

# The Sound and the Fury Signifying Nothing: Trump Sanctions International Criminal Court Chief Prosecutor Fatou Bensouda

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## I. INTRODUCTION

President Trump imposed sanctions on the International Criminal Court’s Chief Prosecutor Fatou Bensouda and her Head of Jurisdiction Phakiso Mochochoko on September 2, 2020.<sup>1</sup> The sanctions followed a

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1. Matthew Lee, *WATCH: Pompeo Announces Sanctions on International Tribunal Prosecutor, Aide*, PBS NEWS HOUR (Sept. 2, 2020), <https://www.pbs.org/newshour/politics/watch-pompeo-announces-sanctions-on-international-tribunal-prosecutor-aide>.

threatening Executive Order issued by President Trump on June 11, 2020, that gave the State Department unprecedented and ineffective authority.<sup>2</sup> The chief prosecutor announced her intent to investigate alleged war crimes and crimes against humanity committed by the United States in the Islamic Republic of Afghanistan three years prior in November 2017; she received authorization on March 5, 2020.<sup>3</sup> President Trump and his sanctions posed empty, unnecessary threats to members of an independent international criminal tribunal—members elected solely to bring justice to victims of crimes defined by the Rome Statute.

This Comment will first explore the complex relationship between the United States and the International Criminal Court (ICC or “the Court”). It is defined by non-cooperation, defiance, and arms-length dealing. Part II begins this endeavor with a survey of the ICC that focuses on the factors that narrow the Court’s jurisdiction. Part III addresses the attitude by the U.S. towards the ICC since 1998, proceeding chronologically through each presidential administration. The U.S. was an original signatory to the Rome Statute under Bill Clinton.<sup>4</sup> When George W. Bush assumed office, however, he formally “unsigned” the treaty.<sup>5</sup> During Barack Obama’s Administration, the U.S. shifted from hostile adversary to sometimes-cooperative non-member state, but never took steps to re-sign or ratify the treaty.<sup>6</sup>

Part IV continues this thread and looks at the Trump Administration. With Donald Trump, the relationship fell into a state of abject conflict as the U.S. blacklisted Chief Prosecutor Bensouda and the Court’s Head of Jurisdiction, despite such action having no real impact on the Court’s ability to continue with its investigation.<sup>7</sup> Part IV also looks at how the

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2. Exec. Order No. 13,928, 85 Fed. Reg. 36139 (2020), *available at* 2020 WL 3128266 [hereinafter June 20 Executive Order].

3. Situation in the Islamic Republic of Afghanistan, Case No. 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, ¶ 79 (Mar. 5, 2020), [https://www.icc-cpi.int/CourtRecords/CR2020\\_00828.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF) [hereinafter Judgment on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan].

4. Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L., 381, 383-84 (2002).

5. Daniel Donovan, *International Criminal Court: Successes and Failures*, INT’L. POL’Y. DIG. (Mar. 23, 2012), <https://intpolicydigest.org/international-criminal-court-successes-and-failures/#:~:text=Another%20success%20of%20the%20ICC,U.S.e%20of%20the%20appeals%20process.>

6. Kurt R. Willems, *U.S. National Security and the International Criminal Court: Should the Obama Administration Consider Reengagement?*, 16 U.C. DAVIS J. INT’L L. & POL’Y. 213, 235 (2009).

7. *See Lee, supra* note 1.

United States has routinely misunderstood the jurisdictional reach of the ICC and used such misunderstanding to rail against the authority of the Court. It concludes with an analysis of remarks by former-National Security Advisor to the Trump Administration, John Bolton, about the “enormous” and “unaccountable” reach of the ICC—detailing how Bolton’s remarks are unfounded, why they are untrue, and how United States sovereignty has never been threatened by the Court.<sup>8</sup>

This Comment ends on a note of tentative optimism. The Trump Administration has ended, the Biden Administration lifted the sanctions on April 2, 2020, and the International Criminal Court is on the cusp of new prosecutorial leadership.

## II. THE INTERNATIONAL CRIMINAL COURT AS A COURT OF LAST RESORT

The International Criminal Court was established on July 17, 1998 with the adoption of the Rome Statute of the International Criminal Court (“Rome Statute” or “Statute”).<sup>9</sup> In the wake of a century rattled by two World Wars, a handful of multi-national armed conflicts, and the unsettling reality of global nuclear destruction, weary and conscientious states recognized the need for an international body capable of investigating and prosecuting the most depraved crimes of mankind.<sup>10</sup> The Statute’s preamble begins with concern that the “delicate mosaic” of humanity’s “shared heritage” could “be shattered at any time,” and that the entire international community must cooperate to effectively prosecute and convict such perpetrators.<sup>11</sup>

Through the Rome Statute, member states acknowledged and accepted the jurisdiction of an international criminal tribunal that operated outside the criminal processes of individual countries.<sup>12</sup> Currently, 123 countries are state parties to the Rome Statute,<sup>13</sup> with the most notable

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8. See *id.*; see generally Matthew Kahn, *National Security Advisor John Bolton Remarks to Federalist Society, Lawfare* (Sept. 10, 2018, 2:43 PM), <https://www.lawfareblog.com/national-security-adviser-john-bolton-remarks-federalist-society>.

