Why Them? On the U.S. Sanctions Against Int’l Criminal Court Officials

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Two officials of the International Criminal Court (ICC) have now been sanctioned by the United States. On Wednesday, September 2, the State and Treasury Departments took their first action on a sanctions program created in June by, first, [restricting](https://twitter.com/J_Andrew_Boyle/status/1301171580530294784?s=20) issuance of visas for unnamed ICC personnel and, second, [adding](https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20200902) two named individuals — Fatou Bensouda and Phakiso Mochochoko — to the Specially Designated Nationals and Blocked Persons [List](https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists). Bensouda, as the Prosecutor and the Court’s highest-profile official, has long been seen as a [target](https://www.washingtonpost.com/politics/2020/06/16/despite-us-sanctions-international-criminal-court-will-keep-investigating-alleged-war-crimes-afghanistan/) of this program. But Mochochoko may come as more of a surprise.

As previous [*Just Security articles*](https://www.justsecurity.org/tag/executive-order-13928/) have described, President Trump’s June [Executive Order 13928](https://www.whitehouse.gov/presidential-actions/executive-order-blocking-property-certain-persons-associated-international-criminal-court/) made good on repeated U.S. threats to take action against the ICC in response to the ICC’s [investigation](https://www.icc-cpi.int/afghanistan) into potential U.S. abuses in Afghanistan since 2003. The order authorized “the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General” to designate foreign individuals and entities who “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.”

The [consequences](https://www.justsecurity.org/70779/dissecting-the-executive-order-on-intl-criminal-court-sanctions-scope-effectiveness-and-tradeoffs/) of being designated include:

* any assets the person has in the United States are frozen;
* the individual can no longer conduct transactions in U.S. dollars which may occur anywhere in the world;
* persons, including financial institutions, cannot conduct transactions with or provide services to the designated individual;
* the designated individual and their family members are barred from entering the United States; and
* anyone who materially assists the designated individual can themselves be designated.

However, the original E.O. was “naked,” meaning that while it authorized designation for involvement with the Afghanistan investigation, it did not actually designate anyone. After two relatively quiet months in U.S.-ICC relations, that designation came on Wednesday and included a name unfamiliar to many, that of the head of the ICC’s Jurisdiction, Complementarity and Cooperation Division. This begs the question: Why include the relatively unknown Mochochoko?

The most obvious reason for Mochochoko’s designation is that he has allegedly supported the inquiry into potential U.S. wrongdoing in Afghanistan. In [remarks](https://www.state.gov/secretary-michael-r-pompeo-remarks-to-the-press-6/) earlier this year, Pompeo identified Mochochoko by name as one of the key individuals at the ICC “helping drive … Bensouda’s effort to use this court to investigate Americans.” Pompeo drew a similar connection when [announcing](https://www.state.gov/secretary-michael-r-pompeo-at-a-press-availability-12/) the designations on Wednesday, using the language of the E.O. to describe Mochochoko as having “materially assisted Prosecutor Bensouda” in the Afghanistan investigation.

The ICC’s Afghanistan investigation — and, to a [somewhat lesser extent](https://www.hrw.org/news/2020/05/22/us-official-threatens-international-criminal-court-again), its [investigation](https://www.icc-cpi.int/palestine) into potential wrongdoing in Palestine — has been at the heart of the United States’ recent grievances with the institution. As Pompeo frequently points out, the United States never ratified the ICC’s founding document, the [Rome Statute](https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf), and accordingly has expected the ICC to leave it alone. However, Afghanistan is a party to the Rome Statute, and alleged U.S. abuses, including many [documented](https://www.hrw.org/report/2019/10/31/theyve-shot-many/abusive-night-raids-cia-backed-afghan-strike-forces) by Human Rights Watch, occurred on the territory of Afghanistan and other parties to the statute. To the U.S. government’s great chagrin, the ICC investigation [has proceeded](https://www.justsecurity.org/69059/icc-appeals-chambers-afghanistan-decision-limits-judicial-review-of-prosecutorial-discretion/) on this basis. Thus, the United States’ core objection to the Afghanistan investigation relates to Mochochoko’s remit at the ICC — jurisdiction.

To make matters worse from the U.S. government’s perspective, there are [three circumstances](https://www.icc-cpi.int/about/otp) under which “the exercise of the Court’s jurisdiction can be triggered where crimes under the Court’s jurisdiction appear to have been committed”: when a state party requests an investigation, when the United Nations Security Council refers an investigation to the Court, or at the ICC prosecutor’s discretion (when the crimes occur on the territory of a state party or are perpetrated by a national of a state party). In the Afghanistan investigation we have an example of the third circumstance. [No one formally asked](https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh#_blank) the Court to look into potential U.S. and other abuses. The Court is exercising jurisdiction — in the U.S. government’s view, overextending its jurisdiction — entirely of its own accord. Although few would argue that the Court actually lacks a legal basis for jurisdiction, this element of discretion combined with the lack of U.S. consent has led some to [argue](https://www.justsecurity.org/71015/the-icc-wants-justice-but-has-no-mandate/) that the Court’s jurisdiction is accordingly illegitimate and ill-advised.

Given the consequences of designation described above, all the U.S. government needed to do to essentially bring the ICC’s operations to a [halt](https://twitter.com/J_Andrew_Boyle/status/1301171579561357319?s=20) was designate one key actor, which it could have accomplished by simply designating Bensouda. By simultaneously designating Mochochoko, the United States pointed to the substance of its argument against the ICC, rather than simply the existence of a dispute.

Whether intentional or not, the United States also sent a clear message about who should bear responsibility. The September 2 designations have targeted the two African and non-White-passing individuals among the five public-facing officials in the ICC’s [Office of the Prosecutor](https://www.icc-cpi.int/about/otp/who-s-who/Pages/default.aspx). In spite of potential connections to the Afghanistan investigation by virtue of their positions, the United States did not designate Deputy Prosecutor James Stewart, Director of the Investigations Division Michel de Smedt, or Director of the Prosecutions Division Fabricio Guariglia. It designated Bensouda and Mochochoko.

As the United States [reckons](https://www.justsecurity.org/71373/racing-national-security-introduction-to-the-just-security-symposium/) with racial justice and its history of racialized violence at home, this fact strikes a particularly sour note. And it curiously replicates [criticism](https://www.justsecurity.org/71614/negotiating-racial-injustice-how-international-criminal-law-helps-entrench-structural-inequality/) of the ICC itself for training its sights on non-White, especially African, leaders when considering who is worthy of condemnation and punishment.

How and whether work at the ICC will proceed in light of this latest development remains to be seen. The Court has likely been preparing for a move along these lines — at least designation of Bensouda — for some time. But the U.S. government has highlighted that it will not hesitate to use the dominance of U.S. financial markets to express its opposition to the ICC’s actions, as they relate both to the Afghanistan investigation and to the question of the ICC’s jurisdiction.