

5 June 2019

Diego García-Sayán,  
United Nations Special Rapporteur of the Human Rights Council  
on the Independence of Judges and Lawyers  
Office of the United Nations High Commissioner for Human Rights  
United Nations Office at Geneva  
8-14 Avenue de la Paix  
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Via Email: [SRindependenceJL@ohchr.org](mailto:SRindependenceJL@ohchr.org)

**RE: Complaint Against the United States of America:  
Interference with Judicial Proceedings at the International Criminal Court**

*“The United States will use any means necessary to protect our citizens and those of our allies from unjust prosecution by this illegitimate court.”*

- U.S. National Security Advisor John Bolton<sup>1</sup>

*“...subsequent changes within the relevant political landscape both in Afghanistan and in key States (both parties and non-parties to the Statute), coupled with the complexity and volatility of the political climate still surrounding the Afghan scenario, make it extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities for the future.”*

- ICC Pre-Trial Chamber II, 12 April 2019 Decision<sup>2</sup>

Dear Special Rapporteur García-Sayán,

This complaint and request for a comprehensive investigation is prompted by the well-founded belief that there has been, and likely continues to be, interference with the independence of judicial proceedings at the International Criminal Court (“ICC” or “Court”) by senior officials of the United States, up to and including President Donald Trump.

Public statements by U.S. officials make clear that the target of this interference extends not only to personnel of the ICC, including members of the judiciary, but also to Member States of the ICC as well as inter-governmental organizations, such as the North Atlantic Treaty Organization (“NATO”), and threatens to interfere with the work of lawyers representing victims or otherwise engaging with the ICC. Indeed, as detailed below, U.S. officials have been explicit that the purpose of their threats – and now actions – against the ICC is to

<sup>1</sup> Al Jazeera, “Full text of John Bolton’s speech to the Federalist Society,” 10 Sept. 2018 at <https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html>.

<sup>2</sup> International Criminal Court, Pre-Trial Chamber II, *Situation in the Islamic Republic of Afghanistan*, ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan,’ ICC-02-17, 12 Apr. 2019 (“Pre-Trial Chamber Decision”), ¶ 94.

interfere with activities of the Court that relate to the United States or certain of its allies, including Israel. Such brazen disregard and disrespect for the fundamental principle of judicial independence demands action.

As you are aware,<sup>3</sup> following the request by the Prosecutor of the ICC to open an investigation into war crimes and crimes against humanity on the territory of ICC Member States including but not limited to Afghanistan involving U.S. citizens among others,<sup>4</sup> various high-level Trump administration officials engaged in a steady stream of attacks directed against the ICC, culminating in an announcement by the U.S. Secretary of State that the U.S. would deny or revoke the visa of other Court personnel, and did, in fact, revoke the visa of ICC Prosecutor Fatou Bensouda.<sup>5</sup> Just one week after this action was made public<sup>6</sup> – and nearly eighteen months after the Prosecutor’s Request was filed<sup>7</sup> – the ICC Pre-Trial Chamber issued its decision rejecting the Request on the grounds that the investigation was not “in the interests of justice.”<sup>8</sup>

President Trump cited the Pre-Trial Chamber’s Decision as “a major international victory,” again calling the Court “illegitimate” and threatening that “[a]ny attempt to target American, Israeli, or allied personnel for prosecution will be met with a swift and vigorous response.”<sup>9</sup> Notably, Secretary of State Pompeo made a direct link between the decision and the U.S. actions against the Court, stating bluntly: “The ICC’s decision follows the State Department’s March 15 announcement of visa restrictions on ICC personnel involved in any investigation

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<sup>3</sup> U.N. Office of the High Commissioner of Human Rights, Press Release, “US “threats” against International Criminal Court must stop, say UN experts,” 22 March 2019 at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24392&LangID=E>. See Letter from ICJ, ISHR and ACLU to the Special Rapporteurs on the situation of human rights defenders, on the independence of judges and lawyers, and on the promotion of truth, justice, reparation and guarantees of non-recurrence re: Intimidation and Reprisals – U.S. Secretary of State Michael Pompeo Remarks re: Visa Restrictions re Cooperation with the International Criminal Court, 19 March 2019 at [https://www.ishr.ch/sites/default/files/documents/final\\_joint\\_ngo\\_communication\\_re\\_pompeo\\_remarks\\_0.pdf](https://www.ishr.ch/sites/default/files/documents/final_joint_ngo_communication_re_pompeo_remarks_0.pdf).

CCR welcomes the recently released communication from your office to the United States regarding potential interference. See Letter to the United States from Mandates of Special Rapporteurs on the Situation of Human Rights Defenders and on the Independence of Judges and Lawyers, Ref: AL USA 6/2019, 20 March 2019 at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24471>. It considers that this complaint complements and expands the scope of the inquiry, as well as reinforces its continued necessity.

<sup>4</sup> ICC, Pre-Trial Chamber III, *Situation in the Islamic Republic of Afghanistan*, ‘Request for authorisation of an investigation pursuant to article 15,’ ICC-02/17-7 20 Nov. 2017 at <https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh> (“Prosecutor’s Request”). The Prosecutor’s Request also identified Poland, Romania and Lithuania as locations where additional crimes by the U.S. are alleged to have occurred.

<sup>5</sup> U.S. Dep’t of State, Secretary of State Michael R. Pompeo, Remarks to the Press, 15 March 2019 at <https://www.state.gov/remarks-to-the-press-6/> (announcing that the United States is initiating visa restrictions on persons involved in or furthering investigations at the ICC of U.S. personnel).

<sup>6</sup> Marlise Simons and Megan Specia, “U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes,” N.Y. Times, 5 April 2019 at <https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html>.

<sup>7</sup> See FIDH, Press Release, “The Long Wait for Justice: Will the ICC Investigate Crimes in the Afghanistan Situation?,” 20 Nov. 2018 at <https://www.fidh.org/en/region/asia/afghanistan/the-long-wait-for-justice-will-the-icc-investigate-crimes-in-the>.

<sup>8</sup> The decision has only just been rendered complete, with the issuance of a Concurring Opinion by Judge Mindua on 31 May 2019, thereby triggering appeal deadlines of the decision as of today.

<sup>9</sup> U.S. White House, Statement from the President, 12 April 2019 at <https://www.whitehouse.gov/briefings-statements/statement-from-the-president-8/>.

of U.S. personnel, and I am glad the Court reconsidered its actions.”<sup>10</sup> Contrary to the reactions of U.S. officials, human rights organizations and victims’ representatives denounced the decision, calling it “shameful” and “dangerous.”<sup>11</sup>

The Center for Constitutional Rights (“CCR”) represents two victims in the Situation of Afghanistan, Sharqawi Al Hajj and Guled Hassan Duran, and in that capacity, filed a submission to the Pre-Trial Chamber urging it to grant the Prosecutor’s Request to initiate an investigation into *inter alia* war crimes by U.S. military or Central Intelligence Agency (“CIA”) officials on the territory of Afghanistan and other ICC Member States.<sup>12</sup> As a legal organization committed to ensuring access to impartial justice for all, CCR welcomed your statement expressing concern regarding the U.S. threats.<sup>13</sup> We now ask you to take further action.

CCR submits that members of the Trump administration have acted in a manner that breaches fundamental principles of international law. CCR is deeply concerned that the threats and attacks by the United States have already negatively impacted the course of justice, and if not further addressed, continue to pose a serious risk to the independence of proceedings before the ICC, whether in future proceedings regarding Afghanistan and U.S. personnel, in proceedings involving U.S. allies that U.S. officials pledged to protect, most notably, Israel,<sup>14</sup> or in proceedings involving other States who could use the U.S. precedent to leverage their political power (including at the U.N. Security Council) to interference with or otherwise improperly influence or derail other proceedings before the Court.

Accordingly, CCR requests that you open a formal, comprehensive investigation into these allegations, and send a communication to the United States in relation to the information set forth herein for the purposes of revealing the full extent of U.S. interference, make clear that any such interference must cease and will be neither accepted nor effective.<sup>15</sup>

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<sup>10</sup> U.S. Dep’t of State, Secretary of State Pompeo, Unanimous Rejection of International Criminal Court Investigation, 12 April 2019 at <https://www.state.gov/unanimous-rejection-of-international-criminal-court-investigation/>.

<sup>11</sup> See, e.g., FIDH/CCR/Armanshahr/OPEN Asia, Press Release, “ICC Refuses to Investigate Crimes in Afghanistan, including US Torture: An Unacceptable and Shameful Decision,” 12 April 2019 at <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/icc-refuses-to-investigate-crimes-in-afghanistan-including-us-torture#>; Amnesty International, Press Release, “Afghanistan: ICC refuses to authorize investigation, caving into USA threats,” 12 April 2019 at <https://www.amnesty.org/en/latest/news/2019/04/afghanistan-icc-refuses-to-authorize-investigation-caving-into-usa-threats/>; and Justice Hub, “Hadi Marifat: ICC judges have shattered Afghan hopes for justice,” 17 April 2019 at <https://justicehub.org/article/hadi-marifat-icc-judges-have-shattered-afghan-hopes-for-justice/>.

<sup>12</sup> Founded in 1966, the Center for Constitutional Rights is a legal and educational organization dedicated to advancing and protecting the rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights. [www.ccrjustice.org](http://www.ccrjustice.org). For information regarding CCR’s interventions at the ICC, visit <https://ccrjustice.org/home/what-we-do/our-cases/accountability-international-crimes-afghanistan>.

<sup>13</sup> Press Release, “US “threats” against International Criminal Court must stop, say UN experts,” *supra* n. 3.

<sup>14</sup> See Secretary Pompeo’s 15 March 2019 Remarks to the Press, *supra* n. 5: “These visa restrictions may also be used to deter ICC efforts to pursue allied personnel, including Israelis, without allies’ consent.”