9. *International Criminal Court, Public Information and Documentation Section, Understanding the International Criminal Court 1* (2013), available at [https://www.icc-cpi.int/icc\\_docs/pids/publications/uicceng.pdf](https://www.icc-cpi.int/icc_docs/pids/publications/uicceng.pdf) [hereinafter *Understanding the ICC*].

10. *Id.* at 3.

11. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

12. *Understanding the ICC*, *supra* note 9, at 3.

13. *The States Parties to the Rome Statute, International Criminal Court* (as of Mar. 27, 2021), [https://asp.icc-cpi.int/en\\_menus/U.S./asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/U.S./asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx).

exception being the United States.<sup>14</sup> Despite the size of its membership, the scope of the ICC's jurisdiction is in fact quite limited.<sup>15</sup>

Narrowing factors, described in greater detail below, tightly constrain the Court: (1) states have primary jurisdiction with the Court operating on the principle of complementarity;<sup>16</sup> (2) the Court has jurisdiction over natural individuals who have attained the age of eighteen;<sup>17</sup> (3) the Court can only investigate and prosecute individuals accused of crimes against humanity, war crimes, crimes of aggression, and the crime of genocide;<sup>18</sup> (4) jurisdiction does not apply retroactively and can only be exercised for crimes taking place after July 1, 2002;<sup>19</sup> (5) finally, for the Court to exercise territorial jurisdiction, the conflict must occur between member states,<sup>20</sup> or one or more member state must be involved, provided the conflict occurred in the territory of a member state or the accused is a member state national.<sup>21</sup> Jurisdiction is further constrained by the Rome Statute's preamble, noting that only the "most serious crimes of international concern" can be investigated and prosecuted by the ICC.<sup>22</sup>

#### A. *The Principle of Complementarity*

The principle of complementarity (or "default jurisdiction") demands that the Court first look to the state responsible for prosecuting the offender.<sup>23</sup> States, member and non-member alike, enjoy primary jurisdiction.<sup>24</sup> A petition is considered inadmissible if the case is already being investigated or prosecuted by the state responsible, the case has already been investigated and the state responsible has decided not to prosecute, the accused has already been tried by a court on the same conduct, or the case has insufficient "gravity" to warrant further action.<sup>25</sup> However, if the state is "unwilling or unable genuinely to carry out the

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14. Andrew Morgan, *Non-Signatory Countries*, JURIST (July 20, 2012, 10:45 PM), <https://www.jurist.org/archives/feature/non-signatory-countries/#:~:text=Israel%2C%20Sudan%20and%20the%20U.S.,their%20signature%20of%20the%20statute>.

15. Mark D. Kielsgard, *War on the International Criminal Court*, 8 N.Y. CITY L. REV. 1, 6 (2005).

16. Rome Statute, *supra* note 11, at pmbl.

17. *Id.* at arts. 25-26.

18. *Id.* at arts. 5-8.

19. *Id.* at art. 11.

20. *Id.* at art. 12.

21. *Id.*

22. *Id.* at art. 1.

23. *Id.* at pmbl.

24. *Id.*

25. *Id.* at art. 17.

investigation or prosecution,” the ICC will then consider the matter.<sup>26</sup> In addition, the Court cannot intervene if the state responsible has already investigated the situation and decided not to prosecute, subject to the “unwilling or unable” caveat.<sup>27</sup>

#### B. *Subject Matter Jurisdiction*

The crimes that fall within the jurisdiction of the Court are crimes against humanity, war crimes, crimes of aggression, and the crime of genocide.<sup>28</sup> In articles six, seven, and eight, the Statute defined the actions that constitute or contribute to genocide, crimes against humanity, and war crimes.<sup>29</sup> In addition, article one points out that the commission of one of these crimes is not solely sufficient to afford the ICC jurisdiction.<sup>30</sup> Instead, the crime must rise to the level of “international concern”—it must affect the world at large.

#### C. *Personal Jurisdiction*

The Court has jurisdiction over natural persons.<sup>31</sup> The Statute outlines a range of liability to include the commission of such a crime jointly or in tandem with another; the ordering or solicitation of a crime; assistance in facilitating the commission of the crime; in any other way contributing to the commission; directly and publicly inciting the commission of genocide; and acting in any way that constitutes a substantial step toward commission.<sup>32</sup> The Court has no jurisdiction over persons who were “under the age of [eighteen] at the time of the alleged commission of the crime.”<sup>33</sup>

#### D. *Temporal Jurisdiction*

The Court began to exercise its jurisdiction after the Statute’s entry into force on July 1, 2002.<sup>34</sup> Jurisdiction is not retroactive and thus cannot apply to prior committed crimes. Furthermore, if a state becomes a party to the Statute, the Court’s jurisdiction is limited to crimes committed after

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26. *Id.*; Kielsgard, *supra* note 15, at 9.

27. Rome Statute, *supra* note 11, at art. 17.

28. *Id.* at art. 5.

29. *Id.* at arts. 6-8.

30. *Id.* at art. 1.

31. *Id.* at art. 25.

32. *Id.*

33. *Id.* at art. 26.

