

The logo for the New York City Bar, featuring the words "NEW YORK CITY BAR" in a bold, serif font, centered between two horizontal blue bars.

**NEW YORK
CITY BAR**

**STATEMENT BY THE NEW YORK CITY BAR ASSOCIATION
AGAINST U.S. SANCTIONS ON PERSONS WORKING WITH OR FOR THE
INTERNATIONAL CRIMINAL COURT**

On July 11, 2020, the President signed an Executive Order (the “Executive Order”),¹ authorizing sanctions (including asset freezes and visa denials) against individual staff members of the International Criminal Court (the “ICC”), their families, and others who provide “material assistance,” and U.S. nationals who provide “funds, goods or services,” to anyone designated under the Executive Order. The New York City Bar Association (the “City Bar”) has long supported the ICC and believes the Executive Order is an unwarranted effort to undermine the work of the ICC by imposing sanctions of the type often used by the United States against terrorist organizations, drug traffickers, and certain state entities such as Cuba and Iran in an effort to affirmatively punish the ICC and its staff for performing their judicial functions. This attempt to use executive power to infringe upon the independence of a judicial institution contravenes established principles of judicial independence both in the U.S. and around the world. The broad language of the Executive Order is also likely to have a chilling effect on those who would otherwise have a legitimate interest in ensuring that genocide, crimes against humanity, and war crimes are properly investigated and prosecuted.

The City Bar has previously opposed disparagement and threats against ICC staff and their families,² and recently reaffirmed its commitment to the ICC in letters to members of the U.S. House and Senate.³ The City Bar now calls upon the President to revoke the Executive Order, and, until its revocation, urges Executive Branch Agencies to decline to designate anyone under it. The City Bar also urges the U.S. Congress to consider appropriate legal means to block enforcement of the Executive Order.

Since its establishment in 1870, the City Bar has worked to advance and defend the rule of law in New York, the United States and internationally. The City Bar has long advocated for the ICC, principally through the work of its Committees on International Human Rights, African

¹ Executive Order on Blocking Property of Certain Persons Associated with the International Criminal Court, June 11, 2020, <https://www.whitehouse.gov/presidential-actions/executive-order-blocking-property-certain-persons-associated-international-criminal-court/> (all websites last visited July 28, 2020).

² Reaffirming Support For The International Criminal Court (ICC Court), New York City Bar Association, April 21, 2020, <https://www.nycbar.org/media-listing/media/detail/support-for-the-international-criminal-court>.

³ Reaffirming Support for the International Criminal Court in Light of Recent Criticism of Current Investigations, New York City Bar Association, June 10, 2020, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/rebutting-recent-icc-criticism>.

Affairs, and United Nations, as well as through its Council on International Affairs, the Cyrus R. Vance Center for International Justice, the Task Force on the Rule of Law, and the Task Force on the Independence of Lawyers and Judges.

THE INTERNATIONAL CRIMINAL COURT

As explained in our April 21, 2020 statement, over the past quarter of a century, international criminal tribunals such as the ICC have played vital roles in advancing the fight against impunity. Based on the 1998 Rome Statute, the ICC has jurisdiction to prosecute the most serious crimes of concern to the international community. One hundred and twenty-three countries are parties to the Rome Statute. Although the U.S. is not a party, a close relationship has existed between the U.S. and the ICC under the Administration of President Barack H. Obama II, and the U.S., under the Administration of President William J. Clinton, participated in drafting the Rome Statute.

To date, the ICC has exercised jurisdiction over genocide, war crimes, and crimes against humanity. Since July 17, 2018, it also has the authority to exercise limited jurisdiction over the crime of aggression.⁴ The ICC is “participating in a global fight to end impunity, and through international criminal justice, the [ICC] aims to hold those responsible accountable for their crimes and to help prevent these crimes from happening again.”⁵ Additionally, the ICC plays an important role in promoting the rule of law by elucidating and applying fundamental standards of due process and developing mechanisms for victims to participate and make their voices heard.