<sup>15</sup> This is not the first time that CCR has filed a complaint regarding interference by the United States with judicial proceedings to hold its citizens and officials accountable for serious crimes: on 19 January 2012, CCR and the European Center for Constitutional and Human Rights submitted a complaint to Special Rapporteur Gabriela Knaul on U.S. efforts to interfere with judicial proceedings and investigations of torture by former U.S. officials before the *Audiencia Nacional* in Spain. <https://ccrjustice.org/sites/default/files/assets/SR%20complaint%201.19.12%20FINAL.pdf>. The former Special Rapporteur did not respond publicly to the complaint and would not advise the complainants of its status, including whether it was ever communicated to the United States (or Spain). A robust response from the Special Rapporteur to this complaint could forestall future interference.

## 1. Introduction

The U.S. position towards the ICC is a complex one. Although it participated in the negotiations of the Rome Statute,<sup>16</sup> the U.S. only signed the Statute in December 2000, during the waning days of the presidency of Bill Clinton. After 11 September 2001 and the beginning of the so-called “war on terror,” President George W. Bush declared the United States would not ratify the Statute nor adhere to any obligations under it. The then-Under Secretary of State John Bolton pursued an official U.S. policy of enacting “Article 98” agreements with countries in an effort to prevent or circumvent any potential accountability for serious crimes by U.S. citizens at the Court.<sup>17</sup> President Obama’s administration made attempts to engage the ICC and improve its relationship with the Court, albeit on its own terms.<sup>18</sup> As set out in detail below, the current U.S. administration, including President Trump and his National Security Adviser John Bolton, has taken an adversarial and aggressive approach to the ICC – and in so doing, threatens and can be seen as already impacting, the independent and impartial functioning of the institution created to prevent, punish and redress the most serious crimes of genocide, crimes against humanity, war crimes and aggression.

Following a decade-long preliminary examination, in November 2016 ICC Prosecutor Bensouda announced that her office would decide “imminently” whether to open an investigation into alleged crimes that occurred in Afghanistan, including by U.S. forces.<sup>19</sup> The Obama administration responded by stating that an ICC investigation is not “warranted or appropriate,” as the U.S. has a “robust system of accountability” and is “committed to complying with the law of war.”<sup>20</sup> Organizations which had long worked on accountability for U.S. crimes that could fall within the investigation disagreed with the Obama administration’s assessment that it did “an extraordinary job of investigating and holding those accountable,”<sup>21</sup> and called on the ICC to move forward with an investigation.<sup>22</sup>

One year later, the Prosecutor formally requested judicial authorization to open an investigation into crimes committed on the territory of Afghanistan by the Afghan Government, the Taliban and the United States, as well as related crimes in Romania, Lithuania and Poland.<sup>23</sup> At the 16<sup>th</sup> Assembly of States Parties to the ICC (“ASP”), the

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<sup>16</sup> Rome Statute of the International Criminal Court (“Rome Statute”), 2187 U.N.T.S. 90 (1998), entered into force 1 July 2002.

<sup>17</sup> Article 98 refers to Article 98 of the Rome Statute, which is purported to provide a limit on the Court’s ability to compel Member States to cooperate with requests for surrender or assistance involving third States. *See, e.g.*, Jean Galbraith, *The Bush Administration’s Response to the International Criminal Court*, 21 Berkeley J. Int’l L. 683 (2003); Mark D. Kielsgard, *War on the International Criminal Court*, 8 N.Y. City L. Rev. 1 (2005); and Antoinette Pick-Jones, *Towards Permanently Delegitimizing Article 98 Agreements: Exercising the Jurisdiction of the International Criminal Court over U.S. Citizens*, 93 N.Y.U. L. Rev. 1779 (2018). *See also* Georgetown Law Library, International Criminal Court – Article 98 Research Guide, at <https://guides.ll.georgetown.edu/c.php?g=363527&p=2456099>.

<sup>18</sup> For an overview of the U.S. position to the ICC prior to the current administration, *see, e.g.*, Caitlin Lambert, “The Evolving U.S. Policy Towards the ICC,” International Justice Project, 6 March 2014 at <https://www.internationaljusticeproject.com/the-evolving-us-policy-towards-the-icc/>.

<sup>19</sup> Office of the Prosecutor, ICC, *Report on Preliminary Examination Activities 2016*, 14 Nov. 2016 at [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).

<sup>20</sup> U.S. Dep’t of State, Daily Press Briefing, 15 Nov. 2016 at <https://2009-2017.state.gov/r/pa/prs/dpb/2016/11/264350.htm>.

<sup>21</sup> *See id.*

<sup>22</sup> *See, e.g.*, Press Release, “Human Rights Groups Call for the Opening of an ICC Investigation into the Situation in Afghanistan,” 13 April 2017 at <https://ccrjustice.org/home/press-center/press-releases/human-rights-groups-call-opening-icc-investigation-situation>.

<sup>23</sup> *See* Prosecutor’s Request, *supra* n. 4.

Trump administration lodged its objection to the Prosecutor’s Request, stating in part, “[t]he United States rejects any assertion of ICC jurisdiction over nationals of States that are not parties to the Rome Statute, absent a UN Security Council referral or the consent of that State... we will regard as illegitimate any attempt by the Court to assert the ICC’s jurisdiction over American citizens.”<sup>24</sup> The U.S. argued that it does not believe that opening an ICC investigation “would serve the interests of either peace or justice in Afghanistan”<sup>25</sup> – a position *not* shared by victims and their representatives in Afghanistan, as discussed below, but notably echoed in the Pre-Trial Chamber Decision. The Trump administration did not attend or address the 17<sup>th</sup> ASP in 2018. Instead, as detailed below, it went on the attack – in word and action – against the Court.

The Trump administration has taken the offensive against the ICC to an unprecedented level and in so doing threatens the very functioning of the institution. Notably, this attitude towards the ICC reflects the administration’s practice of consistently undermining the judiciary domestically and international institutions more broadly.<sup>26</sup> And worryingly, as was recognized by the U.N. High Commissioner for Human Rights upon establishment of your mandate in 1994, a “link [...] exists between the weakening of safeguards for the judiciary and lawyers and the gravity and frequency of violations of human rights.”<sup>27</sup>

The principles for an independent judiciary and their importance in the role of good governance cannot be understated. Indeed, as the Human Rights Council recently reaffirmed when renewing your mandate: “an independent and impartial judiciary, an independent legal profession, an objective and impartial prosecution able to perform its functions accordingly, and the integrity of the judicial system are essential prerequisites for the protection of human rights and fundamental freedoms and the application of the rule of law, and for ensuring fair trials without any discrimination.”<sup>28</sup>

Herein, we maintain that the Trump administration has violated those obligations with respect to the ICC and its conduct must be investigated, and if interference found, appropriate steps identified to prevent further erosion of the rule of law.

## 2. Request for Action

This complaint readily falls within the scope of your mandate as Special Rapporteur. Specifically, Article 2 of Resolution 8/6 of the United Nations Human Rights Council

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<sup>24</sup> ICC 16<sup>th</sup> Session of the Assembly of States Parties, *Statement on Behalf of the United States of America*, 8 Dec. 2017 at [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP16/ASP-16-USA.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ASP-16-USA.pdf).

The ICC is managed by the Assembly of States Parties (“ASP”), which is comprised of representatives of Member States. Among other functions, the ASP is responsible for deciding the budget. *See* Rome Statute, Art. 112.

<sup>25</sup> ICC 16<sup>th</sup> Session of the Assembly of States Parties, *Statement on Behalf of the United States of America*, 8 Dec. 2017, *supra* n. 24.

<sup>26</sup> *See, e.g.*, Brennan Center for Justice. “In His Own Words: The President’s Attacks on the Courts,” 5 June 2017 at <https://www.brennancenter.org/analysis/his-own-words-presidents-attacks-courts>; Emily Tamkin, “ACLU to U.N.: The U.S. commitment to human rights and the rule of law is in serious doubt,” Washington Post, 18 March 2019 at [https://www.washingtonpost.com/world/2019/03/18/aclu-un-us-commitment-human-rights-rule-law-is-serious-doubt/?noredirect&utm\\_term=.6baee5be8e32](https://www.washingtonpost.com/world/2019/03/18/aclu-un-us-commitment-human-rights-rule-law-is-serious-doubt/?noredirect&utm_term=.6baee5be8e32); Uri Friedman, “Donald Trump Issues a Scathing Rejection of ‘Globalism,’” *The Atlantic*, 25 Sept. 2018 at <https://www.theatlantic.com/international/archive/2018/09/donald-trump-united-nations/571270/>.

<sup>27</sup> U.N. Comm’n on Human Rights, *Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers*, E/CN.4/RES/1994/41, 4 March 1994.

<sup>28</sup> U.N. Human Rights Council Resolution 35/11, *Mandate of the Special Rapporteur on the independence of judges and lawyers*, A/HRC/RES/35/11, 10 July 2017.

renewing the mandate of the Special Rapporteur on the Independence of Judges and Lawyers (“Mandate”), requests that the Special Rapporteur:

- (a) Inquires into any substantial allegations transmitted to them and to report their conclusions and recommendations thereon; and
- (b) Identifies and records not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations, including the provision of advisory services or technical assistance when they are requested by the State concerned [...].<sup>29</sup>

In accordance with the Mandate, it is requested that your office:

- 1) take all appropriate measures as deemed necessary to investigate the facts of this complaint, including by issuing formal communications to the United States in order to obtain further information about the breaches alleged herein;
- 2) inquire with other countries implicated in the Prosecutor’s Request, including but not limited to Afghanistan, Romania, Lithuania and Poland,<sup>30</sup> as to what requests, demands or threats have been made to them by the United States regarding their cooperation with ICC, and responses thereto; and
- 3) request that the U.S. take all appropriate measures to investigate and remedy the alleged violations and submit its response and results of its investigations to your offices for further consideration.

