESIGNATIONS (2020), <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20200902> [<https://perma.cc/8K23-32EQ>].

<sup>165</sup> Executive Order, *supra* note 147, § 1.

<sup>166</sup> Boyle, *supra* note 8.

<sup>167</sup> Executive Order, *supra* note 147, § 1.



States person” is defined as “any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States.”<sup>168</sup> In simple terms, if you are an American and in possession of property that belongs to a sanctioned individual, you are required to freeze that property even if you are not within the United States. If you are a non-American but are within the United States and in possession of such property, you are also required to freeze that property. This also applies to corporations that may be in possession of property that belongs to an individual listed on the sanctions list.

However, only foreign persons may be sanctioned.<sup>169</sup> There are four categories of foreign persons that may be sanctioned.<sup>170</sup> Parts (A) and (B) of the Executive Order, which apply to actions against the United States and its allies, respectively, concern “direct engagement” in investigation, arrest, detention, or prosecution.<sup>171</sup> This would include the staff of the ICC but could incorporate those cooperating with the investigation in any capacity. Part (C) expands the group of individuals that could be sanctioned to include those who “materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of . . .”<sup>172</sup> Part (D) expands it yet further and states “to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.”<sup>173</sup>

Yet the question remains, how does this really affect US citizens since they are not the subjects of the sanction program? As previously indicated, once an individual is placed on the sanctions list, US citizens are prohibited from engaging in any financial capacity with the individual.<sup>174</sup> If a US citizen were to violate this prohibition, then they could be subject to steep fines and if they do so willfully, they could even go so far as being prosecuted.<sup>175</sup> The Executive Order also prevents any

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<sup>168</sup> *Id.* § 7(c).

<sup>169</sup> *Id.* § 1(a)(i).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* § 2.

<sup>175</sup> *Id.*

attempt at working around these prohibitions, such as trying to indirectly support the ICC.<sup>176</sup>

There are many questions surrounding the Executive Order's ability to prohibit these interactions of US persons with those involved with the ICC. One such question is whether it is even legal to restrict Americans in this way in the first place. As mentioned earlier, a complaint was filed by the Open Society Justice Initiative and a group of prominent international lawyers on October 1, 2020.<sup>177</sup> They filed the lawsuit on four separate counts: the First Amendment, the Fifth Amendment, *Ultra Vires*, and the Administrative Procedure Act.<sup>178</sup>

The violation of the First Amendment claim seems apparent in that the Executive Order appears to restrict US citizens' freedom of speech and association in respect to supporting the ICC.<sup>179</sup> Americans have long enjoyed the right to freedom of speech and with that right, a penumbra of others. Additionally, the right to due process granted in the Fifth Amendment guarantees that individuals are provided notice of what is prohibited and whether they could be subject to violations.<sup>180</sup> The Plaintiffs in the lawsuit argue that the Executive Order is very unclear as to the restrictions applied to them and whether they are subject to the prohibitions at all.<sup>181</sup>

The individuals in this lawsuit are seeking to aid the ICC in bringing war criminals to justice and the Executive Order prohibits them from doing so.<sup>182</sup> The four individuals in the suit are all deeply connected with the ICC and with the sanctioned ICC Prosecutor Fatou Bensouda.<sup>183</sup> They all work very closely with the prosecutor and others at the ICC in a professional capacity to further the goals of the ICC and provide assistance.<sup>184</sup>

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<sup>176</sup> *Id.* § 5.

<sup>177</sup> Complaint, Open Soc'y Just. Initiative v. Trump, (No. 1:20CV08121), 2020 WL 5836982 (S.D.N.Y.).

<sup>178</sup> *Id.* paras. 122–34.

<sup>179</sup> *Id.* para. 123.

<sup>180</sup> *Id.* paras. 125–26.

<sup>181</sup> *Id.*

<sup>182</sup> Julian Borger, *Human Rights Lawyers Sue Trump Administration For 'Silencing' Them*, THE GUARDIAN (Oct. 1, 2020), <https://www.theguardian.com/us-news/2020/oct/01/human-rights-lawyers-sue-trump-administration-for-silencing-them> [<https://perma.cc/YH23-28TA>].

<sup>183</sup> Complaint, Open Soc'y Just. Initiative v. Trump, No. 1:20CV08121, 2020 WL 5836982 (S.D.N.Y.), paras. 3, 29.

<sup>184</sup> *Id.* para. 3.

The most recent development in this case was on January 4, 2021, where the presiding judge placed a temporary injunction on the sanction program until the case can be resolved on its constitutionality.<sup>185</sup> Despite the temporary injunction, it is still a possibility that the sanctions program could be upheld as constitutional and cause a significant amount of turmoil in the international world with the United States and the ICC.

### C. US ACTIONS MOVING FORWARD

The United States needs to find a better approach to the ICC and the investigation in Afghanistan. It is quite disturbing that the United States has taken such a hostile position so quickly regarding the investigation in Afghanistan. As mentioned earlier, there is no guarantee that there will even be arrest warrants for the US soldiers purportedly involved in the crimes at bar. Additionally, with the amount of time that this investigation has taken to come to fruition, it seems unlikely that any indictments will be made in the near future. One of the reasons that the investigation was first denied was because of the apparent lack of current information and cooperation of individuals involved in the conflict.<sup>186</sup> This all demonstrates that the United States has time to think of an appropriate and mutually beneficial response to the investigation.