34. *Id.* at art. 11.

the treaty's entry into force for that particular state—the date of ratification.<sup>35</sup> One of the few broadening methods of ICC jurisdiction allows the Court to investigate and prosecute continuing crimes that began before the Statute's entry into force.<sup>36</sup>

*E. Dual Avenues of Territorial Jurisdiction*

There are two methods by which the ICC enjoys territorial jurisdiction. First, the Court may exercise its jurisdiction over conflicts occurring between parties to the Statute.<sup>37</sup> Second, where one or more (but not all) of the states involved are parties to the Statute, the Court can consider conduct that occurred on the territory of a member state; or conduct committed by a member state national.<sup>38</sup>

III. THE AMERICAN APPROACH TOWARDS COOPERATION WITH THE ICC: A LEGACY OF ANTAGONISM AND AVOIDANCE

Before discussing Bensouda's investigation into American conduct in Afghanistan or Trump's response, the context of the relationship between the U.S. and the ICC must be established. Because the tenor of association between the United States and the Court has been primarily defined by each executive administration, this part is organized by each successive president, starting with Bill Clinton, moving to George W. Bush, then ending with Barack Obama.

Interaction with the ICC on a narrow level, or more broadly all foreign policy, is the discrete purview of the President. Consequently, each president's attitude toward the ICC is indicative of their general approach to communing with the international congress: Clinton sought atonement for the United States' failure to stop genocide in Rwanda; Bush wanted to be the leader of the free world; and Obama wanted to bring the United States into a space of global communication and cooperation. American interaction with the ICC therefore represents a microcosm in which each of these divergent interests were furthered during their proponent's time in the Oval Office.

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35. *Id.*

36. *Id.* at arts. 6-8.

37. *Id.* at art. 12(1).

38. *Id.* at art. 12(2).

A. *1998-2000: Bill Clinton*

Prior to the Rome Conference, the Clinton Administration proudly declared its support for and interest in the ICC.<sup>39</sup> The U.S. had assisted in creating international criminal tribunals following the situations in the former Yugoslavia and Rwanda, and U.S. representatives were instrumental in drafting the document that would become the Rome Statute.<sup>40</sup> However, the United States voted against the treaty.<sup>41</sup> After two years of negotiation principally aimed at protecting the U.S. from the ICC's proposed reach, America signed the treaty on December 31, 2000, in the waning hours of the Clinton Administration.<sup>42</sup>

B. *2000-2008: George W. Bush*

Less than a month later, President George W. Bush assumed office.<sup>43</sup> His administration voiced strong opposition to the Rome Statute, the creation of the ICC, and the U.S.'s participation in both.<sup>44</sup> These views were echoed by Congress, with the majority of objections centering on a common theme: the Rome Statute posed a fundamental and dangerous threat to American sovereignty.<sup>45</sup> Criticism culminated with a May 6, 2002 notice to the UN Secretary-General, informing the UN that the United States did not intend to ratify the Statute, thereby "unsigned" it.<sup>46</sup> Although the notice appears to be the first shot fired in a disagreement-turned-dispute-turned-war, the administration highlighted that "while [it opposed] the ICC [it shared] a common goal with [the Court's] supporters—the rule of law."<sup>47</sup> In support of that common goal, the United States affirmed its intent to work with ICC member states to "promote real justice."<sup>48</sup>

During his first term, President Bush nominated John Bolton (soon to be the American bogeyman of the ICC) as Under Secretary of State for

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39. Amann & Sellers, *supra* note 4, at 381.

40. *Id.* at 383.

41. *Id.*

42. *Id.* at 383-84.

43. *Id.* at 384.

44. *Id.*

45. *Id.* at 384, 386.

46. Communication (with Declaration) by the United States of America on the Rome Statute of the International Criminal Court, May 6, 2002, 2189 U.N.T.S. 500 [hereinafter Communication (with Declaration)].

47. Marc Grossman, Under Secretary for Political Affairs, Remarks to the Center for Strategic and International Studies: American Foreign Policy and the International Criminal Court (May 6, 2002), available at <https://2001-2009.state.gov/p/U.S./rm/9949.htm>.

48. *Id.*

Arms Control.<sup>49</sup> Bolton led the Bush Administration's effort to subvert the ICC initially through the May 2002 notice.<sup>50</sup> This was followed by coercive efforts to pressure U.S. allies into signing the "Article 98 Agreements," pledging to turn over any requested American nationals to the U.S. instead of the ICC.<sup>51</sup> Domestically, Congress passed Section 7423—Prohibition of cooperation with the International Criminal Court—in August 2002, to prevent Americans from funding, supporting, or in any way cooperating the ICC.<sup>52</sup>

Seemingly mindful of the sour taste left in international mouths by the United States' aggressive opposition, the Bush Administration's second term moved away from Bolton's confrontational, brutalist diplomacy and towards a "more pragmatic 'modus vivendi'" approach.<sup>53</sup> The United States had decided to cooperate.<sup>54</sup> In March 2005, the United States allowed the UN Security Council to refer the situation in Darfur to the Court.<sup>55</sup> It continued to tacitly approve of the ICC's involvement by blocking China's efforts to defer the Office of the Prosecutor's ("OTP") investigation.<sup>56</sup> In March 2006, the United States supported the ICC in allowing the Special Court for Sierra Leone to use the Court's chambers for the trial of Charles Taylor.<sup>57</sup> Secretary of State Condoleezza Rice publicly denounced U.S. restrictions to counterterrorism as detrimentally unproductive, causing President Bush to waive such restrictions towards ICC members.<sup>58</sup>

When President Bush left office, the United States was slowly moving away from deliberate hostility towards the ICC.<sup>59</sup> In its stead, the

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49. Krishnadev Calamur, *A Short Guide to John Bolton's Government Career*, ATLANTIC (Mar. 23, 2018), <https://www.theatlantic.com/international/archive/2018/03/john-bolton/556346/>.

