Can the International Criminal Court Hold the Trump Administration in Contempt?

By Uzay Yasar Aysev
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*On June 11, **President Donald Trump** issued an executive order (E.O.) authorizing the imposition of sanctions in the form of visa/travel restrictions and asset freezes targeting International Criminal Court (ICC) officials as well as other persons that contribute to the Court's investigations against the United States and its allies. During the announcement of the sanctions regime, **Attorney General William Barr** indicated that the U.S. Department of Justice initiated domestic investigations into officials at the ICC's Office of the Prosecutor for corruption and malfeasance.*

This is the Trump administration's latest salvo in its war against the ICC, which can be traced back to a September 2018 speech given by **then-National Security Advisor John Bolton** in response to the ICC Prosecutor's request to initiate an investigation into U.S. conduct in Afghanistan. In his speech, Bolton outlined a number of measures aimed at shielding U.S. nationals as well as the nationals of U.S. allies (presumably Israelis), from investigation or prosecution by the ICC. These measures included prohibiting ICC officials from entering the United States, sanctioning their property located within the United States, and prosecuting them in the U.S. criminal system. This plan's rollout was initiated in March 2019, when **Secretary of State Mike Pompeo** announced that the United States would restrict visas for ICC staff members, including the Prosecutor herself, who were involved in the Court's investigation into the nationals of the United States or its allies. The newly announced sanctions regime represents the second step in the implementation of this plan, reacting to the ICC Appeals Chamber's March 2020 authorization of an investigation into the situation in Afghanistan.

Today, 5 March 2020, the Appeals Chamber of the International Criminal Court ('ICC' or 'Court') decided unanimously to authorise the Prosecutor to commence an investigation into alleged crimes under the jurisdiction of the Court in relation to the situation in the Islamic Republic of Afghanistan. The Appeals Chamber's judgment amended the decision of Pre-Trial Chamber II of 12 April 2019, which had rejected the Prosecutor's request for authorisation of an investigation of 20 November 2017 and had found that the commencement of an investigation would not be in the interests of justice. The Prosecutor had filed an appeal against that decision. Judge Piotr Hofmański, the presiding judge in this appeal, read a summary of the Appeals Chamber's judgment in open court.

Having considered the Prosecutor's grounds of appeal against the Pre-Trial Chamber's decision, as well as the observations and submissions of the Islamic Republic of Afghanistan, representatives of victims and other participants, the Appeals Chamber found that the Pre-Trial Chamber erred in considering the 'interests of justice factor' when examining the Prosecutor's request for authorisation to open an investigation. In the Appeals Chamber's view, the Pre-Trial Chamber should have addressed *only* whether there was a reasonable factual basis for the Prosecutor to proceed with an investigation, in the sense of whether crimes have been committed, and whether the potential case(s) arising from such investigation would appear to fall within the Court's jurisdiction. Noting that the Pre-Trial Chamber's decision contained all the necessary factual findings and had confirmed that there is a reasonable basis to consider that crimes within the ICC jurisdiction have been committed in Afghanistan, the Appeals Chamber decided to authorise the opening of an investigation itself, rather than to send the matter back to the Pre-Trial Chamber for a new decision.

The Appeals Chamber found that the Prosecutor is authorised to investigate, within the parameters identified in the Prosecutor's request of 20 November 2017, the crimes alleged to have been committed on the territory of Afghanistan since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation in Afghanistan and were committed on the territory of other States Parties to the Rome Statute since 1 July 2002.

Judge Ibáñez Carranza filed a separate opinion on the interpretation of article 15 and its relationship with article 53 of the Rome Statute.

Screenshot from the ICC website

This article assesses the possible effects of the U.S. sanctions regime on the ICC investigations in Afghanistan and Palestine with a view to ascertain whether the Trump administration officials who are responsible for its instatement could be prosecuted for contempt before the ICC. In doing so, the article builds upon the analysis of Sergey Vasiliev, which was published on *Just Security* in September 2018 following Bolton's speech.

Offenses Against Court Officials

In his article, Vasiliev argued that Bolton's threats against the ICC constitute contempt of court under article 70(1)(d) of the Rome Statute since they "could impede, intimidate, or corruptly influence ICC judges in relation to their determination of whether to authorize the Prosecutor to investigate in Afghanistan … [or] dissuade the ICC Prosecutor from making progress in the investigation against U.S. service members." Additionally, Vasiliev warned that if the Trump administration actually adopts the measures outlined in Bolton's speech, it would "amount to retaliation against ICC officials on account of performance of their duties in relation to the situation in Afghanistan" and constitute an offense under Article 70(1)(e) of the Statute.