In order to allow the International Criminal Court to carry out its functions, it is requested that the United States:

- Be required to abide by principles of international law outlined in this complaint – including, in particular, relevant provisions of the International Covenant on Civil and Political Rights and the Basic Principles on the Independence of the Judiciary;
- Refrain from further obstructing or otherwise interfering with the outcome of preliminary examinations, investigations, prosecutions or other proceedings before the ICC or with those assisting, working at or cooperating with the ICC (including ICC Member States), through *inter alia* entry bans, freezing of funds or interference with international banking systems, commencement of legal proceedings, employment of financial sanctions, manipulation of financial assistance programs, and/or improper use of procedural mechanisms before

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<sup>29</sup> U.N. Human Rights Council Resolution 8/6, *Mandate of the Special Rapporteur on the independence of judges and lawyers*, HRC/RES/8/6, 18 June 2008.

<sup>30</sup> It is further recommended that inquiries be made to other ICC Member States that participated in the U.S. rendition and detention program, and in particular *Djibouti* (Guled Hassan Duran) and *Jordan* (Sharqawi Al Hajj), which were involved with the detention and rendition of the two victims on whose behalf CCR made victims representations to the ICC, as well as NATO. For more on the allegations underlying the investigation in the Prosecutor’s Request, see Victims’ Representation to the Pre-Trial Chamber, Narrative, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17, 31 January 2018 at <https://ccrjustice.org/sites/default/files/attach/2019/04/AI%20Hajj%20and%20Duran%20ICC%20Victim%20Representation%20FINAL.pdf>.

national, regional or international institutions to block or otherwise impede ICC proceedings; and

- Recognize and reaffirm its commitment, in word and deed, to the principles of an independent and impartial judiciary, the independence of the legal profession, and equal access to justice and nondiscrimination in the administration of justice.

Once formal responses from the U.S. and other impacted countries are forthcoming, CCR requests that your office present your conclusions and recommendations pursuant to Article 2(a) of the Mandate outlined above, including at the U.N. Human Rights Council, to the ICC Assembly of States Parties and any relevant organ of the ICC, and to the author of this complaint.

### **3. Factual Overview: The Trump Administration’s Interference with the Independence of the Judiciary**

#### *a. Donald Trump’s Approach to the U.S. Judiciary*

The first two years of the Trump administration has yielded a sustained and ever increasing assault on the independence of the judiciary both at home and abroad.<sup>31</sup> Indeed, Donald Trump has been attacking the judiciary since he began his presidential campaign. In May 2016, in response to Judge Gonzalo O. Curiel’s orders regarding a class action lawsuit against the then-presidential candidate, Trump made disparaging remarks about the judge’s Mexican heritage,<sup>32</sup> and in July 2016, called U.S. Supreme Court Justice Ruth Bader Ginsberg “incompetent.”<sup>33</sup> In the face of decisions against his Muslim travel ban in 2017, Trump claimed that the “rule of law” had suffered a blow and maintained that he was “absolutely looking at breaking up” the Ninth Circuit Court of Appeals that had issued the decision.<sup>34</sup> He followed this up in 2018, claiming that the Ninth Circuit’s decisions were “not law” and reiterated his call for the Ninth Circuit to be dissolved.<sup>35</sup> When the Chief Justice of the Supreme Court John Roberts delivered a rebuke, Trump responded in a series of tweets alleging “judicial activism.”<sup>36</sup> He has called the federal justice system a “joke” and a

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<sup>31</sup> See, e.g., “Trump attacks on judiciary raise safety concerns for judges,” CBS News, 11 February 2017 at <https://www.cbsnews.com/news/trump-attacks-judiciary-safety-concerns-judges/>; Brennan Center for Justice, “Courts under Pressure: Judicial Independence and Rule of Law in the Trump Era,” 30 April 2018 at <https://www.brennancenter.org/analysis/courts-under-pressure-judicial-independence-and-rule-law-trump-era-0>.

<sup>32</sup> @realDonaldTrump (30 May 2016) *I have a judge in the Trump University civil case, Gonzalo Curiel (San Diego), who is very unfair. An Obama pick. Totally biased-hates Trump* [Twitter post] Retrieved from <https://twitter.com/realdonaldtrump/status/737399475509985280?lang=en>.

<sup>33</sup> @realDonaldTrump (13 July 2016) *Is Supreme Court Justice Ruth Bader Ginsburg going to apologize to me for her misconduct? Big mistake by an incompetent judge!* [Twitter post] Retrieved from <https://twitter.com/realdonaldtrump/status/753354905897668608?lang=en>.

<sup>34</sup> Sarah Westwood, “Exclusive interview: Trump ‘absolutely’ looking at breaking up 9th Circuit,” Washington Examiner, 26 April 2017 at <https://www.washingtonexaminer.com/exclusive-interview-trump-absolutely-looking-at-breaking-up-9th-circuit>.

<sup>35</sup> @realDonaldTrump (21 Nov. 2018) *“79% of these decisions have been overturned in the 9th Circuit.” @FoxNews A terrible, costly and dangerous disgrace. It has become a dumping ground for certain lawyers looking for easy wins and delays. Much talk over dividing up the 9th Circuit into 2 or 3 Circuits. Too big!* [Twitter Post] Retrieved from <https://twitter.com/realdonaldtrump/status/1065368645021388800?lang=en>.

<sup>36</sup> See Adam Liptak, “Chief Justice Defends Judicial Independence After Trump Attacks ‘Obama Judge,’” 21 Nov. 2018 at <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html>; @realDonaldTrump (22 Nov. 2016) *Our highly trained security professionals are not allowed to do their job on the Border because of the Judicial Activism and Interference by the 9th Circuit. Nevertheless, they are working hard to make America a safer place, though hard to do when anybody filing a lawsuit wins!* [Twitter Post] Retrieved from <https://twitter.com/realdonaldtrump/status/1065743662464802817?lang=en>.

“laughing stock.”<sup>37</sup> Demonstrating his lack of respect for the independence of judicial proceedings, President Trump has threatened or actually intervened in a range of proceedings, from extradition to prosecutions or pardons for war crimes.<sup>38</sup>

*b. Pre-Trump Relationship Between the US and the ICC*

The United States actively participated in the negotiations of the Rome Statute. When the Rome Statute was adopted on 17 July 1998, 120 countries voted in favor versus 7 against, including the United States, with 21 nations abstaining. The United States signed the Rome Statute in 2000, but President Clinton did not transmit it to the Senate. While signing does not create a binding legal obligation, it does demonstrate the State’s intention to consider ratifying the treaty, and it obliges the State to refrain from acts that would counter or undermine the treaty’s objective and purpose.<sup>39</sup>

After the beginning of the so-called “war on terror,” George W. Bush’s administration sent a note to the U.N. Secretary General on 6 May 2002, in which it stated that the U.S. no longer intended to ratify the Rome Statute and did not recognize any obligation toward it.<sup>40</sup> Then Under Secretary of State John Bolton subsequently spearheaded the signing of over 100 bi-lateral “Article 98” agreements with parties to the Rome Statute, in an effort to immunize United States personnel from arrest and prosecution.<sup>41</sup> In 2002, the U.S. Congress passed the American Servicemembers’ Protection Act, which effectively prohibited U.S. cooperation with ICC investigations.<sup>42</sup> In 2004, Congress adopted the Nethercutt Amendment as part of the U.S. Foreign Appropriations Bill, which authorized far wider cuts for ICC States Parties that refused to sign bi-lateral agreements with the United States.<sup>43</sup> The Nethercutt Amendment threatened over 50 governments with cuts in aid, including major allies such as Poland, which was in the “coalition of the willing” in Iraq and Afghanistan, as well as Jordan, which was involved in training Iraqi police.<sup>44</sup> Ultimately, aid was cut to seven ICC States Parties and two intergovernmental programs that funded multiple ICC States Parties.<sup>45</sup>

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<sup>37</sup> Rebecca Savaransky, “Trump: US justice system a 'laughing stock,' 'joke',” *TheHill.com*, 11 Nov. 2017 at <https://thehill.com/homenews/administration/358275-trump-us-justice-system-a-laughing-stock-joke>.

<sup>38</sup> See, e.g., Charlie Savage, Katie Benner and Edward Wong, “Trump’s Push for Trade Win Could Undermine Sanctions Enforcement,” *N.Y. Times*, 14 Dec. 2018 at <https://www.nytimes.com/2018/12/14/us/politics/huawei-trump-china.html?module=inline>; Dave Philipps, “Trump May be Preparing Pardons for Servicemen Accused of War Crimes,” *N.Y. Times*, 18 May 2019 at <https://www.nytimes.com/2019/05/18/us/trump-pardons-war-crimes.html>; Gabor Rona, “Can a Pardon Be a War Crime? When Pardons Themselves Violate the Laws of War,” *Just Security*, 25 May 2019 at <https://www.justsecurity.org/64288/can-a-pardon-be-a-war-crime-when-pardons-themselves-violate-the-laws-of-war/>. See also Salvador Rizzo, “Trump, Mueller and obstruction of justice,” *Washington Post*, 31 May 2019 at [https://www.washingtonpost.com/politics/2019/05/31/trump-mueller-obstruction-justice/?utm\\_term=.f73fdb93b61c](https://www.washingtonpost.com/politics/2019/05/31/trump-mueller-obstruction-justice/?utm_term=.f73fdb93b61c).

<sup>39</sup> ABA-ICC Project, “The US-ICC Relationship,” at <https://www.aba-icc.org/about-the-icc/the-us-icc-relationship/>.

<sup>40</sup> *Id.*

<sup>41</sup> See *supra* n. 17. See also Billy Perrigo, “‘Already Dead to Us’: Why the Trump Administration Has a Problem with the International Criminal Court,” *TIME.com*, 12 Sept. 2018 at <http://time.com/5393624/john-bolton-international-criminal-court/>.