50. John B. Bellinger III, *The Trump Administration Throws Down the Gauntlet to the ICC. The Court Should Decline the Challenge*, COUNCIL ON FOREIGN RELATIONS (Sept. 11, 2018, 3:52 PM), <https://www.cfr.org/blog/trump-administration-throws-down-gauntlet-icc-court-should-decline-challenge>.

51. *Id.*; *Letter to European Union Foreign Ministers on Article 98 Agreements*, HUM. RTS. WATCH (Aug. 23, 2002, 8:00 PM), <https://www.hrw.org/news/2002/08/23/letter-european-union-foreign-ministers-article-98-agreements> [hereinafter *Letter on Article 98 Agreements*].

52. 22 U.S.C.A. § 7423 (2002).

53. John B. Bellinger III, *The International Criminal Court and the Trump Administration*, LAWFARE (Mar. 27, 2018, 6:42 PM), <https://www.lawfareblog.com/international-criminal-court-and-trump-administration>.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*



nation was quietly warming to the reality that the Court was globally recognized as a last resort source of international justice for the perpetrators of war crimes, crimes against humanity, crimes of aggression, and genocide.<sup>60</sup> Although America remained resolute in its stance that the international tribunal had no jurisdiction over U.S. soil or its nationals, the conflict had de-escalated to arms-length acknowledgement in time for a new presidential administration.

*C. 2008-2016: Barack Obama*

Although President Obama indicated that the U.S. might reconsider joining the ICC, his eight years in office passed without the United States becoming a signatory of the Statute, let alone ratifying it.<sup>61</sup> Yet, over the course of the Obama Administration, the United States entered a space of greater cooperation with the ICC (particularly when it benefitted the U.S.).<sup>62</sup> President Obama supported the chief prosecutor's investigation and indictment of Sudanese President Omar Al Bashir.<sup>63</sup> In 2011, the United States voted to refer the Libya Crisis to the ICC—an action that bolstered the Court in developing its authority as well as signaling greater assistance and respect from the U.S.<sup>64</sup> The United States also assisted in locating and capturing leaders of the Lord's Resistance Army, including alleged Brigade Commander Dominic Ongwen, who were later sent to the Hague tribunal's detention center to await trial.<sup>65</sup>

Though supportive of some of the Court's endeavors, the Obama Administration remained unhelpful in matters concerning the United States.<sup>66</sup> After the CIA inspector-general reported crimes taking place in the territory of Afghanistan (including water boarding, physical beating, and mock executions, among other abuses), President Obama blocked prosecution.<sup>67</sup> According to the Obama Administration, there were no

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60. *Id.*; see generally Jess Bravin, *U.S. Warms to Hague Tribunal*, WALL ST. J. (June 14, 2006), <https://www.wsj.com/articles/SB115024503087679549>.

61. See Willems, *supra* note 6.

62. Donovan, *supra* note 5.

63. Willems, *supra* note 6.

64. Aminta Ossom, *An African Solution to an African Problem? How an African Prosecutor Could Strengthen the ICC*, 52 VA. J. INT'L L. DIG. 68 (2011).

65. See generally *The Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15, Trial Judgement, ¶ 3116 (Feb. 4, 2021) (recently found guilty of 61 crimes against humanity and war crimes, currently awaiting appeal from either party).

66. See Kate Mackintosh, *The U.S.A and ICC: Friends or Foes?*, 43 L.A. LAW 18, 20 (2020).

67. *Id.*

grounds to investigate the deaths of Taliban prisoners of war.<sup>68</sup> This particular disregard for the “interests of justice” helped prompt ICC chief prosecutor Fatou Bensouda to pursue investigation into any Rome Statute crimes committed by the United States in Afghanistan.<sup>69</sup>

Through his actions, Obama indicated support for the utility of an international criminal tribunal. However, such utility came at a price the United States was unwilling to pay, let alone submit to the jurisdiction of.

Part IV discusses the saga’s next installment—sponsored by President Donald Trump, National Security Advisor John Bolton, and Secretary of State Mike Pompeo—three actors determined to prevent the ICC from investigating potential war crimes committed by the United States in Afghanistan.<sup>70</sup>

#### IV. FATOU BENSOU DA V. DONALD J. TRUMP

##### A. *The Opening Act: Potential ICC Investigation*

On November 3, 2017, ICC Chief Prosecutor Fatou Bensouda announced her intent to investigate possible war crimes and crimes against humanity taking place in the territory of Afghanistan since May 2003.<sup>71</sup> On September 10, 2018, President Trump issued a press release titled “Protecting American Constitutionalism and Sovereignty from the International Criminal Court.”<sup>72</sup> At that time, the chief prosecutor had yet to formally open an investigation—her request for authorization would not be filed until April of the following year.<sup>73</sup> Yet, Trump went on the offensive.<sup>74</sup>

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68. See James Risen, *U.S. Inaction Seen After Taliban P.O.W.'s Died*, N.Y. TIMES (July 10, 2009), <https://www.nytimes.com/2009/07/11/world/asia/11afghan.html?bl&ex=1247371200&en=a0ddbfbdb1569336c&ei=5087%0A>.