SANCTIONS AGAINST COURT OFFICIALS AND THEIR FAMILIES

The Executive Order, among other things, threatens ICC officials and staff and other “foreign persons,” including “entities” — like universities, NGOs, or even the ICC itself — with asset freezes and (as to individuals) visa denials. This particularly includes lawyers and officials who investigate, on behalf of the ICC, the allegations against U.S. military and personnel of the Central Intelligence Agency (“CIA”) of torture, rape, and other war crimes in Afghanistan as well as related CIA “black sites” in Lithuania, Poland and Romania.⁶ The same is true for lawyers and

⁴ The jurisdiction of the crime of aggression activated only on July 17, 2018, but under a different, more limited, jurisdictional regime than the ICC’s other three core crimes.

⁵ International Criminal Court, About, <https://www.icc-cpi.int/about>.

⁶ Specifically, the Executive Order purports to prohibit:

- (a) transfer, payment, export, withdrawal, or other dealing in, assets of “foreign persons” described in clauses (A)-(D) below,
- (b) “making of contributions or provision of funds, goods, or services by, to, or for the benefit of,” “foreign persons” described in clauses (A)-(D) below,
- (c) entry into the U.S. of
 - (i) “aliens determined by the [U.S.] Secretary of State to be employed by, or acting as an agent of, the ICC,” or

officials who investigate on behalf of the ICC, “any personnel of a country that is an ally of the United States without the consent of that country’s government.” The Executive Order additionally contains certain language that appears to encompass U.S. nationals.⁷

REASONS FOR OPPOSITION

The Executive Order seriously concerns us for several reasons.

1. The claim that there is a “national emergency” that warrants the Order

First and foremost, the actions of one judicial institution, the work of which is largely aligned with U.S. interests (outlined below), is not an “unusual and extraordinary threat to the national security and foreign policy of the United States,” as the Executive Order claims as its basis for a “national emergency.” The ICC has no independent enforcement power and relies upon state support and cooperation. The numerous constraints on the ICC’s operations include unexecuted arrest warrants and funding difficulties. These inherent challenges to the Court’s success have provided fodder for its critics, as evidenced by the June 11, 2020 Press Briefing, during which U.S. officials described the ICC as “grossly ineffective” and a “failed institution.”⁸ If this is indeed the view of the current administration, the ICC cannot possibly pose an “unusual and extraordinary threat” that constitutes a “national emergency.”

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- (ii) any aliens or spouses or children of any aliens determined by the U.S. Secretary of State, in consultation with the U.S. Secretary of the Treasury and Attorney General, to be a “foreign person” determined
 - (A) to have directly engaged in any effort by the ICC to investigate, arrest, detain, or prosecute any United States personnel without the consent of the United States;
 - (B) to have directly engaged in any effort by the ICC to investigate, arrest, detain, or prosecute any personnel of a country that is an ally of the United States without the consent of that country’s government;
 - (C) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, [any activity described in (A) or (B) above], or any person whose property and interests in property are blocked pursuant to [the Executive Order], or
 - (D) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to [the Executive Order].”

Executive Order, *supra* note 1.

⁷ See Executive Order, Sections 2-3; *see also* discussion below “[t]he overbreadth and consequent chilling effect of encompassing US nationals.”

⁸ Remarks to the Press, Michael R. Pompeo, Secretary of State et al., June 11, 2020, <https://www.state.gov/secretary-michael-r-pompeo-at-a-press-availability-with-secretary-of-defense-mark-esper-attorney-general-william-barr-and-national-security-advisor-robert-obrien/>.

At its core, the issue is rather the United States' insistence that its nationals—or those of any ally, such as Israel,⁹ that has not consented to the Court's jurisdiction—be treated as above the law. As such, it is the Executive Order itself—a measure that appears designed to ensure impunity for acts of torture and other violations of international law—that poses the true threat, both to U.S. standing in the world and to the rule of law globally.