<sup>42</sup> American Servicemembers’ Protection Act, 22 U.S.C. §§ 7421–7433 (2002).

<sup>43</sup> The Nethercutt Amendment to the FY2005 Consolidated Appropriations Act (H.R. 4818/P.L. 108-447), at <https://www.congress.gov/bill/108th-congress/house-bill/4818/amendments>. Specifically, the amendment authorized cuts to such countries’ Economic Support Fund assistance programs, including funds aimed at helping U.S. allies promote democracy, fight terrorism and corruption, and resolve conflict. See also Human Rights Watch, “U.S.: Congress Tries to Undermine War Crimes Court,” 8 Dec. 2004 at <https://www.hrw.org/news/2004/12/08/us-congress-tries-undermine-war-crimes-court#>.

<sup>44</sup> Human Rights Watch, “The United States and the International Criminal Court: The Bush Administration’s Approach and a Way Forward Under the Obama Administration,” 2 August 2009 at



The Obama administration stated its intention to cooperate with the ICC, seeing such cooperation as a component of its first National Security Strategy.<sup>46</sup> On 16 November 2009, then-Ambassador-at-Large for War Crimes Issues Stephen Rapp announced that he would lead the first U.S. delegation to the ICC’s annual meeting of the ASP in The Hague as an observer.<sup>47</sup> As Ambassador Rapp stated, “[w]e’ve had a concern in the past that the ICC could...undertake politically motivated prosecutions, could perhaps come after Americans who were engaged in protecting people from atrocity instead of emphasizing those that were committing the crimes. Thus far, the Court has been appropriately focused.”<sup>48</sup> The United States participated in the 2010 ICC Review Conference in Kampala as well as the ASP each year of the Obama administration, and lauded its cooperation with the Court.<sup>49</sup>

*c. The ICC’s Examination of the U.S. Role in Afghanistan – and Potential Crimes on the Territory of Other ICC Member States*

In 2007, the ICC made public that it was beginning a preliminary examination into allegations of war crimes in Afghanistan. On 14 November 2016, ICC Prosecutor Bensouda announced that there was a “reasonable basis” for her to open investigations into *inter alia* war crimes of torture and related ill-treatment by U.S. military forces deployed to Afghanistan and in secret detention facilities operated by the CIA in facilities based in Poland, Romania and Lithuania, which are parties to the Rome Statute.<sup>50</sup> (The release of the Prosecutor’s Preliminary Examination Report came less than one week after the surprise election of Donald Trump as president of the United States.) The Obama administration responded that it did not believe an ICC investigation was “warranted or appropriate,” and that “[t]he United States is deeply committed to complying with the law of war [and has] a robust national system of investigation and accountability [that] is as good as any country in the world.”<sup>51</sup> The State Department official repeated that the U.S. is not a party to the Rome Statute and “has not consented to ICC jurisdiction.”<sup>52</sup> At the 15<sup>th</sup> Assembly of States Parties days later, the Obama administration did not address the Prosecutor’s announcement but rather, noted that it has positively engaged with the Court and supported other investigations and prosecutions.<sup>53</sup>

In November of 2017, Prosecutor Bensouda submitted a request to open a formal investigation of Afghanistan to the ICC Pre-Trial Chamber. The Prosecutor’s Request

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<https://www.hrw.org/news/2009/08/02/united-states-and-international-criminal-court-bush-administrations-approach-and-way>.

<sup>45</sup> *Id.*

<sup>46</sup> American NGO Coalition for the International Criminal Court, “The Obama Administration,” at <https://www.amicc.org/obama-administration>.

<sup>47</sup> David Clarke, “U.S. to attend Hague court meeting as observer,” Reuters, 16 Nov. 2009 at <https://www.reuters.com/article/us-usa-icc/u-s-to-attend-hague-court-meeting-as-observer-idUUSTRE5AF30A20091116>

<sup>48</sup> U.S. Dep’t of State, Special Briefing, U.S. Engagement with the ICC and the Outcome of the Recently Concluded Review Conference, 15 June 2010 at [https://2009-2017.state.gov/j/gcj/us\\_releases/remarks/2010/143178.htm](https://2009-2017.state.gov/j/gcj/us_releases/remarks/2010/143178.htm).

<sup>49</sup> ICC 15<sup>th</sup> Session of the Assembly of States Parties, *Statement on Behalf of the United States of America*, 17 Nov. 2016 at [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP15/GenDeba/ICC-ASP15-GenDeba-OS-USA-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/GenDeba/ICC-ASP15-GenDeba-OS-USA-ENG.pdf) (lauding a number of “remarkable achievements” by the ICC over the previous year, and stating that the U.S. “is pleased to have played a supporting role in a number of positive developments”).

<sup>50</sup> Office of the Prosecutor, ICC, *Report on Preliminary Examination Activities 2016*, p. 44, *supra* n. 19.

<sup>51</sup> U.S. Dep’t of State, Daily Press Briefing, *supra* n. 20.

<sup>52</sup> *Id.* At this briefing, the State Department official also reiterated that the United States has “engaged with the ICC and [...] supported ICC investigations and prosecution of cases that we believe advance our values in accordance with U.S. law.”

<sup>53</sup> See 15<sup>th</sup> ASP Statement of the U.S., *supra* n. 49.

included three components: (1) crimes against humanity and war crimes by the Taliban and their affiliated Haqqani Network; (2) war crimes by the Afghan National Security Forces, in particular, members of the National Directorate for Security and the Afghan National Police; and (3) war crimes by members of the United States armed forces on the territory of Afghanistan, and by members of the US CIA in secret detention facilities in Afghanistan and on the territory of other States Parties to the Rome Statute, principally in the period of 2003-2005.<sup>54</sup> The request includes allegations of torture by the members of the U.S. armed forces and the CIA, noting that a number of CIA “black sites” were located outside of Afghanistan on the territory of other States Parties including Poland, Romania and Lithuania.<sup>55</sup>

*d. Response to the ICC Preliminary Examination and Investigation Request Involving U.S. Citizens*

In response to the Request, John Bolton – then a private citizen working as a think tank strategist and an attorney – wrote an op-ed in the *Wall Street Journal*, in which he strongly criticized the Court. He opined that “America’s long-term security depends on refusing to recognize an iota of legitimacy in this brazen effort to subordinate democratic nations to the unaccountable melding of executive and judicial authority in the ICC.”<sup>56</sup> He continued that the ICC’s “real targets always have been not merely individual soldiers accused of war crimes, but their commanders and political leaders—all the way to the commander in chief of the global hegemon (as they resentfully see it). The White House should not facilitate these efforts to constrain and inhibit its ability to defend Americans.”<sup>57</sup> Mr. Bolton concluded stating, “America should welcome the opportunity, as in Churchill’s line about Bolshevism, to strangle the ICC in its cradle. At most, the White House should reply to Ms. Bensouda with a terse note: ‘Dear Madame Prosecutor: You are dead to us. Sincerely, the United States.’”<sup>58</sup>

Four months later, it was announced that John Bolton would join the Trump administration as the new National Security Advisor.

Meanwhile, at the 16<sup>th</sup> ASP, which was taking place in New York two weeks after the Prosecutor’s Request was filed, the Trump administration again registered its objection to the ICC investigating U.S. citizens and refuted the need for an ICC investigation in light of purported action taken at the national level:

*The United States rejects any assertion of ICC jurisdiction over nationals of States that are not parties to the Rome Statute, absent a UN Security Council referral or the consent of that State. [...] We affirm this continuing position of the United States Government, and object to the request by the Office of the Prosecutor for authorization from the Court to pursue an investigation of alleged actions by U.S. personnel in the context of the conflict in Afghanistan. As the United States has previously stated, we will regard as illegitimate any attempt by the Court to assert the ICC’s jurisdiction over American citizens.*

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<sup>54</sup> See ICC, Statement, “The Prosecutor of the International Criminal Court, Fatou Bensouda, requests judicial authorisation to commence an investigation into the Situation in the Islamic Republic of Afghanistan,” 20 Nov. 2017 at <https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh>.

<sup>55</sup> See Prosecutor’s Request, *supra* n. 4.

<sup>56</sup> John Bolton, “The Hague Aims for U.S. Soldiers,” *Wall Street Journal*, 20 Nov. 2017 at <https://www.wsj.com/articles/the-hague-tiptoes-toward-u-s-soldiers-1511217136?ns=prod/accounts-wsj>.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

*The United States has undertaken numerous, vigorous efforts to determine whether its personnel have violated the law and, where there have been violations, has taken appropriate actions to hold its personnel accountable. The United States is deeply committed to complying with law, and has a robust system of investigation, accountability and transparency that is among the best in the world. Indeed, we note the irony that in seeking permission to investigate the actions of U.S. personnel, the Prosecutor appears to have relied heavily upon information from investigations that the United States Government itself decided to make public.*

*By intervening at this meeting, we are expressing our long standing, continuing, and principled objections. We registered these objections throughout the course of the negotiations in the 1990s. We registered these objections following the entry into force of the Rome Statute. And we repeat these objections today. Further, we have long believed and stated that justice is most effective when it is delivered at the local level.<sup>59</sup>*

In light of the reasoning of the Pre-Trial Chamber to decline an investigation, it is notable that the U.S. concluded its remarks by stating: “we don’t believe that moving to open an investigation by the ICC would serve the interests of either peace or justice in Afghanistan.”<sup>60</sup> (The United States did not send a delegation to the 17<sup>th</sup> ASP held in The Hague in 2018.)