69. Mackintosh, *supra* note 66, at 20-21.

70. Press Release, The White House Office of Commc'ns, *Protecting American Constitutionalism and Sovereignty from the International Criminal Court* (Sept. 10, 2018), available at Westlaw 2018 WL 4293005 [hereinafter *Protecting American Constitutionalism*]; see Merrit Kennedy, *International Criminal Court Allows Investigation of U.S. Actions in Afghanistan*, NPR (Mar. 5, 2020, 3:57 PM), <https://www.npr.org/2020/03/05/812547513/international-criminal-court-allows-investigation-of-u-s-actions-in-afghanistan>.

71. Mackintosh, *supra* note 66, at 20.

72. *Protecting American Constitutionalism and Sovereignty*, *supra* note 70.

73. See generally *Situation in the Islamic Republic of Afghanistan*, Case No. ICC-02/17, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶ 15 (Apr. 12, 2019), [https://www.icc-cpi.int/CourtRecords/CR2019\\_02068.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF) [hereinafter *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*].

74. *Protecting American Constitutionalism*, *supra* note 70, at 2.

In his statement, Trump first mentioned May 2002—when President Bush authorized Bolton to “unsign” the Statute—and reiterated that the U.S. had voiced “strong objections.”<sup>75</sup> In addition, Trump expressed concern that the ICC had “broad, unaccountable powers,” and concluded that the Court would disrupt U.S. sovereignty.<sup>76</sup> He moved on to note what “steps” the Trump Administration would consider should the chief prosecutor move forward with a formal investigation.<sup>77</sup> Such steps included: negotiation of “even more binding, bilateral agreements” designed to protect U.S. nationals from the reach of the ICC; bans on ICC judges and prosecutors from entering the U.S.; sanctions of such persons’ funds and property; criminal prosecution of such persons; and a UN Security Council agenda constraining the Court’s “sweeping powers.”<sup>78</sup> True to his brash style of executive leadership, Trump pledged to fight back.<sup>79</sup>

On the same day, National Security Advisor John Bolton delivered a speech, announcing the United States’ new policy toward the ICC.<sup>80</sup> Essentially, Bolton announced that the U.S.’s attitude had once more devolved into pointed, threatening animosity.<sup>81</sup> Within a slew of insults directed at the Court and its Chief Prosecutor—“ineffective . . . unaccountable . . . deeply flawed . . . outright dangerous . . . utterly unfounded, unjustifiable investigation . . . superfluous”—Bolton echoed the promises made by Trump’s same-day Executive Order.<sup>82</sup> The U.S. would attempt to steamroll bilateral treaties to insulate nationals and consider sweeping bans and sanctions upon ICC judges and prosecutors.<sup>83</sup>

In his speech, Bolton attacked the legitimacy of the ICC on baselessly untrue grounds, prefaced by the statement that the Court is “already dead to [the United States].”<sup>84</sup> In Bolton’s construction of the Court, the ICC was a reckless international body able to prosecute willy-nilly and

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75. *Id.*

76. *Id.* at 1.

77. *Id.*

78. *Id.* at 2-3.

79. *Id.* at 3.

80. Milena Sterio, *The Trump Administration and the International Criminal Court: A Misguided New Policy*, 51 CASE W. RES. J. INT’L L. 201, 203 (2019).

81. See Bellinger, *The International Criminal Court and the Trump Administration*, *supra* note 53.

82. Kahn, *supra* note 8.

83. *Id.*

84. *Id.*

inherently flawed for not following the constitutional scheme of one country—a country that is not even a signatory.<sup>85</sup>

*B. From Accusations to Sanctions: Bensouda and Trump Up the International Ante*

In April 2019, the chief prosecutor failed to secure authorization to investigate alleged crimes in Afghanistan.<sup>86</sup> The Trial Chamber cited the “current circumstances in Afghanistan” as likely to “make the prospects for a successful investigation and prosecution extremely limited.”<sup>87</sup> The Court did not indicate that Trump and Bolton’s threatening language had any impact on its decision, though the timing is telling.<sup>88</sup> Just after the September 10 statements, former legal advisor for the Department of State, John Bellinger, noted that any attempt to “double down” by ICC judges would be “counterproductive” to the point of “hurt[ing] the [C]ourt and the cause of international justice in the long run.”<sup>89</sup>

One year later, Bensouda won her appeal.<sup>90</sup> On March 5, 2020, the ICC Appeals Chamber authorized Bensouda to investigate the alleged crimes committed since May 2003.<sup>91</sup> In her submissions to the court, the prosecutor explained that the people of Afghanistan had “suffered immensely” at the hands of armed conflicts constantly waged in the territory.<sup>92</sup> Armed insurgency and guerilla-style warfare had victimized “many thousands” of civilians to “continuous acts of serious violence.”<sup>93</sup> Bensouda sought to investigate four classes of groups: alleged crimes by (1) the Taliban and other armed groups; (2) the Afghan Forces; (3) the

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85. *Id.* (For a detailed discussion of each of Bolton’s remarks, see Sterio, *supra* note 80, at 203-10, where the author notes each of Bolton’s allegations and systematically explains how they are “erroneous facts.” Sterio concludes that the policy espoused was “misguided, contrary to the United States’ national security interests and to the global goals of justice.”).

86. Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, *supra* note 73.

