

Sanctions Order May Accelerate Decline In US-ICC Relations

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On June 11, President Donald Trump signed an executive order (as yet unnumbered)[1] authorizing blocking sanctions and additional visa restrictions against personnel of the International Criminal Court. The White House took the action in response to the ICC authorizing an investigation into alleged crimes by U.S. personnel in connection with the war in Afghanistan.

Although no individuals are immediately designated for sanctions under this authority, the EO represents a stark escalation in the fraught relationship between the U.S. and the ICC.

Background

Although the U.S. has cooperated with the ICC on a number of fronts, the relationship has been difficult from the beginning. President Bill Clinton signed the Rome Statute — the treaty that established the ICC — in 2000, but he did not transmit it to the Senate for advice and consent.

In 2002, President George W. Bush announced that the U.S. did not intend not to ratify the Rome Statute, and his administration went to great lengths to shield U.S. forces from ICC jurisdiction.

Among other measures, the U.S. concluded dozens of bilateral agreements with other states, including Afghanistan, in which those states commit not to surrender U.S. personnel to the ICC. Although the relationship with the ICC was more cooperative during the Obama administration, the U.S. has never become party to the Rome Statute.

The current tension dates back to 2017, when ICC Prosecutor Fatou Bensouda sought authorization to investigate crimes committed in connection with the conflict in Afghanistan. The Rome Statute defines the court's jurisdiction to include certain serious crimes committed in the territory of a state party.

Bensouda's application[2] made clear that she sought to investigate not only alleged crimes by the Taliban and associated armed groups, and by the Afghan National Security



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Forces, but also alleged crimes by U.S. armed forces and intelligence personnel in Afghanistan, and by U.S. intelligence personnel in detention centers in Poland, Romania and Lithuania. Those states are all parties to the Rome Statute.

The U.S. government warned it would respond to any investigation of U.S. personnel. In 2018, then National Security Adviser John Bolton threatened to impose sanctions on the ICC for any such investigation.[3] And in 2019, Secretary of State Michael Pompeo announced a policy restricting visas to ICC personnel involved in investigating U.S. personnel.[4] Later that year, the U.S. revoked Bensouda's visa to enter the U.S.[5]

Although the Pre-Trial Chamber of the ICC denied Bensouda's application, on March 5 the Appeals Chamber reversed that decision, and authorized an investigation of alleged war crimes and crimes against humanity committed in Afghanistan, and in the territory of other states parties to the Rome Statute, related to the conflict in Afghanistan.[6]

Afghanistan has submitted a request that the ICC defer its investigation of crimes that fall within Afghanistan's jurisdiction in favor of Afghanistan's own domestic investigations.[7] That request remains under consideration by the prosecutor, and if necessary would be decided by the Pre-Trial Chamber, including possible review by the Appeals Chamber.

The Executive Order

The EO describes the situation with respect to the ICC as involving "illegitimate assertions of jurisdiction over personnel of the United States and certain of its allies," and finds that the ICC's investigation threatens to "subject current and former United States Government and allied officials to harassment, abuse, and possible arrest" and to "impede the critical national security and foreign policy work of United States Government and allied officials."

In response, the EO declares a national emergency with respect to "any attempt by the ICC to investigate, arrest, detain, or prosecute any United States personnel without the consent of the United States," as well as with respect to such efforts directed at U.S. allies who have not consented to the ICC's jurisdiction.

The EO authorizes the imposition of blocking sanctions on any foreign person determined by the secretary of state, in consultation with the secretary of the treasury and the U.S. attorney general, "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" or any personnel of a U.S. ally without the consent of that country's government.

The term "United States personnel" is defined to include:

any current or former members of the Armed Forces of the United States, any current or former elected or appointed official of the United States Government, and any other person currently or formerly employed by or working on behalf of the United States Government.

The designation authority extends to any foreign persons determined "to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of," any such efforts by the ICC or any person designated under the EO, and to persons determined "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 EO.

The EO also suspends entry into the U.S. of any person designated under the EO and their immediate family, as well as aliens determined to be employed by or acting as agents of the ICC.

Executive orders imposing new sanctions programs often are accompanied by an annex identifying initial targets that are subject to the sanctions imposed by the order. This order does not do so, and so it remains to be seen when and if the U.S. government will use the authorities established by the EO.

Commentary

U.S. relations with the ICC have long been fraught, but this action represents a serious escalation. This appears to be the first time that the U.S. has authorized sanctions against an international organization.

In practical terms, the scope of the authority to designate persons 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" has the potential to reach well beyond ICC employees and agents, and potentially to include third parties that cooperate with such investigations.

Furthermore, because the ICC authorized investigation into "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," persons who directly engage in the ICC's investigation not only in Afghanistan but also in other states parties to the Rome Statute may face risk of designation, in particular in Poland, Romania and Lithuania.

Because no one has yet been designated, the EO may be intended as a warning to deter the ICC and others who might cooperate in an investigation. Whether it has that effect remains to be seen.

At the same time, this move by the U.S. could become another point of contention for the EU and its member states, which have been increasingly frustrated with U.S. sanctions policy, in particular the current administration's unilateral withdrawal from the Joint Comprehensive Plan of Action with respect to Iran's nuclear program.

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[1] https://www.treasury.gov/resource-center/sanctions/Programs/Documents/20200611_eo_iccp.pdf.

[2] https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF.

[3] <https://www.lawfareblog.com/national-security-adviser-john-bolton-remarks-federalist-society>.

[4] <https://www.state.gov/u-s-policy-on-the-international-criminal-court-remains-unchanged/>.

[5] <https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html>.

[6] https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF.

[7] https://www.icc-cpi.int/CourtRecords/CR2020_01537.PDF.