



**STATEMENT BY THE NEW YORK CITY BAR ASSOCIATION
CONDEMNING THE IMPLEMENTATION OF SANCTIONS AGAINST SENIOR
STAFF OF THE INTERNATIONAL CRIMINAL COURT**

The New York City Bar Association (“City Bar”) through its Committees, including the United Nations Committee, the Task Force on the Independence of Lawyers and Judges, the International Human Rights Committee, the African Affairs Committee, and the Council on International Affairs, condemns the decision by the Executive Branch of the United States government on September 2, 2020, to implement sanctions against the International Criminal Court (“ICC”)’s Prosecutor Fatou Bensouda, Director of the Jurisdiction, Complementarity and Cooperation Division Phakiso Mochochoko, and other unnamed staff. The misguided decision, which adds Ms. Bensouda and Mr. Mochochoko to the Specially Designated Nationals and Blocked Persons List and restricts the issuance of visas to unnamed ICC staff, was taken pursuant to Executive Order 13928 (“EO 13928”), which was issued June 11, 2020.

The City Bar earlier issued a statement expressing its concerns in relation to EO 13928.¹ The implementation of sanctions against specific senior staff of the ICC intensifies the concerns raised in the aforementioned statement. The City Bar has been a strong supporter of the work of the ICC, and its mission to end impunity for the most serious of international crimes, namely genocide, war crimes, crimes against humanity, and the crime of aggression. The decision by the United States to implement sanctions against Ms. Bensouda and Mr. Mochochoko is an abuse of executive authority, violates doctrines of United States domestic law, conflicts with the principles of international law and the United Nations Charter, hinders the work of the ICC and the United Nations, and is generally contrary to the interests of the United States. The City Bar calls on the President to immediately remove sanctions against all ICC staff and revoke EO 13928.

ABUSE OF EXECUTIVE AUTHORITY

The Executive Branch of the United States government issued EO 13928 based on the assertion that the ICC, and its investigation into the situation in Afghanistan, poses an “unusual and extraordinary threat to the national security and foreign policy of the United States,” and thus constitutes a “national emergency.” The position that the ICC, an institution the current United States administration has described as “grossly ineffective” and a “failed institution,” constitutes a national emergency as envisaged under the International Emergency Economic Powers Act and the National Emergencies Act is without merit.² As a result, the implementation of sanctions,

¹ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposing-sanctions-on-international-criminal-court>.

² The City Bar’s Task Force on the Rule of Law has supported the passage of the ARTICLE ONE Act, which would rebalance the relationship between the Executive and Legislative Branches in the exercise of authority during

which are generally reserved for terrorists, narcotics traffickers, despots, and human rights abusers, against Ms. Bensouda and Mr. Mochochoko pursuant to EO 13928 is an abuse of executive authority.

Furthermore, should the United States truly believe that the ICC's investigation into the situation in Afghanistan (and potentially related situations), including potential crimes committed by United States personnel, threatens national security, the proper means to address the situation is for the United States to conduct its own thorough, genuine, and transparent investigation, and prosecution if necessary, into alleged crimes committed by United States personnel. Under the ICC's principle of complementarity, should such an investigation (and prosecution, where warranted) be undertaken by the United States, this would render the matter inadmissible before the ICC.

VIOLATES DOCTRINES OF UNITED STATES DOMESTIC LAW

In addition to being an abuse of executive authority, EO 13928, and its implementation against Ms. Bensouda and Mr. Mochochoko, violates doctrines of United States domestic law, as it is overbroad and vague, and is designed to chill ongoing cooperation with the ICC. The Department of Treasury's implementing regulations specifically prohibit a person from transacting in "property" or "property interests" which are defined to include "services of any nature whatsoever."³ Under these regulations, United States based lawyers and human rights defenders, for example, are prohibited from providing legal advice to the ICC regarding its investigations or casework unless the United States entity has first obtained a specific license to do so.⁴ This prohibition includes conducting legal research for the ICC, submitting amicus briefs with the ICC, or engaging in factfinding on behalf of the ICC, which violates the First Amendment rights, including the right to free speech, of lawyers and human rights defenders actively engaged in advocating for the victims of genocide, war crimes, and other offenses. This also undermines the United States' commitment to Due Process and the rule of law. Notably, four United States law professors and the Open Society Justice Initiative have sued the current United States administration on these grounds.⁵

CONFLICTS WITH PRINCIPLES OF INTERNATIONAL LAW AND THE UNITED NATIONS CHARTER

The United States sanctions are contrary to fundamental principles of international law, including respect for national sovereignty, and the United Nations Charter. While the United States is not a party to the Rome Statute, Afghanistan, the location of the alleged crimes being

national emergencies not involving military conflict. See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/national-emergencies-act-urging-passage-of-article-one-act>.