Soon after John Bolton took up his position as National Security Advisor, he echoed and amplified this message that the United States will not only *not* cooperate with the ICC, but it may in fact take action against the ICC, its judges, staff and States, persons or companies cooperating with it. In a speech at the Federalist Society on 10 September 2018, Bolton attacked the ICC as “fundamentally illegitimate,” stating bluntly that the “ICC is dead” and that the United States would “not cooperate, engage, fund, or assist the ICC in any way.”<sup>61</sup> Moving beyond mere rhetoric against the Court, Bolton declared that the “United States will use any means necessary to protect our citizens and those of our allies from unjust prosecution by this illegitimate court,” and made explicit threats regarding the ongoing preliminary investigation into US crimes in Afghanistan and Eastern Europe, and potential crimes involving Israeli citizens in Palestine.<sup>62</sup> Bolton warned:

*If the court comes after us, Israel or other US allies, we will not sit quietly. We will take the following steps, among others, in accordance with the American Servicemembers’ Protection Act and our other legal authorities:*

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<sup>59</sup> ICC 16<sup>th</sup> Session of the Assembly of States Parties, *Statement on Behalf of the United States of America*, *supra* n. 24.

<sup>60</sup> *Id.*

<sup>61</sup> Al Jazeera, “Full text of John Bolton's speech to the Federalist Society,” *supra* n. 1.

<sup>62</sup> Palestine became a State Party to the ICC on 31 December 2014, and granted the Court retroactive jurisdiction to 13 June 2014. See Mahmoud Abbas, President of the State of Palestine, *Declaration Accepting the Jurisdiction of the International Criminal Court*, 31 Dec. 2014 at [http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine\\_A\\_12-3.pdf](http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf); Letter from Herman von Hebel (Registrar) to Mahmoud Abbas, President of the State of Palestine, Ref: 2015/IOR/3496/HvH, 7 Jan. 2015 at <http://www.icc-cpi.int/iccdocs/PIDS/press/150107-Registrar-Letter-to-HE-President-Abbas-regarding-Palestine-Art-12-3--Declaration.pdf>. Soon thereafter, the Prosecutor opened a Preliminary Examination. See “Press Releases: The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine,” ICC-OTP-201501160PR1083, 16 Jan. 2015 at [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx). On 22 May 2018, the State of Palestine made a referral to the ICC, pursuant to Article 14. See “Statement by the ICC Prosecutor, Mrs. Fatou Bensouda, on the referral submitted by Palestine,” 22 May 2018 at <https://www.icc-cpi.int/Pages/item.aspx?name=180522-otp-stat>.

- *We will negotiate even more binding, bilateral agreements to prohibit nations from surrendering US persons to the ICC. And we will ensure that those we have already entered are honored by our counterpart governments.*
- *We will respond against the ICC and its personnel to the extent permitted by US law. We will ban its judges and prosecutors from entering the United States. We will sanction their funds in the US financial system, and we will prosecute them in the US criminal system. We will do the same for any company or state that assists an ICC investigation of Americans.* (emphasis added)
- *We will take note if any countries cooperate with ICC investigations of the United States and its allies, and we will remember that cooperation when setting US foreign assistance, military assistance, and intelligence sharing levels.* (emphasis added)
- *We will consider taking steps in the UN Security Council to constrain the court's sweeping powers, including ensuring that the ICC does not exercise jurisdiction over Americans and the nationals of our allies that have not ratified the Rome Statute.*<sup>63</sup>

It is worth noting that when White House Press Secretary Sarah Sanders was asked about John Bolton's remarks on 10 September 2018, she said the timing of those remarks was “[b]ecause they told us they were on the verge of making that decision, and we’re letting them know our position ahead of them making that decision.”<sup>64</sup> Of course, the Pre-Trial Chamber did not issue its decision – which was ultimately welcomed by the United States – for an additional seven months after John Bolton's remarks

On 25 September 2018, in his speech to the U.N. General Assembly, President Trump linked his opposition to the Court to the promotion of U.S. sovereignty and affirmed that the threats Bolton made would, in fact, guide U.S. policy:

*The United States will provide no support in recognition to the International Criminal Court. As far as America is concerned, the ICC has no jurisdiction, no legitimacy, and no authority. The ICC claims near-universal jurisdiction over the citizens of every country, violating all principles of justice, fairness, and due process. We will never surrender America's sovereignty to an unelected, unaccountable, global bureaucracy.*

*America is governed by Americans. We reject the ideology of globalism, and we embrace the doctrine of patriotism. Around the world, responsible nations must defend against threats to sovereignty not just from global governance, but also from other, new forms of coercion and domination.*<sup>65</sup>

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<sup>63</sup> Al Jazeera, “Full text of John Bolton's speech to the Federalist Society,” *supra* n. 1. At the same time, Bolton announced the closure of the Palestine Liberation Organization (“PLO”) office in Washington D.C. for requesting that the ICC look into war crimes committed by Israel. Owen Bowcott, Oliver Holmes, and Erin Durkin, “John Bolton threatens war crimes court with sanctions in virulent attack,” *The Guardian*, 10 Sept. 2018 at <https://www.theguardian.com/us-news/2018/sep/10/john-bolton-castigate-icc-washington-speech>.

<sup>64</sup> U.S. White House, Press Briefing by Press Secretary Sarah Sanders and CEA Chairman Kevin Hassett, 10 Sept. 2018 at <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-cea-chairman-kevin-hassett-091018/>.

<sup>65</sup> Alex Ward, “Read Trump's speech to the UN General Assembly,” 25 Sept. 2018 at <https://www.vox.com/2018/9/25/17901082/trump-un-2018-speech-full-text>. Notably, in that speech, President Trump singled out Poland – a target of the ICC's investigation – for praise.

This was followed in early November 2018 by a second speech by John Bolton, this time to the Zionist Organization of America, in which he forcefully declared the U.S. opposition to the ICC, stating:

*... the United States will not engage, fund, or support the International Criminal Court in any way. We will not cooperate. We will provide no assistance. And, we certainly will not join. The ICC is an illegitimate, unaccountable, and unconstitutional foreign bureaucracy that has the audacity to consider asserting jurisdiction over American and Israeli citizens without their consent.[...]*

*The ICC's real purpose is of course not to punish these perpetrators [from Sudan, The DRC or Libya], but to constrain the foreign policies of the United States and our allies like Israel. The Court claims jurisdiction for ambiguously defined crimes in order to intimidate leaders in both countries, who strive to defend their nations from myriad threats every single day.[...]*

*In November of last year, the ICC Prosecutor also requested to investigate alleged war crimes supposedly committed by U.S. service members and intelligence professionals during the war in Afghanistan. This outcome was entirely predictable. First, the global governance apostles go after Israel. Then, they come for the United States. It is fully apparent that the ICC wants U.S. and Israeli leaders to think twice before taking action to protect their people from terrorism and other threats.<sup>66</sup>*

U.S. Secretary of State Mike Pompeo kept up the attacks on the Court and operationalized them. First, in a 4 December 2018 speech at NATO headquarters in Brussels, Pompeo stated that the United States was taking “*real action to stop rogue international courts, like the International Criminal Court, from trampling on our sovereignty – your sovereignty – and all our freedoms.*”<sup>67</sup> He warned: “*We will take all necessary steps to protect our people, those of our NATO allies who fight alongside of us inside of Afghanistan from unjust prosecution. Because we know that if it can happen to our people, it can happen to yours too.*”<sup>68</sup>

Then, on 15 March 2019, Pompeo followed up on that warning with the announcement that the United States had begun the policy of denying visas to ICC personnel involved in investigating U.S. personnel in Afghanistan or allies of the United States, specifically naming Israel, and that Washington was prepared to take more steps, including economic sanctions if necessary:

*I'm announcing a policy of U.S. visa restrictions on those individuals directly responsible for any ICC investigation of U.S. personnel. This includes persons who*

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<sup>66</sup> John Bolton, Remarks by National Security Advisor Ambassador John Bolton to the Zionist Organization of America, 5 Nov. 2018 at <https://www.whitehouse.gov/briefings-statements/remarks-ambassador-john-bolton-zionist-organization-america/>. In this speech, Bolton also derided the membership “of the so-called ‘State of Palestine’” at the ICC, and touted the U.S. closure of the PLO offices in Washington, D.C. as an apparently retaliatory action for Palestinians’ efforts to seek justice and accountability at the ICC, as well as the defunding of both the Palestinian Authority and the United Nations Relief and Works Agency (“UNRWA”).

<sup>67</sup> U.S. Dep’t of State, Remarks of Secretary of State Pompeo, Restoring the Role of the Nation-State in the Liberal International Order, 4. Dec. 2019 at <https://www.state.gov/restoring-the-role-of-the-nation-state-in-the-liberal-international-order-2/>. In this speech, Pompeo criticized “multilateralism” and launched attacks on international institutions such as the United Nations. He indicated a “divine right” for the US to lead in relation to world security and stated that, “international bodies must help facilitate cooperation that bolsters the security and values of the free world, or they must be reformed or eliminated.”

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

*take or have taken action to request or further such an investigation. [...] if you're responsible for the proposed ICC investigation of U.S. personnel in connection with the situation in Afghanistan, you should not assume that you will still have or will get a visa, or that you will be permitted to enter the United States. [...]. These visa restrictions will not be the end of our efforts. We are prepared to take additional steps, including economic sanctions if the ICC does not change its course.”*<sup>69</sup> (emphasis added)

Secretary Pompeo elaborated on timing of his remarks: “with respect to the reason for the actions we’re taking today, *it’s part of a continued effort to convince the ICC to change course with its potential investigation and potential prosecution of Americans for their activities and our allies’ activities in Afghanistan, trying to stop them, trying to prevent them from taking actions* that are deeply inconsistent, in our view, with the course of action that has been laid out for the ICC.”<sup>70</sup> Pompeo ended his prepared remarks with language that can only be understood as coercive: “*It’s not too late for the court to change course and we urge that it do so immediately.*”<sup>71</sup>

It is now known that the United States did, in fact, cancel the visa of the Prosecutor of the ICC to the United States. Two weeks later, the Pre-Trial Chamber denied the Prosecutor’s Request to open an investigation into the Situation of Afghanistan et al.

