

USA: Attack on the International Criminal Court – The Trump Years

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By: Rhiannon Vader-Rikhof

The International Criminal Court (ICC) is an independent court whose sole purpose and responsibility is to participate "…in a global fight to end impunity, and through international criminal justice, the Court aims to hold those responsible accountable for their crimes." This responsibility has been under threat by the United States for many years, but has recently, during the four years of the Trump presidency, become increasingly aggressive and outright dangerous. The international community should be gravely concerned by the threats made and recent sanctions imposed by the United States (US) against the International Criminal Court, its personnel and those cooperating with the Court.

This article aims to detail the history of the building animosity between the ICC and the US, detail the reasons behind the US attacks against the ICC and members of the Court and explain why the international community should be concerned and speak out against any attack on an independent international body such as the ICC.

It should be noted that on April 2, 2021, the recently elected US President Joseph Biden issued and executive order terminating the sanctions against the ICC and their staff but did not revoke any other previous actions that undermines the ICC, such as *The American Servicemembers' Protection Act*. Instead, President Biden stated that the US "…continues to object to the ICC's assertions of jurisdiction over personnel of such non-States Parties as the United States…and will vigorously protect current and former United States personnel from any attempts to exercise such jurisdiction…" showing only minimal progress and a still uncertain future between the ICC and the US.

Factual Background

For many years, the US has been in a complicated, and at varying times, hostile relationship with the ICC. During the Clinton administration, it first appeared as though the US and the ICC would be able to work together to further the aims of the Rome Statute and the ICC. At the Rome Conference, held in 1998 to establish the ICC, the American delegate voted in favour of the adoption of the Rome Statute and the Clinton administration signed the treaty on 31 December 2000. However, President Clinton, in his *Statement on the Rome Treaty on the International Criminal Court* showed his reservations about the ICC and stated that he would "…not and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied." Once the Bush administration came into power, there was a change in views and the US became openly hostile towards the Court. In 2002, the Bush administration decided to withdraw their support through the "un-signing" of the Rome Statute and indicating that they did not intend to become a party to the treaty. After their withdrawal, the Bush administration took a number of steps to undermine the authority of the ICC, including:

"…the negotiation of more than 100 treaties…with states that would prevent the surrender of any US national to the court; pressuring the Security Council to immunize US peacekeepers from the ICC's jurisdiction and passing…the "Hague Invasion Act"…which authorized the use of military force to rescue any Americans who are in the ICC's custody." (see: Robert J Currie and Dr. Joseph Rikhof, *International and Transnational Criminal Law, Third Edition*, Irwin Law Inc. 2020, p.219)

Over the next few years, the American view of the Court seemed to soften and in 2005 the US refrained from vetoing the referral of the situation in Darfur by the United Nations Security Council to the Court. The same situation occurred in 2011 with the referral to the Prosecutor of the ICC by the UN Security Council when there was grave concern over the situation in the Libyan Arab Jamahiriya with violence and use of force being used against civilians. The Bush administration in 2006 even went so far as to recognize the importance of the ICC to international criminal justice. Then, when the Obama administration took over, there were signs that the US and the ICC could work together in

cooperation, two examples being the large US delegation that attended the first ICC Review Conference in Kampala in 2010 and the $5 million the Obama administration made available for information leading to the arrests of fugitives. (see: Robert J Currie and Dr. Joseph Rikhof, *International and Transnational Criminal Law, Third Edition*, Irwin Law Inc. 2020, p.219) However, when the Trump administration took over, the situation deteriorated rapidly, especially as a result of the decision by the ICC prosecutor to investigate the situation in Afghanistan which implicates US military personnel.

The most current sanctions and threats by the US against the ICC, its personnel and those cooperating with the Court, are in response to the request made in November 2017 of the ICC Office of the Prosecutor (OTP) for authorization from the ICC Pre-Trial chamber to proceed with an investigation of the Situation in Afghanistan as of 1 July 2002. As a result of the OTP's preliminary examination, which began in 2006, the OTP reported having a reasonable basis to believe that the crimes of torture, war crimes, outrages upon personal dignity and rape and other forms of sexual violence, by members of the US armed forces on the territory of Afghanistan and members of the CIA in secret detention facilities did occur. On 5 March 2020, the Appeals Chamber of the ICC decided to authorise the Prosecutor to commence an investigation into alleged crimes under the jurisdiction of the Court in relation to the Situation in Afghanistan, after the Pre-Trial Chamber II initially had refused to allow the investigation.