87. *Id.*

88. See generally Bellinger, *The International Criminal Court and the Trump Administration*, *supra* note 53.

89. Bellinger, *The Trump Administration Throws Down the Gauntlet to the ICC. The Court Should Decline the Challenge*, *supra* note 50.

90. Judgment on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan, *supra* note 3, at ¶ 79.

91. *Id.*

92. Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, *supra* note 73.

93. *Id.*

U.S. Forces and the CIA; and (4) ‘other acts’ by members of international armed forces.<sup>94</sup>

Regarding the United States, the prosecutor intended to investigate alleged war crimes of “torture and cruel treatment, outrages upon personal dignity, and rape and other forms of sexual violence pursuant to a policy approved by the U.S. authorities.”<sup>95</sup> Bensouda premised her reasonable belief that war crimes had been committed on specific incidents that described the conditions under which detainees were held and interrogated.<sup>96</sup> Those incidents included: inflicting severe physical and mental pain (or suffering) to *hors de combat* detainees, some of which was extremely cruel, brutal and gruesome; inflicting the same treatment on others not actively involved in the non-international armed conflict; humiliating, degrading, or otherwise violating victims’ dignity; depriving victims of fundamental material and spiritual needs, such as sleep, food, water, and praying; and acts designed to offend, stress, or shame victims, including sexual acts.<sup>97</sup>

After she was granted authorization in March 2020, Bensouda opened the ICC, the OTP, and herself up to the gamut of international response.<sup>98</sup> Amnesty International’s Head of International Justice, Solomon Sacco, praised the ICC for “[reversing] a terrible mistake and [deciding] to stand by the victims of war crimes and crimes against humanity committed by all sides . . . in Afghanistan.”<sup>99</sup> The director of the ACLU’s Human Rights Program, Jamil Dakwar, stated that the Appeals Chamber’s decision “vindicate[ed] the rule of law and gives hope to the thousands of victims seeking accountability when domestic courts and authorities have failed them.”<sup>100</sup>

On the other side, sharp and scathing condemnation came from then-Secretary of State Mike Pompeo: “this is a truly breathtaking action by an unaccountable political institution masquerading as a legal body . . . [the United States] will take all necessary measures to protect our citizens from

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94. *Id.* at ¶ 18-26.

95. *Id.* at ¶ 24.

96. *Id.*

97. *Id.* at 23.

98. *See generally* Kennedy, *supra* note 70.

99. *Afghanistan: ICC Authorizes Historic Investigation*, AMNESTY INT’L (Mar. 5, 2020), <https://www.amnesty.org/en/latest/news/2020/03/afghanistan-icc-authorizes-historic-investigation/>.

100. *ICC Authorizes Investigation into U.S. War Crimes in Afghanistan*, ACLU (Mar. 5, 2020), <https://www.aclu.org/press-releases/icc-authorizes-investigation-U.S.-war-crimes-afghanistan>.

this renegade, so-called court.”<sup>101</sup> As Bensouda had backed the United States and its volatile forty-fifth president into a corner, Pompeo’s rancor merely foreshadowed President Trump’s unprecedented and severe retaliation.

On June 11, 2020 the Trump Administration formalized its previous threats to pursue retribution against the ICC by issuing Executive Order 13928: Blocking Property of Certain Persons Associated with the International Criminal Court.<sup>102</sup> After stating that he, the President, considered Bensouda’s proposed investigation a threat to the country’s “national security and foreign policy” that would subject U.S. government officials to “harassment, abuse, and possible arrest,” Trump declared a national emergency.<sup>103</sup> He ordered that all US-based property and property interests be blocked for persons that directly engaged with the ICC’s effort to “investigate, arrest, detain, or prosecute” any U.S. or U.S. ally personnel.<sup>104</sup> President Trump had fired a cease-and-desist letter at the Court and its chief prosecutor, disguised as an Executive Order.

On September 2, 2020, under the authority of the June 11 Executive Order, Secretary of State Mike Pompeo announced that sanctions had been imposed on Chief Prosecutor Bensouda and the Court’s Head of Jurisdiction, Phakiso Mochochoko, shocking the international and civil rights communities and inspiring outrage.<sup>105</sup> Human Rights Watch (HRW) stated that the unprecedented sanctions “show[ed] an egregious disregard for victims of the world’s worst crimes.”<sup>106</sup> HRW’s International Justice Director, Richard Dicker, commented that “the Trump administration’s perverse use of sanctions, devised for alleged terrorists and drug kingpins, against prosecutors seeking justice for grave international crimes, magnifies the failure of the U.S. to prosecute torture.”<sup>107</sup> President of the ICC’s Assembly of States Parties O-Gon Kwon denounced the sanctions

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101. Jennifer Hansler, *Pompeo Slams International Criminal Court Decision to Authorize Afghanistan War Crimes Investigation*, CNN (Mar. 5, 2020), <https://www.cnn.com/2020/03/05/politics/icc-afghanistan-pompeo/index.html>.

102. See June 20 Executive Order, *supra* note 2.

103. *Id.*

104. *Id.*

105. Lee, *supra* note 1.

106. *U.S. Sanctions International Criminal Court Prosecutor: Trump Administration’s Action Tries to Block Justice for World’s Worst Crimes*, HUM. RTS. WATCH (Sep. 2, 2020, 10:52 AM), <https://www.hrw.org/news/2020/09/02/U.S.-sanctions-international-criminal-court-prosecutor#>.