³ See 31 C.F.R. 520.310

⁴ A specific license to provide these services is required pursuant to 31 C.F.R. 520.506(b) and is distinctly different from legal services which are expressly authorized pursuant to 31 C.F.R. 520.506(a).

⁵ See Diane Marie Amann, Margaret deGuzman, Gabor Rona and Milena Sterio, "Why We Are Suing President Trump," Just Security, Oct. 8, 2020, <https://www.justsecurity.org/72733/why-we-are-suing-president-trump/> (last visited Nov. 20, 2020).

investigated, became a party to the Rome Statute and subject to the ICC's jurisdiction, on May 1, 2003. The United States efforts to undermine the ICC's investigation into the situation in Afghanistan violates Afghanistan's sovereignty and its right to be free from interference in its internal affairs. The Purposes and Principles of the United Nations Charter are likewise in conflict with the United States decision to impose sanctions on ICC staff members. Articles One and Two of the United Nations Charter enumerate its purposes and principles, including international cooperation, equality between states, development of justice and international law, and respect for human rights. Unilateral coercive actions taken by the United States, such as the imposition of sanctions against ICC staff members who work to hold perpetrators of mass atrocities accountable, violate the spirit and objectives of the United Nations Charter.

HINDERS THE WORK OF THE ICC AND THE UNITED NATIONS, AND GENERALLY CONTRARY TO THE INTERESTS OF THE UNITED STATES

The imposition of sanctions against senior officials at the ICC will not only hinder the functioning of the ICC in relation to its investigation into the situation in Afghanistan, but also disrupt investigations being conducted by the ICC into other situations involving the most serious violations of international law. This is especially true as the ICC's work is not necessarily segregated into specific investigations. It is in the United States' own national interest for the ICC to conduct investigations, and prosecutions when warranted, into the most serious violations of international law. The United States has supported the ICC's work in a variety of contexts because accountability for mass atrocities and grave violations of international law supports the interests of the United States by strengthening international respect for the rule of law and the elimination of impunity globally.

The impact of the sanctions against Ms. Bensouda, who serves as the ICC prosecutor, will also interfere with the proper functioning of the United Nations. Specifically, under United Nations Security Council resolutions 1593 and 1970, the ICC prosecutor is invited to provide briefings every six months to the United Nations Security Council regarding the status of its investigations into the situations in Sudan and Libya. While the current Covid-19 pandemic has prevented in-person briefings from taking place, when such in-person briefings do resume, it will be necessary for Ms. Bensouda or her successor to travel to the United Nations Headquarters in New York to update the United Nations Security Council on the ICC's work. The sanctions imposed against Ms. Bensouda include a ban from entering the United States, which would hinder the normal functioning of the United Nations Security Council.

Furthermore, under Section 11 of the United Nations Headquarters Agreement, "The federal, state or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district of: ... (5) other persons invited to the headquarters district by the United Nations or by such specialized agency on official business." The United Nations General Assembly, on September 13, 2004, formally recognized the relationship between the ICC and the United Nations under resolution 58/318. As noted above, the United Nations Security Council in resolutions 1593 and 1970 extended an invitation to the ICC prosecutor to brief the United Nations Security Council every six months on its investigations into the situations in Sudan and Libya. Therefore, the implementation of sanctions under EO 13928 violates the United States

obligations under the United Nations Headquarters Agreement, which is a foundational agreement that facilitates the work of the United Nations.

CONCLUSION

The City Bar calls on the Executive Branch of the United States government to immediately remove sanctions imposed against Ms. Bensouda and Mr. Mochochoko, and to revoke EO 13928. As described above, EO 13928 and sanctions imposed under this Executive Order are an abuse of executive authority, violate domestic and international law, hinder the work of the ICC and the United Nations, and are generally contrary to the interests of the United States. The United States has historically been a champion of human rights, the rule of law, and international justice. If the United States is to lead in promoting the rule of law and supporting the independence of judicial institutions, it must remove sanctions against ICC staff and revoke EO 13928.

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