This concern appears to have now materialized with the issuance of Trump's E.O. Section 1(a)(i)(A)-(B) of the order allows the imposition of sanctions on any foreign person who has "directly engaged in any effort by the ICC to investigate, arrest, detain, or prosecute United States personnel … [or] any personnel of a country that is an ally of the United States without the consent of that country's government." The latter part of the provision presumably refers to Israel.

There is no doubt that the primary target of this provision is the Court officials, including judges, who play a role in advancing the ICC investigations and prosecutions carried out against U.S. and Israeli personnel in the Afghanistan and Palestine situations. The opening text of the E.O. itself refers to the situation in Afghanistan, and complaints from U.S. officials about the work of the Court often refer to both situations.

The E.O. also extends the sanctions to anyone who "materially assist[s], sponsor[s], or

provide[s] financial, material, or technological support for, or goods or services to or in support of" those whose property is blocked (see Section 1(a)(i)(C)). Accordingly, U.S. officials may target any non-U.S. individual or entity who enters into any sort of commercial transaction with the ICC officials who are placed on the U.S. sanctions list. In order to not face sanctions themselves, individuals or other entities may avoid engaging in any commercial transactions with the sanctioned Court officials, which may have serious implications on their personal and professional lives. Additionally, the announced initiation of criminal investigations against the Court officials for the simple reason that they are carrying out their functions under the Statute may cause serious risks to their liberty and personal security considering the global reach and influence of the U.S. authorities.

These measures have clearly been designed to impede, intimidate, or influence ICC officials involved in the Afghanistan and Palestine investigations with a view to stop them from performing their duties or to retaliate against them in the event they do perform those duties. The Court itself appears to be convinced of this since it characterized the U.S. sanctions as "an escalation and an unacceptable *attempt to interfere* with the rule of law and the Court's judicial proceedings … with the declared aim of *influencing the actions* of ICC officials in the context of the Court's independent and objective investigations and impartial judicial proceedings," (emphasis added). The Prosecutor reiterated these remarks by characterizing the U.S. measures as "naked attempts to interfere with the court's judicial and prosecutorial independence to meet political objectives."

Such conduct is criminalized under Article 70(1)(d) and (e) of the Statute. These offenses could be proven without a need to demonstrate the targeted Court officials were in fact affected by the acts of the perpetrator. As the Commentary on the Law of the International Criminal Court lays out, carrying out the prohibited conduct in itself is sufficient, meaning that the U.S. officials who are implicated in instating the sanctions regime have already incurred liability under these provisions.

Interference with the Witnesses and Evidence Collection Process

The potential targets of the sanctions regime is not limited to the Court officials. As noted above, Section 1(a)(i)(A) allows sanctioning of anyone who "directly engages" with the ICC investigation into Afghanistan and Israel. What constitutes "direct engagement," however, is not clarified within the order.

The use of such wide an imprecise language allows U.S. authorities to sanction anyone who provides any support to the ICC Prosecutor's investigations into U.S. and Israeli nationals. This, arguably, includes witnesses providing information to the Court on the alleged crimes committed by U.S. or Israeli personnel in Afghanistan and Palestine respectively. As a result, fearing possible U.S. sanctions, potential witnesses may be unwilling to come forward and give testimony to the Court. Those who have already done so, on the other hand, may face sanctions for their engagement with the Court.

These acts by the United States may incur liability under Article 70(1)(c) of the Statute, which criminalizes "obstructing or interfering with the attendance or testimony of a witness, [and] retaliating against a witness for giving testimony." The Court's decisions in the case against **Jean-Pierre Bemba**, in which the politician and former warlord was convicted with others of corruptly influencing witnesses, confirm this. The Trial Court's judgment verified that it is prohibited to directly or indirectly threaten, pressure, or intimidate the physical

wellbeing or property of witnesses in order to deter them from providing full and truthful information to the Court or punishing them for doing so *ex post facto* (para. 45; see also the confirmation of charges decision, para. 30). That judgment also found that there is no need to prove that the witness actually felt intimidated or was deterred by the perpetrator's conduct (para. 48). (As the International Criminal Tribunal for the former Yugoslavia has indicated, however, the relevant conduct must be of sufficient gravity to likely intimidate or deter the witness from giving evidence (para. 18).) Finally, the Appeal Chamber elaborated that the term "witness" in this context includes not only actual witnesses but also potential witnesses and, more generally, anyone who knows, or is believed to know, something of relevance to the investigations or judicial proceedings before the ICC (para. 720).