In response to these attacks, the ICC maintained, “The Court is an independent and impartial judicial institution. [...] The ICC, as a court of law, will continue to do its independent work, undeterred, in accordance with its mandate and the overarching principle of the rule of law.”<sup>72</sup>

#### 4. Legal Framework and Submission

##### a. Legal Framework

It is submitted that the Trump administration’s persistent attacks on the legitimacy of the ICC as well as its actions – threatened or taken – interfere with the independence and effectiveness of the ICC’s judiciary both directly or indirectly, including by impacting the level of cooperation with the institution. This improper U.S. interference also impacts the ability of lawyers to carry out their duties, whether such lawyers are ICC personnel or lawyers who practice at and engage with the Court. As a result of this sustained effort to interfere with – and derail – the Court’s investigative and prosecutorial functions, it is alleged that a number of rights and principles under international law have been violated, including:

- *The right to a fair and public hearing by a competent, independent and impartial tribunal* established by law pursuant to Article 14 of the International Covenant on

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<sup>69</sup> See Secretary Pompeo’s 15 March 2019 Remarks to the Press, *supra* n. 5. The policy will be implemented in accordance with U.S. obligations under the U.N. Headquarters Agreement, which allows ICC personnel to continue to travel to the United States for the purposes of conducting work at the United Nations HQ.

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

<sup>71</sup> *Id.*

<sup>72</sup> ICC, Statement, “The ICC will continue its independent and impartial work, undeterred,” 12 Sept. 2018, ICC-CPI-20180912-PR1406 at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1406>. See also Press Release, “Statement of the President of the Assembly, O-Gon Kwon, reiterating strong support for the ICC,” 15 March 2019, ICC-ASP-20190315-PR1442 at [https://asp.icc-cpi.int/en\\_menus/asp/press%20releases/Pages/pr1442.aspx](https://asp.icc-cpi.int/en_menus/asp/press%20releases/Pages/pr1442.aspx); Press Release, “Statement of the President of the Assembly, O-Gon Kwon, reaffirming support for the ICC,” 11 Sept. 2018, ICC-ASP-20180911-PR1405 at [https://asp.icc-cpi.int/en\\_menus/asp/press%20releases/Pages/PR1405.aspx](https://asp.icc-cpi.int/en_menus/asp/press%20releases/Pages/PR1405.aspx).

Civil and Political Rights (“ICCPR”)<sup>73</sup> and Article 10 of the Universal Declaration of Human Rights (“UDHR”),<sup>74</sup> and in accordance with Principle 1 of the Basic Principles on the Independence of the Judiciary (“BPIJ”),<sup>75</sup>

- The *right to equal protection of the law* without any discrimination, guaranteed by Article 7 of the UDHR and Article 26 of the ICCPR;
- The *right to an effective remedy by competent tribunals* for acts violating the fundamental rights guaranteed by Article 3 of the ICCPR and Article 8 of the UDHR;<sup>76</sup>
- The principle of the *exclusive authority of the judiciary to determine cases without restrictions, improper influences, pressures, threats or interferences* as set out in Principles 2 and 3 of the BPIJ;
- The principle *assuring against inappropriate or unwarranted interference in the judicial process* as provided for in Principle 4 of the BPIJ;
- The principle ensuring that *lawyers are able to perform their professional functions without intimidation, hindrance, harassment or improper interference* in addition to not suffering or being threatened with sanctions for any action taken in accordance with their professional duties, standards, and ethics as set out in Principle 16 of the Basic Principles on the Role of Lawyers;<sup>77</sup> and
- The principle that *States ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference, or unjustified exposure to civil, penal or other liability as provided for in Principle 4 of the Guidelines on the Role of Prosecutors<sup>78</sup> and that prosecutors give due attention to the prosecution of crimes committed by public officials, particularly abuse of power and grave violation of human rights* as set out in Principle 15.

Additionally, Article 70 of the Rome Statute vests the Court with jurisdiction over offences against the administration of justice, including for: “(d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties; (e) Retaliating against an official of the Court on account of duties performed by that or another official; (f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.”

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<sup>73</sup> *International Covenant on Civil and Political Rights*, 19 Dec. 1966, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

<sup>74</sup> *Universal Declaration of Human Rights*, 10 Dec. 1948 G.A. Res 217A [III], U.N. Doc. A/810 (1948).

<sup>75</sup> *Basic Principles on the Independence of the Judiciary*, 13 Dec. 1985, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

<sup>76</sup> *See also Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, opened for signature 10 January 1984, 1465 U.N.T.S. 85 (entered into force 26 June 1987), Art. 14.

<sup>77</sup> *Basic Principles on the Role of Lawyers*, 7 Sept. 1990, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Havana, Cuba, from 27 August to 7 September 1990.

<sup>78</sup> *Guidelines on the Role of Prosecutors*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

*b. Serious Risk of Inappropriate Interference with the Judicial Process*

The threats and actions of the United States towards the ICC pose a serious risk to, and may have already impacted, the impartial and independent functioning of the International Criminal Court. As these sustained attacks and multiple threats are linked not only to the investigation of U.S. citizens but also of its allies, or indeed, any investigation that the United States (or another powerful country objects to), it is critical that all dimensions of this attack are investigated – and stopped.

i. The Institution, Judges and Prosecutors

The **ICC** was established by the Rome Statute as a permanent institution with international legal personality that is vested with the legal capacity to exercise its functions and jurisdiction over persons for the most serious crimes of international concern.<sup>79</sup> The United States threatened the very functioning of the ICC, as a legal entity, when U.S. National Security Advisor Bolton stated the U.S. will “sanction their funds in the US financial system.” Furthermore, the United States labeling of the Court, established by law, as “illegitimate,” “unaccountable,” “rogue” and “dead” poses a direct threat to the rule of law.<sup>80</sup> Such an attack further risks undermining respect for other judicial institutions and adherence to judicial decisions at the international, regional and national level.

With respect to judges and prosecutors of the Court, prior to being able to fulfill their respective duties, each are required to make a solemn undertaking to exercise their respective functions “impartially and conscientiously.”<sup>81</sup> In your report to the Human Rights Council on 9 June 2017, you note that the independence of the judiciary is linked to the lack of interference in, pressures on and threats against the judiciary.<sup>82</sup> To ensure the independence of the judicial system, judges, lawyers and prosecutors must be free of any interference, pressure or threat that might affect the impartiality of their judgements and decisions.

All **Judges** of the Court are required to act independently in the performance of their functions.<sup>83</sup> As you rightly advised in your recent report to the Human Rights Council, the independence of the judiciary is an essential component of the right to a fair trial and the rule of law.<sup>84</sup> International standards provide that it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary, and to adopt all appropriate measures to ensure that judges can decide matters before them impartially and without any improper influences, pressures, or interferences.<sup>85</sup>

In relation to the Situation of Afghanistan, the following points are relevant to take into account in investigating possible interference with the judiciary:

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<sup>79</sup> Rome Statute, Arts. 1 and 4.

<sup>80</sup> Beyond active *interference* with the Court’s work, it is recalled that the Trump administration halted the increasingly significant *cooperation* of the United States with the ICC, including assistance in investigations. See 15<sup>th</sup> ASP Statement of the U.S., *supra* n. 49.

<sup>81</sup> Rome Statute, Art. 45.

<sup>82</sup> U.N. Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, 9 June 2017, A/HRC/35/31 (2017) at ¶ 70.

<sup>83</sup> Rome Statute, Art. 40. See also ICC Code of Judicial Ethics, ICC-BD/02-0105 at [https://www.icc-cpi.int/NR/rdonlyres/A62EBC0F-D534-438F-A128-D3AC4CFDD644/140141/ICCBD020105\\_En.pdf](https://www.icc-cpi.int/NR/rdonlyres/A62EBC0F-D534-438F-A128-D3AC4CFDD644/140141/ICCBD020105_En.pdf); Rome Statute, Art. 41(2)(a).

<sup>84</sup> U.N. Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, 2 May 2018, A/HRC/38/38 (2018) at ¶ 7.

<sup>85</sup> *Id.* at ¶ 9.



- After declaring that the U.S. will “use any means necessary to protect our citizens and those of our allies,” the U.S. National Security Advisor stated the U.S. “will ban” ICC judges from entering the United States. The Secretary of State repeated the visa-ban threat against ICC personnel involved in the Afghanistan Situation, which would certainly include the judges. The United States did, in fact, revoke the visa of one of the Principals of the ICC, Prosecutor Bensouda.
- The U.S. National Security Advisor threatened that the U.S. “will prosecute” ICC personnel.
- The Pre-Trial Chamber took an unprecedented length of time – nearly 18 months – in deciding the Prosecutor’s Request. Prior Article 15 requests by the Prosecution to investigate were decided within a range of 50 to 125 days.<sup>86</sup>
- During the pendency of the Request, the newly-elected Presidency of the ICC recomposed the Pre-Trial Chamber.<sup>87</sup> Even with the change of two of the three judges, it was still nearly thirteen months after the assignment of judges before the Decision was issued.
- No Pre-Trial Chamber has ever denied a request to open an investigation;<sup>88</sup> it is an extraordinary step that such a decision was taken despite the Chamber having satisfied itself that the crimes set forth in the Prosecutor’s Request fall within the jurisdiction of the Court and potential cases would be admissible – and having received near-unanimous support for the investigation from victims. The Chamber’s reliance on and novel interpretation of “the interests of justice” to deny the request has been roundly criticized;<sup>89</sup> it is expected that the Pre-Trial Chamber’s improper reliance on “interests of justice” – a discretionary factor for *the Prosecutor* that the Rome Statute mandates take into account *the interests of victims* – will be the focus of submissions by victims and the Prosecutor in any appeal of the Decision.<sup>90</sup>
- It is recalled that the reasoning employed by the Pre-Trial Chamber, namely that opening an investigation would not serve the interests of justice, mirrors the position advanced by the United States in its remarks at the ASP General Debate in 2017.