107. *Id.*

that “only serve to weaken our common endeavor to fight impunity for mass atrocities.”<sup>108</sup>

C. *A Confused Methodology to the Madness of Sanctions*

Trump’s sanctions can be understood through the United States’ historic misconception of ICC jurisdiction. Specifically, the U.S. has taken issue with the Court’s ability to investigate and prosecute nationals of non-member states.<sup>109</sup> However, the ICC’s jurisdiction is limited through careful, rigorous factors that do not allow the Court to prosecute anyone, anywhere, at any time, or for anything (according to John Bolton).<sup>110</sup>

First, the Statute did not create any new crimes.<sup>111</sup> Instead, the treaty brought crimes already considered as *jus cogens norms* into the Court’s jurisdiction—crimes outlined by “customary international laws that are universally binding.”<sup>112</sup> Because all states have the obligation to bring perpetrators of these crimes to justice, the Statute merely reiterated law that already existed.<sup>113</sup> The drafters did not legislate.<sup>114</sup> They used copy-paste.<sup>115</sup>

Second, the Statute created severe temporal restraints.<sup>116</sup> The treaty is clear that jurisdiction cannot be exercised retroactively, thereby insulating the perpetrators of crimes committed before July 1, 2002.<sup>117</sup> In addition, nationals of member states cannot be prosecuted for crimes occurring before the Statute’s entry into force for that particular state; meaning, if the United States became party to the Statute tomorrow, American nationals would not be liable for crimes committed on American soil today.<sup>118</sup>

Third, accepted precedent stands behind the Court’s ability to prosecute law breakers of any nationality.<sup>119</sup> The International War Crimes

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108. Laurel Wamsley, *Trump Administration Sanctions ICC Prosecutor Investigating Alleged U.S. War Crimes*, NPR (Sep. 2, 2020, 6:27 PM), <https://www.npr.org/2020/09/02/908896108/trump-administration-sanctions-icc-prosecutor-investigating-alleged-u-s-war-crim>.

109. Beth Fain, *The International Criminal Court: An Eminent Impact of a Hesitant United States*, 35 TEX. TECH L. REV. 163, 180 (2004).

110. See generally Rome Statute, *supra* note 11, at arts. 5-25; see Kahn, *supra* note 8.

111. Fain, *supra* note 109, at 183.

112. *Id.*

113. *Id.*

114. See *id.* at 183.

115. *Id.*

116. *Id.*

117. *Id.*; Rome Statute, *supra* note 11, at art. 11.

118. Rome Statute, *supra* note 11, at art. 11.

119. Fain, *supra* note 109, at 184.

Tribunals for the Former Yugoslavia and Rwanda each exercised similar jurisdiction, thereby suggesting “international acceptance for the authority of such bodies.” Moreover, the United States had a heavy hand in conducting these tribunals, with U.S. nationals primarily drafting the treaties and staffing the courts.<sup>120</sup>

Fourth, the Court’s jurisdiction over nationals of non-member states (provided the alleged crime was committed on the territory of a member state) follows a recognized practice of international law: natural persons “are subject to the substantive and procedural criminal laws applicable in the territories to which they travel,” which includes treaty obligations.<sup>121</sup> The United States is currently party to several multilateral agreements that afford similar jurisdiction to member states (for example, the 1949 Geneva Conventions),<sup>122</sup> thus demonstrating the country’s willingness to allow other states jurisdiction over American nationals.<sup>123</sup> However, this point of contention is the paramount motivator behind U.S. opposition to the ICC.<sup>124</sup> In fact, according to the U.S., it is a relentless attack on the country’s sovereignty.<sup>125</sup>

Bolton’s September 2018 remarks—acting as a preface to the 2020 Executive Order and sanctions—cried that the ICC and its chief prosecutor control “potentially enormous, essentially unaccountable powers” that constitute “an assault on the constitutional rights of the American People and the sovereignty of the United States.”<sup>126</sup> In consideration of the Statute’s built-in limiting factors, Bensouda’s prosecutorial power is hardly “enormous.”<sup>127</sup> Furthermore, the OTP does not function as an “unaccountable,” runaway train of justice: the legislative body of the Court, the Assembly of States Parties, can remove both judges and prosecutors if member states deem that any have overstepped the bounds of their authority.<sup>128</sup>

Bolton continued to argue that the Court enjoyed ‘automatic jurisdiction,’ which allowed itself to “prosecute individuals even if their own governments have not recognized, signed, or ratified the treaty.”<sup>129</sup>

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120. *Id.*

121. *Id.*

122. *Id.* at 185.

123. *Id.* at 184.

124. *Id.*

125. Kahn, *supra* note 8.

126. *Id.*; e.g., Sterio, *supra* note 80, at 203.

127. Sterio, *supra* note 80, at 204.

128. *Id.*

129. Kahn, *supra* note 8.



The lynchpin condition to ICC jurisdiction over nationals of non-member states is that the crime be committed on the territory of a member state.<sup>130</sup> It is, by definition, not automatic.<sup>131</sup> Bolton then remarked that the Court’s “next obvious step is to claim complete universal jurisdiction,” an allegation premised on his opinion that the crimes outlined by the Statute have “disputed and ambiguous definitions” and that the investigation into Afghanistan was “utterly unfounded.”<sup>132</sup>

However, Articles 6-8 of the Rome Statute define the crime of genocide, crimes against humanity, and war crimes in detailed, explicit terms.<sup>133</sup> Bensouda’s investigation was spurned by the discovery of U.S. torture at Abu Ghraib<sup>134</sup> and falls within the gravity and complementarity requirements of the Statute.<sup>135</sup> Therefore, the structure and limitations of the Court as defined by the Statute preclude the chief prosecutor from universally prosecuting anyone for anything.