The E.O.'s provision for sanctioning non-U.S. individuals and entities who materially support those involved in ICC investigations into U.S. and Israeli personnel may constitute further criminal interference with the Prosecutor's collection of evidence in the Afghanistan and Palestine investigations under article 70(1)(c). The wide range of actors who may be implicated under the E.O.'s section 1(a)(i)(C) includes States Parties to the Rome Statute, NGOs or international organizations that provide information or assistance to the Prosecutor, and any company or individual whose services are procured by the Court in relation these investigations may be implicated under this provision. The possibility of finding themselves on the crosshairs of a superpower with vast capabilities, influence, and reach may very well intimidate and dissuade such actors from interacting with the Court.

Could the ICC Initiate Contempt Proceedings Against U.S. Authorities?

There do not appear to be any jurisdictional impediments to the ICC initiating contempt proceedings against the U.S. officials implicated in the creation and implementation of the sanctions regime. As discussed above, the conduct of the U.S. authorities appears to constitute at least three of the types of conduct criminalized under Article 70 — that is, conduct described in 70(1)(c), (d), and (e). Further, Article 70 of the Statute provides the ICC with jurisdiction over offenses against its administration of justice irrespective of the nationality of the perpetrator or the territory in which the act was committed (see ICC Rules of Procedures and Evidence, Rule 163).

The main impediment that the Court will likely face in carrying out contempt proceedings against U.S. authorities is related to enforcement. While a number of States Parties have voiced serious concerns regarding the U.S. sanctions towards the ICC — for example, France, the U.K., the Netherlands, and the European Union, which is comprised of many States Parties — it is unlikely that any of them would be willing or able to enforce an arrest warrant issued by the Court against U.S. officials. This is for the simple reason that doing so would amount to political suicide under current circumstances, and indeed could put these individuals and entities at risk of physical harm.

Furthermore, as Vasiliev has rightly pointed out, Part IX of the Statute, which otherwise requires States Parties to cooperate with ICC investigations and prosecutions, does not apply to the Court's exercise of jurisdiction in offenses against the administration of justice. Rather, pursuant to Article 70(2) of the Statute, these cooperation issues are governed by the domestic laws of the State whose cooperation is requested. States Parties may rely on this provision in justifying their refusal to cooperate with the Court in bringing the indicted U.S. officials before the Court.

It should be remembered, however, that the ICC has not shied away from investigating

situations and indicting suspects where the prospects for arrest were very low in the past — for instance, the situations in Sudan and Myanmar. As the ex-Sudanese president Omar Al-Bashir's recent ousting from power and possible transfer to the ICC has shown us, the political context may change, and with it the prospects for arrest and surrender. Considering Trump's unprecedented lack of popularity worldwide and rapidly diminishing chances of being re-elected, it is not inconceivable that a similar situation may materialize for some U.S. officials at some point in the future.

One concern Vasiliev raises in connection to this point seems to have been resolved by the ICC Appeals Chamber since the publication of his article. It is now settled that that the heads of states and other high-ranking officials of non-State Parties do not enjoy immunity from arrest and surrender to the ICC before the domestic courts of the States Parties to the Statute where the Court is properly exercising its jurisdiction (paras. 1-5). This is a valuable piece of jurisprudence for national authorities of certain States Parties who may be willing to take a stand and enforce the ICC's decisions against any U.S. officials indicted for contempt. While this finding was made in the context of a prosecution involving Article 5 crimes (war crimes, genocide, and crimes against humanity), there is no reason why the Court's reasoning should not equally apply to its exercise of jurisdiction over offenses under Article 70. There would be no basis for the Court to adopt different standards on immunities in relation to various crimes under the Statute. Indeed, if this were the case, the high-ranking officials of non-States Parties pursued by the Court could freely commit any of the offenses listed under article 70 to impede the proceedings against them with impunity.

Conclusion

There is a plausible case to be made for the Court to initiate contempt proceedings against the officials of the Trump administration. As discussed, the jurisdictional requirements are met. What ICC officials need now is to muster the judicial courage to stand up to an administration that time and again has demonstrated it does not consider itself bound by the rule of law, internationally or domestically, and to strike back with the powers that are vested in them by the Statute.

This surely is a perilous step to take since it will further escalate the tension between the United States and the ICC. Taking on a global superpower is not an easy task for an international tribunal. The only alternatives to fighting back, however, are either inaction or appeasement — that is, halting investigations against U.S. and Israeli personnel. Some may say that the ICC should take this path for self-preservation. Others realize that neither of these options are any good in the long run.

Inaction will allow the U.S. attacks against the ICC to further escalate as the Afghanistan and Palestine investigations move forward. Appeasement, on the other hand, will only damage the Court's reputation and credibility, and open it up to further accusations of pro-Western bias. The Court must fight back. Not only this will send a strong message to those who believe that they can bully the ICC into submission but it will also bolster the Court's status in the eyes of the international community.

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