2. The disregard that most of the ICC's work aligns with U.S. interests

In attacking the staff and others working with or for the ICC, and mischaracterizing the ICC as a “threat to the national security and foreign policy of the United States” that creates a “national emergency,” the Executive Order ignores the alignment of much of the ICC's work with U.S.-avowed interests. Some current examples of that alignment are the following:

- In early June, Ali Kushayb surrendered on charges of crimes against humanity and war crimes committed in Darfur.¹⁰ His trial would mark the first prosecution of crimes in Darfur, crimes that then-Secretary of State Colin Powell and then-President George W. Bush declared to be “genocide.”¹¹
- The trial of Dominic Ongwen closed in March of this year. Ongwen was a leader in the Lord's Resistance Army, a group whose members U.S. Special Operations Forces tracked in conjunction with the Ugandan military after issuance of ICC arrest warrants.¹²
- The ICC is attempting to prosecute crimes against the Rohingya by Myanmar's military. The U.S. has imposed sanctions against Myanmar since 2018 for what the U.S. has described as “ethnic cleansing,” and, *the day before* President Trump issued

⁹ In remarks to the press on June 11, 2020, Secretary of State Pompeo stated that the U.S. would impose economic sanctions and visa restrictions on ICC personnel and their families in response to the ICC's investigations of actions by U.S. forces in Afghanistan and by Israeli forces in the West Bank and the Gaza Strip. *See id.* The ICC refers to the latter investigation as the “Palestine Situation” and one involving alleged crimes committed “in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014.” On December 20, 2019, the ICC Prosecutor concluded that, after a preliminary investigation, all the statutory criteria under the Rome Statute for the opening of an investigation have been met; however, she “requested from Pre-Trial Chamber I a jurisdictional ruling on the scope of the territorial jurisdiction” of the ICC. *See* <https://www.icc-cpi.int/palestine>. The ICC's investigation of alleged crimes includes actions of Palestinians as well as those of Israelis. *See* <https://www.hrw.org/news/2020/05/22/us-official-threatens-international-criminal-court-again>.

¹⁰ Associated Press, “Sudanese War Crimes Suspect Arrested After 13 Years on the Run,” NY TIMES, June 9, 2020, <https://www.nytimes.com/2020/06/09/world/africa/ali-kushayb-in-custody.html>.

¹¹ Rebecca Hamilton, “Inside Colin Powell's Decision to Declare Genocide in Darfur,” THE ATLANTIC, August 17, 2011, <https://www.theatlantic.com/international/archive/2011/08/inside-colin-powells-decision-to-declare-genocide-in-darfur/243560/>.

¹² Mac William Bishop, “Inside the Green Berets' Hunt for Wanted Warlord Joseph Kony,” NBC NEWS, March 6, 2017, <https://www.nbcnews.com/news/world/inside-green-berets-hunt-warlord-joseph-kony-n726076>.

the Executive Order, praised The Gambia for having “courageously brought a case before the International Court of Justice regarding crimes against the Rohingya.”¹³

When the U.S. attacks the ICC, it is making *all* of the Court’s vital work more difficult, including the above.

3. The claim that it is in U.S. interests to implement sanctions — which closely parallel sanctions against terrorist organizations — against persons working with or for the ICC and their families

The Executive Order threatens imposition of sanctions blocking “[a]ll property and interests in property that are in the United States” of, in addition to “foreign persons described in Section 1.(a)(i)(C) and (D),” “foreign persons” who “directly engaged in any effort by the ICC to investigate, arrest, detain, or prosecute any United States personnel” or “personnel” of “an ally of the United States” without the consent of the government of the respective country. (Section 1.(a)(i)(A) and (B).) The Executive Order also contains a restriction on entry into the U.S. by those “foreign persons,” certain other “foreign persons” described in Section 1.(a)(i)(C) and (D), and spouses and children of those persons and aliens “determined by the [U.S.] Secretary of State to be employed by, or acting as an agent of, the ICC.” (Section 4.)

The threat of such sanctions is part of (1) ongoing behavior that threatens international civil servants and their families—previously denounced by, among others, this Bar Association,¹⁴ the President of the ICC’s Assembly of States Parties,¹⁵ and the International Bar Association,¹⁶ and (2) an isolationist trend of disrespect for multilateral institutions and U.S. commitments to its allies.

These sanctions measures are also exceedingly broad and could have potentially dire consequences to persons listed, their families, and the ICC itself or any person or entity that attempts to provide funding to help a person or institution listed. In addition to the personal harm of denying a person designated for these sanctions access to assets in U.S. bank accounts, the United States government is sending a clear message to those involved in any investigation of U.S. conduct that any attempt at uncovering the truth will be met with resistance, economic punishment, and being made a pariah in the U.S. Similarly, if a foreign NGO or person, or even the ICC itself, were to attempt to “assist” the covered person, then the foreign NGO, person, or the ICC could potentially have its own assets frozen, etc. And while there is good reason the U.S. has used such measures for the likes of drug traffickers and terrorists, to place professional staff of a judicial

¹³ Remarks to the Press, Michael R. Pompeo, Secretary of State, June 10, 2020, <https://www.state.gov/secretary-michael-r-pompeo-at-a-press-availability-on-the-release-of-the-2019-international-religious-freedom-report/>.