The Statute mandates that the **Office of the Prosecutor** act independently when conducting examinations, investigations, and prosecutions before the Court.<sup>91</sup> To fulfill her mandate, it is required that the Prosecutor be able to pursue all relevant facts and evidence as well as take

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<sup>86</sup> See FIDH, Press Release, “The Long Wait for Justice: Will the ICC Investigate Crimes in the Afghanistan Situation?,” *supra* n. 7.

<sup>87</sup> ICC, The Presidency, ‘Decision assigning judges to divisions and recomposing Chambers,’ ICC-02/17-30, 16 March 2018.

It is noted that one of the newly appointed judges of Pre-Trial Chamber II, Judge Rosario Salvatore Aitala, had served as a senior legal advisor for Afghanistan through his government’s (Italy) Ministry of Foreign Affairs and International Cooperation, during part of the time-period of investigation of crimes set forth in the Prosecutor’s Request. See ICC Judicial Nomination, CV of Rosario Salvatore Aitala, pg. 3 at [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Elections/EJ2017/ICC-ASP-EJ2017-ITA-CV-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Elections/EJ2017/ICC-ASP-EJ2017-ITA-CV-ENG.pdf).

<sup>88</sup> Pre-Trial Chambers have granted the four prior requests by the Prosecutor to proceed with an investigation, in Burundi, Cote D’Ivoire, Georgia and Kenya.

<sup>89</sup> See, e.g., John O’Donohue, Amnesty International, “The Prosecutor’s next steps on Afghanistan will determine the future of the International Criminal Court,” 17 April 2019 at <https://hrij.amnesty.nl/prosecutors-next-steps-afghanistan-will-determine-future-international-criminal-court/> (calling for appeal of the “Pre-Trial Chamber’s elitist, self-serving and uninformed finding that it was acting in the best interests of victims by denying them any hope of justice”).

<sup>90</sup> See Rome Statute, Art. 53(1)(c).

<sup>91</sup> Rome Statute, Art. 42.

appropriate measures to ensure the effective investigation and prosecution of crimes.<sup>92</sup> The threats and intimidation by the United States could significantly impact the Prosecutor’s ability to carry out her functions and have a chilling effect on the willingness of the Office – whether now or in the future – to initiate examinations, investigations and prosecutions against persons from a politically powerful (or bullying) country, or who has the backing of such a State. It is recalled that in response to the U.S. revocation of her visa to the United States, the Prosecutor issued a statement: “The Prosecutor and her office will continue to undertake that statutory duty with utmost commitment and professionalism, without fear or favor.”<sup>93</sup>

In relation to the Situation of Afghanistan, as well as any possible investigations against Israeli officials for crimes committed on the territory of the State of Palestine, which are currently before the Office of the Prosecutor at the Preliminary Examination stage,<sup>94</sup> the following points are relevant to take into account in investigating possible interference with the Office of the Prosecutor:

- Cooperation with and assistance to the ICC, including the Office of the Prosecutor for investigations, by the United States has ceased.<sup>95</sup>
- After declaring that the U.S. will “use any means necessary to protect our citizens and those of our allies,” National Security Advisor Bolton stated the U.S. “will ban” ICC prosecutors from entering the United States. The Secretary of State repeated the visa-ban threat against ICC personnel involved in the Afghanistan Situation. The United States did, in fact, revoke the visa of the ICC Prosecutor, Fatou Bensouda.
- The U.S. National Security Advisor threatened that the U.S. “will prosecute” ICC personnel, including prosecutors.
- The threat of retaliatory action by the United States is ongoing, as it relates not only to any possible appeal of the Pre-Trial Chamber’s Decision but to future preliminary examinations, investigations or prosecutions pursued by the Office of the Prosecutor.

## ii. Threats to Member States

Part 9 of the Rome Statute sets out *inter alia* the obligations on **Member States** to cooperate with the Court.<sup>96</sup> Article 86 requires that Member States “shall...*cooperate fully* with the Court in its *investigation* and *prosecution* of crimes within the jurisdiction of the Court.”<sup>97</sup>

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<sup>92</sup> Rome Statute, Art. 54 (1) (a) and (b).

<sup>93</sup> Mike Corder, “US revokes visa for International Court prosecutor Bensouda,” AP News, 5 April 2019 at <https://apnews.com/a5e0748b9b7443e683c6a0f4e0c7d509>.

<sup>94</sup> See ICC, Preliminary Examinations: Palestine at <https://www.icc-cpi.int/palestine>.

<sup>95</sup> Compare ICC 14<sup>th</sup> Session of the Assembly of States Parties, *Intervention of the United States Observer Delegation*, 19 Nov. 2015 at [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP14/GenDeb/ASP14-GenDeb--OS-USA-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/GenDeb/ASP14-GenDeb--OS-USA-ENG.pdf) (“we continue to work with the ICC in areas of shared interest, on a case-by-case basis and consistent with U.S. laws and policy. The United States has expressed its support for each of the investigations and prosecutions currently under way before the Court”) with Al Jazeera, “Full text of John Bolton’s speech to the Federalist Society,” *supra* n. 1 (after the Prosecutor’s Request, “the ICC is already dead to us” and the United States “will not cooperate, engage, fund or assist the ICC in any way”).

<sup>96</sup> Obligations on Member States to cooperate are also set forth in other sections of the Rome Statute, including under Part 5, Investigation and Prosecution. See, e.g., Art. 59 (1): “A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.”

<sup>97</sup> See also Rome Statute, Art. 54(3) (b) and (c), which provides: “The Prosecutor may: (b) Request the present of and question persons being investigated, victims and witnesses; and (c) Seek the cooperation of any State or

(emphasis added). The Rome Statute mandates that “[w]here a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under the Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties [...]” Art. 87(7).

Numerous Member States of the ICC have expressed their support for the Court in the face of U.S. attacks. The full Assembly of States Parties adopted a resolution at the 17<sup>th</sup> ASP in December in which it “[r]econfirms its unwavering support for the Court as an independent and impartial judicial institution, reiterates its commitment to uphold and defend the principles and values enshrined in the Rome Statute and to preserve its integrity undeterred by any threats against the Court, its officials and those cooperating with it, and renews its resolve to stand united against impunity.”<sup>98</sup>

Following John Bolton’s September 2018 attacks on the Court, a number of Member States expressed their support for the ICC.<sup>99</sup> Notably, it does not appear that any of the Member States most directly implicated in the Situation of Afghanistan investigation – namely, Afghanistan, Poland, Lithuania or Romania – or other Member States implicated in the detention, interrogation and/or rendition of the two victims CCR represents, Djibouti or Jordan, made statements in support of the Court following the Bolton attack.<sup>100</sup> In response to Secretary of State Pompeo’s announcement on canceling or denying visas to ICC personnel, twenty-two Member States issued a joint statement expressing their “serious concern” while “unequivocally reconfirm[ing]” their support for the Court and pledging “to stand united against impunity and remain committed to preserving the ICC’s integrity undeterred by any threats against the Court and its officials;” the statement did not include any of the States directly implicated in the potential investigation.<sup>101</sup>

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intergovernmental organization or arrangement in accordance with its respective competence and/or mandate”; Art. 93 (“Other forms of cooperation”).

<sup>98</sup> ASP, Strengthening the International Criminal Court and the Assembly of States Parties, I CC-ASP/17/Res.5, 12 Dec. 2018 at [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP17/RES-5-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/RES-5-ENG.pdf). But see FIDH, Press Release, “ICC States Parties’ gathering concludes: the paradox of collective political support for accountability without adequate financial support may impact the effectiveness of the ICC,” 13 Dec. 2018 at <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/icc-states-parties-gathering-concludes-the-paradox-of-collective>.

<sup>99</sup> See, e.g., Alex Moorehead and Alex Whiting, *Countries’ Reaction to Bolton’s Attack on the ICC*, Just Security, 18 Sept. 2018 at <https://www.justsecurity.org/60773/countries-reactions-boltons-attack-icc/>.

<sup>100</sup> As the Narrative filed with the Victims’ Representation of Sharqawi Al Hajj and Guled Hassan Duran, and the sources cited therein, make clear, at least a quarter of the Member States of the ICC were involved, directly or indirectly, in the Bush administration’s detention and rendition program, and thus provide relevant information to the Prosecution to assist an investigation. See Victims’ Representation: Narrative, *supra* n. 30 at ¶¶ 38- 89.

<sup>101</sup> The 22 States were: Austria, Belgium, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Finland, Iceland, Ireland, Liechtenstein, Luxembourg, Mexico, Norway, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland and Uruguay. But see European Union, Speech by HR/VP Mogherini on cases of breach of human rights, democracy and the rule of law – the situation in Uganda, Strasbourg, 13 March 2019 at <https://eeas.europa.eu/headquarters/headquarters-homepage/50406/speech-high-representativevice-president-federica-mogherini-plenary-session-european-en> (stating “today the existence of the International Criminal Court (ICC) is being questioned and I think it is important to say in this hemicycle - formally and clearly - that it is not questioned by the European Union and that we will continue to strongly and fully support the ICC and its work”). See also Statement by H.E. Aurelia Frick, Minister of Foreign Affairs of the Principality of Liechtenstein, on Travel Restrictions Imposed by the United States on International Criminal Court Officials, 15 March 2019 at <https://www.facebook.com/LiechtensteinUN/photos/pb.463969180346010.-2207520000.1559763684./2135285059881072/?type=3&theater> (registering regret with U.S. travel restrictions “as such actions not only obstruct the core mission of the Rome Statute to end impunity, but also erode the broader rules-based international order”).