## V. CONCLUSION

The United States has pushed against and recoiled from the authority of the International Criminal Court for more than twenty years. From the Bush Administration, through the Obama Administration, to the Trump Administration, the U.S. has kept the Court at arm’s length lest American sovereignty fall. This argument, borne of hostility and nourished through hypocrisy, is fundamentally flawed. It confused the Court’s jurisdiction and culminated in Trump’s sanctions against Fatou Bensouda and Phakiso Mochochoko in September 2020, sanctions that had no bearing on the ICC’s investigation. Now, United States foreign policy is under the control of Joseph R. Biden.

Approximately one month after Joe Biden was inaugurated, more than eighty “non-governmental organizations, faith-based groups, and academic institutions” signed a statement prepared by Human Rights Watch urging the Biden Administration to lift the sanctions and engage in a productive relationship with the ICC.<sup>136</sup> After pronouncing the Trump

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130. Sterio, *supra* note 80, at 206.

131. *Id.*

132. Kahn, *supra* note 8.

133. *Id.*; Rome Statute, *supra* note 11, at arts. 6-8.

134. See generally Seymour M. Hersh, *Torture at Abu Ghraib*, *NEW YORKER* (Apr. 30, 2004), <https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>.

135. Sterio, *supra* note 80, at 206.

136. *More than 80 Non-Governmental Organizations, Faith-Based Groups, and Academic Institutions Call for the Biden Administration to Repeal ICC Sanctions*, *HUM. RTS. WATCH*

Administration's actions as "unprecedented," "abus[ive]," and a "betrayal," the letter appealed to the fervor behind Biden's demonstrable commitment to reentering and cooperating with the international community.<sup>137</sup> In the weeks that followed, political progressives became impatient with Biden's foreign policy agenda, lodging complaints about the still-existing sanctions.<sup>138</sup> Left-wing ire rose when Secretary of State Antony Blinken voiced U.S. opposition to the ICC's investigation of alleged war crimes committed in Palestine.<sup>139</sup>

Around 4:00 PM on Friday April 2, 2021, President Biden lifted the sanctions and visa restrictions on Bensouda and Mochochoko.<sup>140</sup> Despite pleasing the aforementioned human rights groups and European allies, the development does not indicate a rapidly turning tide in the relationship between the ICC and the U.S.<sup>141</sup> In a statement announcing the decision, Secretary of State Antony Blinken reiterated the United States' "longstanding objection" to the Court's assertion of jurisdiction over non-member states' personnel.<sup>142</sup> In addition, the U.S. continues to "disagree strongly" about ICC investigation of the situations in Afghanistan and Palestine.<sup>143</sup>

Yet, where Trump set fire to the entire grove, Biden extended a nascent olive branch: Blinken affirmed U.S. support for "the rule of law, access to justice, and accountability for mass atrocities," with specific references to American assistance for prior international criminal

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(Feb. 17, 2021, 4:46 PM), <https://www.hrw.org/news/2021/02/17/more-80-non-governmental-organizations-faith-based-groups-and-academic-institutions#>.

137. *Id.*

138. See Nahal Toosi, *Progressives Get Antsy Over Biden's Slow-Mo Foreign Policy*, POLITICO (Mar. 25, 2021), <https://www.politico.com/news/2021/03/25/progressives-biden-foreign-policy-478042>.

139. Press Statement from Antony Blinken, Secretary of State, The United States Opposes the ICC Investigation into the Palestine Situation (Mar. 3, 2021) (on file with the U.S. Department of State), available at <https://www.state.gov/the-united-states-opposes-the-icc-investigation-into-the-palestinian-situation/>; see generally Mike Corder & Josef Federman, *ICC Launches War Crimes Probe Into Israeli Practices*, AP NEWS (Mar. 3, 2021), <https://apnews.com/article/israel-west-bank-palestinian-territories-courts-crime-19117d4265f5d564256ea7fe75854aa6>.

140. Nahal Toosi, *Biden Lifts Sanctions on International Criminal Court Officials*, POLITICO (Apr. 2, 2021, 4:10 PM), <https://www.politico.com/news/2021/04/02/icc-sanctions-reversed-biden-478731>.

141. *Id.*

142. Press Statement from Antony Blinken, Secretary of State, Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court (Apr. 2, 2021) (on file with the U.S. Department of State), available at <https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/>.

143. *Id.*

tribunals.<sup>144</sup> He pledged that the United States will continue that legacy through “cooperative relationships.”<sup>145</sup> Such spirit of teamwork finds evidence in Biden’s cited reasons for repealing the sanctions: although the United States maintained concerns about the power and reach of the ICC, it believes that those concerns should be addressed with “engagement,” not “imposition.”<sup>146</sup> In addition to lifting the sanctions and visa restrictions against Bensouda and Mochochoko, Biden also revoked Trump’s June 11 Executive Order—and with it, Trump’s political melodrama.

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144. *Id.*

145. *Id.*

146. *Id.*