¹⁴ *See supra* note 2.

¹⁵ Press Release, “ASP President, O-Gon Kwon, Reaffirms Unwavering Support for the ICC,” March 25, 2020, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1521>.

¹⁶ International Bar Association Human Rights Institute, “United States Must Cease Threats to International Criminal Court Personnel and Families,” March 19, 2020, <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=0d639152-3fcb-473e-a42b-37c533266b1d>.

institution, and potentially their families and the ICC itself, in such a position is squarely at odds with our history as a nation that adheres to, and champions, the rule of law.

In attacking the ICC, the U.S. is also disregarding the support for the ICC by one hundred and twenty-three states, including virtually all major U.S. allies. Recently, ten states serving on the UN Security Council—including Germany, France, and the UK—came out with resounding endorsement of the work of the Court.¹⁷ Sixty-seven UN Member States have come out in support of the Court,¹⁸ as have the American Bar Association,¹⁹ the Philadelphia Bar Association,²⁰ and numerous non-governmental organizations.²¹ Additionally, in the United States, 188 academics and lawyers who are experts in international law have urged the President to rescind the Executive Order.²² As former U.S. War Crimes Ambassador Clint Williamson points out, “the United States stands virtually alone among liberal democracies in its rejection of the ICC.”²³

4. The overbreadth and consequent chilling effect of including the provision of “material assistance” as a basis for imposing sanctions

In Section 1(a)(i)(C) of the Executive Order covers any “foreign person” who has “materially assisted, sponsored, or provided financial, material, or technological support for, or

¹⁷ Joint Statement by UN Security Council Members that are States Parties to the Rome Statute of the International Criminal Court (Belgium, the Dominican Republic, Estonia, France, Germany, Niger, Saint Vincent and the Grenadines, South Africa, Tunisia and the United Kingdom), June 10, 2020, <https://new-york-un.diplo.de/un-en/news-corner/200610-unscc-icc/2351876>.

¹⁸ “Statement in Support of the International Criminal Court (ICC) Following the Release of the US Executive Order of 11 June 2020,” June 23, 2020, available at <https://onu.delegfrance.org/We-remain-committed-to-an-international-rules-based-order>, endorsed by Andorra, Argentina, Australia, Austria, Bangladesh, Belgium, Belize, Bolivia, Brazil, Bulgaria, Burkina Faso, Canada, Chile, Colombia, Costa Rica, Côte d’Ivoire, Croatia, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Dominican Republic, Ecuador, Estonia, Fiji, Finland, France, Gambia, Germany, Greece, Guyana, Iceland, Ireland, Italy, Latvia, Lesotho, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malta, Mexico, Namibia, Netherlands, New Zealand, Nigeria, Norway, Peru, Portugal, Romania, Saint Vincent and the Grenadines, San Marino, Senegal, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, State of Palestine, Sweden, Switzerland, Trinidad and Tobago, Tunisia, Uganda, United Kingdom, Uruguay and Venezuela.

¹⁹ ABA President Judy Perry Martinez statement Re: U.S. sanctions of International Criminal Court personnel, June 12, 2020, <https://www.americanbar.org/news/abanews/aba-news-archives/2020/06/aba-president-judy-perry-martinez-statement-re--u-s--sanctions-o/>.

²⁰ Philadelphia Bar Association Resolution Supporting Independence of the International Criminal Court and Freedom from Sanctions and Freedom to travel of its Members, June 24, 2020, http://www.philadelphiabar.org/page/ResJune20_2?appNum=1.

²¹ “Oppose Trump Administration Measures against the International Criminal Court,” June 11, 2020, <https://static1.squarespace.com/static/577d646ff5e231af02679e31/t/5ee2a44c1f8c4f286b1e1a77/1591911500903/20-06-11++NGO+Statement++Oppose+U.S.+Measures+against+the+ICC+-+.pdf>.