Significantly, in the Pre-Trial Chamber Decision, the Chamber relied upon

*subsequent changes within the relevant political landscape both in Afghanistan and in key States (both parties and non-parties to the Statute), coupled with the complexity and volatility of the political climate still surrounding the Afghan scenario, make it extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities for the future, whether in respect of investigations or of surrender of suspects; suffice it to say that nothing in the present conjuncture gives any reason to believe such cooperation can be taken for granted.*<sup>102</sup>

This finding was made despite the obligations for State cooperation to come into force only at the stage of *investigation* and *not at the preliminary examination* stage, pursuant to Part 9 of the Statute; certainly, the pressure of the United States on Member States – and the Court – was a factor for Pre-Trial Chamber.

In relation to the Situation of Afghanistan and other potential investigations involving U.S. allies, which are currently before the Office of the Prosecutor at the Preliminary Examination stage,<sup>103</sup> the following points are relevant to take into account in investigating possible interference with the cooperation of Member States to the ICC:

- US. National Security Advisor Bolton stated the U.S. “will sanction the funds in the US financial system” of any state that “assists an ICC investigation of Americans.”
- Bolton stated the U.S. “will take note if any countries cooperate with ICC investigations of the United States and its allies, and we will remember that cooperation *when setting US foreign assistance, military assistance, and intelligence sharing levels.*” (emphasis added)
- The States identified by the Prosecutor as falling within the scope of the proposed investigation namely, Afghanistan, Poland, Lithuania and Romania, as well as States identified by Victims Al Hajj and Duran that would have information to assist the investigation because of their role in each men’s detention, interrogation and/or rendition – Djibouti and Jordan – not only would all be able to provide the Prosecution with relevant information in an investigation, but are all recipients of U.S. foreign assistance and military assistance, and as such, are particularly vulnerable to threats of sanctions or cuts in aid.<sup>104</sup> None of these States has spoken out in support of the ICC, and it is unknown whether any have entered into new agreements with the United States that could hinder their cooperation with the Court.
  - As one example of the state of relations between these nations and the United States, one week after Bolton’s September 2018 attacks on the Court, President Trump hosted Poland’s President Duda at the White House. At their joint press conference, Trump stated that he and Duda “agreed to *bolster* our robust defense ties. We will *enhance cooperation* in military relations,

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<sup>102</sup> Pre-Trial Chamber Afghanistan Decision, *supra* n.2 at ¶ 94.

<sup>103</sup> In this regard, CCR recalls that the United Kingdom remains under a preliminary examination for possible war crimes by its nationals in the context of the Iraq conflict and occupation from 2003-2003. See Preliminary Examination: Iraq/UK at <https://www.icc-cpi.int/iraq>.

<sup>104</sup> See USAID, U.S. Foreign Aid by Country at <https://explorer.usaid.gov/cd/AFG>.

intelligence, missile defense, technology and training.”<sup>105</sup> In response, Duda said, “Poland has chosen its place ... as a loyal ally and strategic partner of the United States.”<sup>106</sup> The two men signed an agreement “which is deepening our strategic partnership and which is renewing that strategic partnership.”<sup>107</sup> Trump also expressed his thanks for Poland’s contributions to NATO operations in Afghanistan.<sup>108</sup>

iii. Threats to Lawyers, Non-Governmental Organizations and Human Rights Defenders

At the ICC, victims can participate in proceedings, whether by engaging with the Court directly, through **legal representatives** or in interventions by **non-governmental organizations**. Pursuant to Article 15 of the Rome Statute, victims can provide information to the Office of the Prosecutor to demonstrate that a reasonable basis to conclude that admissible crimes within the jurisdiction of the Court have been committed and that an investigation is warranted. If the Prosecutor requests authorization to initiate an investigation – as she did in the Situation of Afghanistan et al – victims can make representations to the Pre-Trial Chamber, including through counsel. Pursuant to Article 68(3) of the victims “views and concerns” can be presented by their “legal representatives” at various stages of proceedings.

In the Situation of Afghanistan, the Prosecutor reported having received 112 communications pursuant to Article 15 before she filed her Request. The Registry received 699 victim representations in support of the Prosecutor’s Request. Legal representatives and NGOs were active in the preparation of a number of these victims’ representations, including the undersigned counsel. Statements by U.S. officials and actions of the U.S. are designed to intimidate, harass and interfere with the ability of lawyers’ ability to carry out their professional duties, and risks interfering with the rights of victims to redress and access to justice:

- U.S. National Security Advisor threatened to ban or prosecute any “company” that assists an ICC investigation of Americans. This threat would encompass legal counsel for victims and NGOs.
- Secretary of State Pompeo stated that visa restrictions would be extended to “persons who take or have taken action to request or further such an investigation.”

iv. NATO

NATO nations’ involvement in Afghanistan began with US coordinated airstrikes during “Operation Enduring Freedom,” starting on 7 October 2001.<sup>109</sup> These were followed by troop

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<sup>105</sup> U.S. White House, Remarks by President Trump and President Duda of the Republic of Poland Joint Press Conference, 18 Sept. 2018 at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-president-duda-republic-poland-joint-press-conference/>.

<sup>106</sup> *Id.* President Duda continued, “I hope that we will build Fort Trump in Poland together, Mr. President.”

<sup>107</sup> *Id.*

<sup>108</sup> At the visit between U.S. Vice President Pence and Polish President Duda, it was announced that Poland purchased additional military equipment from the U.S. “as an ongoing testament to our close security cooperation.” U.S. White House, Remarks by Vice President Pence and President Duda of Poland in Joint Press Statement, 13 Feb. 2019 at <https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-president-duda-poland-joint-press-statement-warsaw-poland/>.

<sup>109</sup> CNN, *Operation Enduring Freedom Fast Facts*, 4 Oct. 2018 at <https://www.cnn.com/2013/10/28/world/operation-enduring-freedom-fast-facts/index.html>.

commitments from the United Kingdom, Turkey, Poland, the Netherlands, Germany, France and Italy. On 20 December 2001, the United Nations authorized the International Security Assistance Force to provide security support for the Interim U.S. backed government in Afghanistan and on 9 August 2003, NATO assumed responsibility for the mission.<sup>110</sup> At its height, there were over 100,000 of troops on the ground in Afghanistan through NATO, with 49 countries participating in the mission.<sup>111</sup> This combat mission continued until 28 December 2014, at which time NATO transitioned into a secondary combat and primarily training and logistics role.<sup>112</sup>

Pursuant to Article 87(6), the ICC can request that intergovernmental organizations, such as NATO, to provide information or ask for other forms of cooperation or assistance; it is not known whether the ICC and NATO have entered into a formal Memorandum of Understanding, but no such agreement is necessary for the ICC to seek the assistance of an intergovernmental organization. Additionally, under Article 73, the Court can request a State Party *inter alia* to provide information in its custody that was disclosed by an intergovernmental or international organization; it is then incumbent on the State Party to seek the consent of the originator to disclose the information to the Court, and if granted, disclose such information.

U.S. Secretary of State chose NATO headquarters as the site of his first attack against the ICC. In those remarks, he sought to present other NATO nations on the side of the United States, in a joint endeavor against the ICC, warning that the Court was threatening “our sovereignty – your sovereignty” and stated that the U.S. would “take all necessary steps to protect...our NATO allies who fight alongside of us inside Afghanistan from unjust prosecution.”<sup>113</sup>

As part of your follow-up on the allegations herein, it is respectfully suggested that inquiries be made with NATO regarding the current status of their cooperation with the ICC in relation to the Situation of Afghanistan, and whether any such cooperation has been or could be in the future impacted by the statements and actions of the U.S. in regards to the ICC.

## 5. Conclusion

In light of the above, you are requested to undertake all appropriate measures to investigate this complaint and continue to denounce threats against the ICC, its personnel and those engaging with the Court, in accordance with the terms of your mandate as United Nations Special Rapporteur on Independence of Judges and Lawyers.

It is recalled that in renewing your mandate, the Human Rights Council urged all Governments to cooperate with and assist you in the performance of your tasks, and “to provide all necessary information requested” and “to respond to communications transmitted to them by the Special Rapporteur without undue delay [...]”<sup>114</sup> In accordance with that directive, CCR respectfully recommends that in addition to

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<sup>110</sup> See Gareth Porter, *How Afghanistan became a NATO war*, Al Jazeera, 4 Jan. 2011 at <https://www.aljazeera.com/indepth/features/2011/01/201114818346562.html>.

<sup>111</sup> DATABLOG, *Afghanistan troop numbers data: how many does each country send to the Nato mission there?* Guardian.com (2011) at <https://www.theguardian.com/news/datablog/2009/sep/21/afghanistan-troop-numbers-nato-data>.

<sup>112</sup> NATO, *NATO & Afghanistan*, 5 March 2019 at [https://www.nato.int/cps/en/natohq/topics\\_8189.htm](https://www.nato.int/cps/en/natohq/topics_8189.htm).

<sup>113</sup> CCR was unable to find any comments by a NATO official reacting to Secretary of State Pompeo’s remarks.

<sup>114</sup> U.N. Human Rights Council Resolution 35/11, *supra* n. 28, para 3.

corresponding with the United States, you seek information from those States who could be the target of intimidation or otherwise the object of U.S. efforts to forestall cooperation with the ICC, including those ICC Member States implicated in the Prosecutor's Request, including but not limited to Afghanistan, Romania, Lithuania, Poland, Jordan and Djibouti.

If I can provide any further information to support your enquiries, please do not hesitate to contact me. I look forward to your response to this important matter.

Yours sincerely,



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cc:

Mr. O-Gwon Kwon, President of the Assembly of States Parties to the Rome Statute

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<sup>i</sup> Katherine Gallagher served as Adjunct Professor/Supervising Attorney at the Human Rights and Gender Justice Clinic of Main Street Legal Services, Inc. at CUNY Law School for this project.