However, after the strong and aggressive response from the Trump Administration, it will take a lot to recover the relationship between the ICC and the United States. With the change of administration after the election of President Joe Biden, it is left open for the mind to wonder what will become of the sanctions program. Whether President Biden will continue the strong-armed tactics of the Trump Administration or will follow in the footsteps of the Obama Administration, by recognizing the valuable role the ICC can sometimes play.

There are a few options that the new Administration can take in regard to the sanctions program: rescind the Executive Order creating the sanctions program, amend the ability of administrations to use the IEEPA, or continue with the program in the hopes that it doesn't completely destroy the relationship between the ICC and United States.

By rescinding the Executive Order that establishes the sanctions program, there is no longer a possible infringement upon US citizens' constitutional rights and it no longer hinders the prosecutor's ability to find

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<sup>185</sup> See generally *Open Soc'y Just. Initiative v. Trump*, 510 F. Supp.3d 198 (S.D.N.Y. 2021).

<sup>186</sup> Denial of Investigation, *supra* note 108, para. 91.

justice for the victims involved in the armed conflict in Afghanistan. The only things that the Executive Order has accomplished are infringed on the rights of US citizens, encumbered the ICC investigation, and attempted to intimidate the prosecutor from investigating the US involvement in the crimes committed in Afghanistan. As clearly indicated by the lawsuit pending against President Trump, US citizens are distraught at the infringement of rights. Furthermore, while the investigation is slow going and difficult, the prosecutor does not seem phased in her pursuit of investigating the crimes in Afghanistan. In total, it seems as though the sanctions program is useless.

By amending the ability of Executives to use the IEEPA, the regulation won't be used in the manner that it was used to establish the sanctions program against the ICC in the future. This course of action would get to the source of the problem by restricting a president's ability to establish sanction programs unless there is an actual need for one. As mentioned earlier, the IEEPA was not intended to be used as a tool for the Executive to create sanction programs at a whim.<sup>187</sup> It was created to make it more difficult for presidents to create sanction programs that went on for eternity.<sup>188</sup>

If the Biden Administration continues to use the sanctions program, its use is likely to destroy anything that is left of the relationship between the ICC and the United States. As examined throughout this discussion, the United States has continued to portray itself as a supporter of international justice for atrocities committed in the name of war.<sup>189</sup> If the United States continues its attempts to strongarm the prosecutor, it will "set a deeply problematic example of disrespect for the personnel and judicial processes of the ICC."<sup>190</sup>

The United States has been at the forefront of the creation of international tribunals since their very beginning after World War II.<sup>191</sup> Moreover, the United States has consistently inserted itself into conflicts in the hopes of coming to a resolution.<sup>192</sup> The ICC up to this point has only advanced the interests of the United States in seeking prevention of these

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<sup>187</sup> Smith, *supra* note 153.

<sup>188</sup> *Id.*

<sup>189</sup> See Jane Stromseth, *The United States and the International Criminal Court: Why Undermining the ICC Undercuts U.S. Interests*, 47 GA. J. INT'L & COMPAR. L. 639, 656 (2019).

<sup>190</sup> *Id.* at 652.

<sup>191</sup> Meyer, *supra* note 13, at 101–02.

<sup>192</sup> Stromseth, *supra* note 189, at 644.

atrocities we see that come from armed conflict.<sup>193</sup> Truthfully, in investigating crimes in Afghanistan that might have been committed by US officials, it seems as though the ICC is still advancing the interests of the United States in seeking justice for these victims.

The United States needs to take a more pragmatic and mutually beneficial stance towards the ICC and the investigation in Afghanistan. This could be accomplished in many ways as pointed out throughout this discussion, but some would accomplish this goal better than others. The sanctions program is not how the United States should approach the investigation by the ICC. The United States should either comply with the investigation, which would advance its interests in international justice, or find a way to avoid investigation by acting within the rule of complementarity.

#### IV. CONCLUSION

The ICC was created to end war crimes and ultimately prevent them. It does this through investigations that can lead to arrest warrants and hopefully with enough support, obtain convictions of war criminals who commit atrocities. It has been quite successful so far, but it needs support from outside countries every step of the way to bring these criminals to justice. The recent actions of the United States will most certainly hinder this process and it could mean the end to a proper investigation into the war crimes committed in Afghanistan.

Even though the sanctions program aligns with the US view of the ICC, it doesn't seem to be meeting the goals of either entity. The United States has continually held itself out to be a defender of justice in the face of war criminals, but by directly opposing the ICC, it ultimately opposes the goal of the ICC which is to defend the victims of war crimes. This opposition may have been here from the very beginning, but it is not too late to change the foreign policies of the United States and once again be the defender of those who cannot defend themselves. Changing how the United States views the ICC will be a great step in the right direction to really establishing a zero-tolerance policy on war crimes and crimes against humanity.

Additionally, the sanctions program is an obstruction to US citizens' First and Fifth Amendment rights. By listing individuals in the sanction program, it prevents US citizens from supporting the ICC in

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<sup>193</sup> *Id.* at 643.

almost any fashion. This sanctions program is not an appropriate use of executive power and should not be how the United States reacts to an investigation into the atrocities committed in the armed conflict of Afghanistan.