²² *Opinio Juris*, “Statement against US Sanctions on ICC Investigations (Updated),” <https://opiniojuris.org/2020/06/30/statement-against-us-sanctions-on-icc-investigations/>.

²³ Ambassador Clint Williamson: “Trump Administration’s Actions towards ICC Damage U.S. Global Standing,” June 12, 2020, <http://newsletters.asucollegeoflaw.com/irls/2020/06/12/amb-williamson-trump-administrations-actions-towards-icc-damage-u-s-global-standing/>.

goods or services to or in support of,” among other activities, investigating U.S. “personnel” or personnel of a U.S. ally without the consent of the respective country’s government.

Because the ICC works on numerous investigations and much of its work is not segregated by particular situation, this language likely covers any “foreign person” providing support to the ICC, from those working on IT systems, to translators, to investigators, to judges, to staff in the field, to ICC lawyers or outside lawyers representing victims, to non-governmental organizations that support the ICC, to nationals of foreign countries—including U.S. allies—who provide support or assistance to the ICC. Moreover, the Order could even be considered to cover nationals of the ICC’s 123 States Parties who help to decide or play a role in securing the ICC’s budget. In short, the overbreadth of this language appears designed to have a broadly chilling effect that stands poised to hamper the ICC’s Afghanistan investigation regarding U.S. nationals²⁴, the ICC’s investigation of Israeli personnel in connection with its Palestine Situation investigation²⁵, and the ICC’s work generally.

5. The overbreadth and consequent chilling effect of encompassing U.S. nationals

The Executive Order is also overbroad in that Sections 2 and 3 apparently cover U.S. nationals, among other persons. That is, Section 2 applies to anyone “making . . . donations” “to, or for the benefit of any person whose property and interests in property are blocked,” and Section 3 covers anyone “making . . . any contribution or provision of funds, goods, or services, . . . to, or for the benefit of any person whose property and interests in property are blocked.” (Sections 2 and 3.) Because, unlike Section 1(a), neither Section 2 nor Section 3 references “foreign persons,” these Sections arguably cover U.S. nationals.

Thus, particularly regarding the provision of “services,” any *amicus curiae* in the Afghanistan situation (such as former U.S. War Crimes Ambassador David J. Scheffer) might be covered by Section 3 of the Executive Order if he or she were *amicus curiae* now. Three U.S. nationals who serve as Special Advisers to the ICC Prosecutor might be construed as covered by Section 3 if they continue their work, as might any U.S.-based NGO doing advocacy related to the ICC’s investigation of alleged crimes by U.S. or Israeli nationals, or even the ICC more broadly because advocacy might not be investigation-specific. The potential ramifications to counsel representing individuals before the ICC or participating in the ICC investigatory process undermine the independence of the legal profession.

While the briefing regarding the Executive Order led by Secretary of State Pompeo suggested the Executive Order applies only to “foreign nationals,” the text clearly suggests otherwise. Moreover, the Executive Order will improperly interfere with the ICC’s work, and the work of U.S. and foreign lawyers, academics, and NGOs who see the value of the ICC’s work and have participated in numerous investigations and prosecutions, some of which the U.S. has itself actively assisted.

²⁴ The investigation also covers crimes by the Taliban and affiliated armed groups, and the Afghan authorities. See <https://www.icc-cpi.int/afghanistan>; see also <https://www.hrw.org/news/2020/03/05/icc-greenlights-afghanistan-investigation>.

²⁵ As discussed at note 9, *supra*, the ICC’s Palestine Situation investigation includes actions of Palestinians as well as those of Israelis.

CONCLUSION

In inviting imposition of sanctions against ICC staff and associates, immediate families of ICC staff, and potentially covering U.S. nationals, the order undermines longstanding U.S. interests and international justice, a field which the U.S. has historically taken a lead role in creating since the Nuremberg trials, and has otherwise supported in many ways since then. The City Bar now calls upon the President to revoke the Executive Order and, until its revocation, urges representatives of the U.S. Government to decline to designate anyone under it. The City Bar additionally urges the U.S. Congress to invoke legal means to block enforcement of the Executive Order.

July 2020