

Matters of International Justice: Challenging Trump's ICC Sanctions

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On September 2, US sanctions – the sort normally reserved for fully fledged terrorists and decorated drug traffickers – were imposed on the chief prosecutor of the International Criminal Court, Fatou Bensouda and her colleague Phakiso Mochochoko, head of Jurisdiction, Complementarity and Cooperation. For Balkees Jarrah, senior counsel for Human Rights Watch, [it was a](#) “stunning perversion of US sanctions, devised to penalize rights abusers and kleptocrats, to target those prosecuting war crimes”.

This followed from the authorisation by the Trump administration of economic and travel sanctions against employees of the ICC. According to [Executive Order 13928](#), “The entry of such aliens into the United States would be detrimental to the interests of the United States and denying them entry will further demonstrate the resolve of the United States in opposing the ICC’s overreach by seeking to exercise jurisdiction of the United States and its allies.”

On June 11, US Secretary of State Mike Pompeo [expressed his objection](#) to how the Court’s Office of the Prosecutor had, in November 2017 “announced its intention to investigate our brave warriors for alleged crimes arising from counterterrorism missions in Afghanistan.” This was not a “prosecution of justice” so much as “a persecution of Americans.”

Bensouda’s original November 2017 [request](#) to investigate was less dramatic, focusing “solely upon war crimes and crimes against humanity allegedly committed since 1 May 2003 on the territory of Afghanistan as well as war crimes closely linked to the situation in Afghanistan allegedly committed since 1 July 2002 on the territory of other States Parties to the Rome Statute.”

President Trump’s executive measures are both threatening and disruptive, attempting to add a few holes to what is already a complex investigative process. They grant the US Secretary of State the power of designating such foreign persons as have engaged or assisted efforts by the ICC to investigate or prosecute crimes allegedly committed by Americans or personnel of certain United States allies. Included are also those who have assisted, supported or provided services to or in support of such persons. Engaging in prohibited interactions with such individuals is unlawful, opening the subject to civil and criminal fines. If a “natural person”, 20 years of incarceration might follow, pursuant to the International Emergency Economic Powers Act.

This pugilistic approach to the ICC has not been well received by numerous signatories of the Rome Statute, which established the court. A [statement](#) endorsed by countries from several continents was issued on June 23 affirming “unwavering support for the Court as an independent and impartial judicial institution.” Using the stock language familiar with US

diplomacy, the states claimed to “remain committed to an international rule-based order.”

Such rules-based orders can be the stuff of exaggeration and make believe. International law remains susceptible to political pull, influence and manipulation. Accusations have been levelled against the ICC for its purported biases, notably against African states. Rwandan President Paul Kagame repeated that common line of criticism in 2018. “The ICC was supposed to address the whole world, but it ended up covering only Africa.” A decade prior, Kagame [had taken issue](#) with the efforts of Luis Moreno-Ocampo, the then ICC chief prosecutor, to arrest Sudanese President Omar al-Bashir. “If you use a fraudulent mechanism or institution against somebody who needs to be held accountable, in the end you are not helping people understand whether this person needs to be held accountable.”

Those keen on more expeditious procedures have also taken the court to task for inefficiency. The court’s proceedings [have been derided](#) as, according to Elizabeth Wilmshurst of Chatham House, too “cumbersome” and “lengthy”. Money has been spent for poor returns. The Ivory Coast’s ex-President Laurent Gbagbo [was acquitted](#) of war crimes charges in 2019. Kenya’s President Uhuru Kenyatta, saw crimes against humanity charges against him [dropped](#) in 2014.

Context is all, and the court’s weaknesses have as much to do with problems of state cooperation – or its absence – as they do with feasibility and focus. (In Kenyatta’s case, prosecutors complained that the Kenyan government had refused to submit vital evidence.) Having a supremely powerful international court with razor sharp teeth, abundant resources and the means to satisfy the cravings of civil society, seems improbable, and even undesirable. But the latest efforts from Washington go further, an attempt defang the fundamental workings of the court itself.

With that in mind, a domestic legal experiment is underway in the United States. In an attempt to counter the Trump administration, the Open Society Justice Initiative, along with four prominent academics of the law, [have filed an action](#) challenging the lawfulness of Executive Order 13928, along with implementing regulations issued by the Office of Foreign Assets Control. The plaintiffs admit to having history of involvement with the ICC “including in its investigations and prosecutions”. They express no desire to stop engaging with it. They also admit to having assisted “two high-ranking officials within the Court’s Office of the Prosecutor – by educating, training or advising them and members of their Office, and by undertaking public advocacy in support of their mission and work.”

The plaintiffs cite several grounds, notably that the Executive Order and accompanying regulations “impermissibly restrict [their] First Amendment rights to freedom of speech by prohibiting them from providing the speech-based services and assistance” so described, including in connection with ICC investigations and prosecutions the US supports. They also argue that the Executive Order is decidedly vague in what acts it prohibits, leading to “arbitrary enforcement.”

The executive director of the Open Society Justice Initiative, James Goldston, had a whole spray for the administration in [a statement](#). “By issuing this outrageous order, the Trump administration has betrayed Washington’s long-standing support for international justice, snubbed its allies, and violated the US constitution.” Going to court served to “end this reckless assault on a judicial institution and the victims it serves.”

Despite the predictable theatre that often accompanies these policy announcements, the

burdens imposed on the ICC are not insuperable. The main site of the investigation remains Afghanistan, where the alleged crimes, including those committed by US personnel, took place. Most of the evidence will be gathered in Afghanistan. Witnesses and relevant individuals in the US may be interviewed by remote means. This act of US imperial machismo, despite its punchy seriousness, may fall flat.

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