President Biden
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

8 March 2021

Re: Executive Order 13928 and Sanctions against ICC officials

Dear Mr President,

The Bar Human Rights Committee of England and Wales ("BHRC") and the International Bar Association's Human Rights Institute ("IBAHRI") write to urge you to rescind Executive Order 13928 ("the Order") signed by President Trump on 11 July 2020 following the Decision of the Appeals Chamber of the International Criminal Court ("ICC") of 5 March 2020 authorising the investigation into alleged war crimes committed in Afghanistan.

In addition, we call upon the United States to withdraw all economic sanctions and visa restrictions placed on the outgoing ICC Prosecutor, Ms Fatou Bensouda and the Director of the Jurisdiction, Complementarity and Cooperation Division, Mr Mochochoko and their family members pursuant to the Order.[1]

BHRC is the independent, international human rights arm of the Bar of England and Wales.[2] BHRC works to protect the rights of advocates, judges and human rights defenders around the world. It is dedicated to promoting principles of justice and respect for fundamental human rights through the rule of law.

The International Bar Association, established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. It has a membership of over 80,000 individual lawyers, and 190 bar associations and law societies, spanning over 170 countries. The IBAHRI, an autonomous and financially independent entity, works with the global legal community to promote and protect human rights and the independence of the legal profession worldwide.

BHRC and IBAHRI welcome the Department of State's announcement on 26 January 2021 that it will "thoroughly review" the sanctions against Ms Bensouda and Mr Mochochoko pursuant to the order on 2

[1] Michael R. Pompeo, Secretary of State, 'Actions to Protect U.S. Personnel from Illegitimate Investigation by the International Criminal Court', 2 September 2020.
[2] BHRC is independent of the Bar Council of England and Wales.

September 2020,[3] as it "determines [its] next steps".[4] However, as of the date of this letter the sanctions have not been revoked.

BHRC and IBAHRI stress our position that the imposition of coercive measures against Ms Bensouda and Mr Mochochoko, and any other ICC official or person who engages with the court, constitutes a severe and improper interference with the independence of the ICC, and gravely undermines the rule of law.[5]

BHRC and IBAHRI stress that the purpose of the ICC is not to usurp the sovereignty of any State to prosecute alleged war crimes and crimes against humanity committed by its nationals. The ICC is a court of last resort. The situation in Afghanistan is one that, after careful consideration, the Appeals Chamber has determined calls for investigation. The scope of the investigation is not limited to the conduct of U.S. and allied personnel and includes the conduct of members of the Taliban and associated armed groups. The ICC's decision to investigate does not preclude the United States from carrying out its own investigation into the matter. Pursuant to the War Crimes Act the United States has the jurisdiction to investigate and prosecute allegations of war crimes committed abroad by or against its citizens.[6] The principle of complementarity adopted by the ICC means that it is only in circumstances where the United States demonstrates that it is unwilling or unable to investigate the alleged perpetrators of such crimes that the ICC will exercise its jurisdiction.[7] The principle of complementarity applies to all situations that are the subject of an ICC investigation, including investigation of the Situation in the Occupied Palestinian Territories.

BHRC and IBAHRI stress that any concerns that the United States may have regarding the ICC's investigation of the Situations in Afghanistan and in the Occupied Palestinian Territories should not be realised in the form of continued use of coercive measures against ICC officials and their families, or the failure to rescind the Order.

BHRC and IBAHRI accept that the ICC and its Prosecution Division should not be immune from criticism. As a relatively new international institution dealing with some of the most fractious and complex issues of our time, there is undoubtedly room for improvement as it proceeds in its mission to ensure the most serious crimes are brought to trial. However, the correct approach must be to support reform where necessary and not to impose coercive and unjust measures against its personnel.

The failure to rescind the Order constitutes a continuing attempt to improperly interfere with the important work of the ICC, an independent and impartial court established by law, and with the international legal order. Further, the failure to act risks gravely undermining work that is vital in the pursuit of ending impunity for the gravest crimes, including genocide, crimes against humanity and war crimes, and substantially risks undermining victims' access to justice. The provision of legal advice, case work or even submitting amicus curiae briefs exposes individuals to the risk of being designated according to the terms of the Order. Such undue pressure upon those simply seeking to assist the work of the ICC and to provide expert support regarding the most serious crimes under international law is unacceptable.

Moreover, the failure to rescind the Order maintains a grave risk that similar measures will be used by other States in order to intimidate judges, lawyers, investigators, and human rights defenders including those who are citizens or residents of the United States and members of the American Bar Association.

BHRC and IBAHRI note and welcome the United States' past and recent support for the work of the ICC. As a permanent member of the UN Security Council, the United States has voted in favour of referral to

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[3] Michael R. Pompeo, Secretary of State, 'Actions to Protect U.S. Personnel from Illegitimate Investigation by the International Criminal Court', 2 September 2020.

[4] S. Lewis, 'Biden administration to review sanctions on International Criminal Court officials', Reuters, 26 January 2021.

[5] BHRC, 'USA: Sanctions against iCC officials "gravely undermine" the rule of law', 3 September 2020.

[6] 18 U.S. Code §2441 – War Crimes

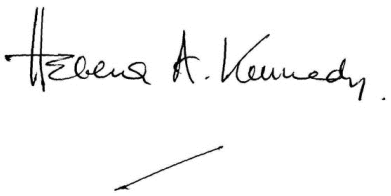
[7] The principle of complementarity applies to all investigations by the prosecutor and cases before the ICC, including the Situation in the Occupied Palestinian Territories.

the ICC of the situations in Libya[8] and Darfur, Sudan.[9] On 4 February 2021, the Department of State welcomed the verdict in the case against Dominic Ongwen for war crimes and crimes against humanity committed in Uganda.[10]

Mr President, BHRC and IBAHRI respectfully urge you to immediately rescind this unjust and draconian Order, and to stand by the United States' commitment to ending impunity for grave crimes and to the rule of law. Any failure to rescind the Order will amount to the continued harassment and condemnation of those who engage with the ICC and sends a message to the world that the intimidation and harassment of judges, lawyers and human rights defenders who seek to ensure accountability for war crimes and other atrocities is acceptable. Such action will only serve to severely undermine the United States' purported recommitment "to a foreign policy centered on democracy, human rights, and equality",[11] and to add sustenance to those who seek to evade justice and enjoy impunity.

Sincerely

Schona Jolly QC
Chair, Bar Human Rights Committee
of England and Wales



Baroness Helena Kennedy QC
Director, International Bar Association's
Human Rights Institute

[8] Un Security Council resolution 1970 (2011).

[9] UN Security Council resolution 1593 (2005).

[10] U.S. Department of State, 'Welcoming the Verdict in the Case Against Dominic Ongwen for War Crimes and Crimes Against Humanity', 4 February 2021.

[11] Antony J. Blinken, Secretary of State, 'U.S. Decision to Reengage with the UN Human Rights Council', 8 February 2021.