Threats over the investigation into alleged crimes in Afghanistan were first made by the US Secretary of State Mike Pompeo and then US National Security Advisor John Bolton against the ICC on 10 September 2018. Mr. Bolton made explicit threats against ICC judges, prosecutors and personnel if they investigated war crimes alleged to have been committed by US military or intelligence personnel in Afghanistan, or war crimes allegedly committed by Israeli forces or other US allies. Mr. Bolton then threatened any countries that cooperated with the ICC investigations of the US and its allies with potential withholding of foreign assistance, military and intelligence assistance. Following those threats and statements, on 15 March 2019, Mr. Pompeo announced a policy to deny and revoke US visas for ICC personnel who investigate suspected crimes committed by US nationals. The very next month, on 4 April 2019, the US revoked the entry visa of the chief Prosecutor of the International Criminal Court, Ms. Fatou Bensouda. On 25 September 2019, US President Donald J. Trump stated in the UN General Assembly that the ICC had "…no jurisdiction, no legitimacy and no authority."

More recently, on 11 June 2020, the US announced new measures, pursuant to the US Executive Order 13928, which include possible suspension of entry into the US of ICC officials, employees and agents, as well as their immediate family members, and the freezing of all property and interests of ICC officials, employees and agents that are in the US, that come within the US or come within the possession or control of any US person. The ICC called the sanctions by the US as "another attempt to interfere with the Court's judicial and prosecutorial independence and crucial work to address grave crimes of concern to the international community as mandated under the ICC Rome Statute" and "an escalation and an unacceptable attempt to interfere with the rule of law and the Court's judicial

proceedings."

The ICC also stated that the new sanctions imposed by the US on 11 June 2020 represented "the latest in a series of unprecedented attacks on the ICC, an independent international judicial institution, as well as on the Rome Statute system of international criminal justice, which reflects the commitment and cooperation of the ICC's 123 State Parties" and that the attacks "constitute an escalation and an unacceptable attempt to interfere with the rule of law and the Court's judicial proceedings. They are announced 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." In support of the ICC after the announcement of the new sanctions in June 2020, 67 member countries, including key US allies and Canada, issued a joint cross-regional statement expressing their unwavering support for the Court. In the same month, 175 legal scholars, jurists and lawyers with experience in international law and national security urged the Trump administration to rescind the executive order and stated that the sanctions were "…wrong in principle, contrary to American values, and prejudicial to U.S. national security." Then, in October 2020, as a further rebuke, the Open Society Justice Initiative and four law professors, who had all had previous experience with the ICC and assisted ICC prosecutors in the past, filed a lawsuit seeking "…a declaration from the U.S. federal court that the Executive Order and its implementing Regulations violate the U.S. Constitution and statutory law." On 5 January 2021, a federal district judge in the Southern District of New York granted a preliminary injunction on the basis that the plaintiffs were likely to succeed on the merits of part of their claim, while on 2 April 2021, the Biden administration ended the sanctions. However, the Biden administration still continues to strongly disagree with the ICC's investigation into Afghanistan. The actions of the Biden administration show progress, but it is not enough to address the issue of external pressure or threats that were made in an attempt to undermine the independence of the court. As stated by the Guardian newspaper by 30 prominent European politicians on May 31 2021, the ICC is a vital part of the rules-based international order and the US and the Biden administration must work on "…strengthening international justice institutions and norms…" and failure to act could have serious consequences.

Analysis

As stated in the Rome Statute, Article 1, the ICC shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern. The Pre-Trial Chamber II Decision concerning the request made by the Prosecutor in 2017 over alleged crimes in Afghanistan expanded upon this statement in paragraph 34 and wrote that the ICC has a mandate to end impunity and prevent mass atrocities with the view to achieving peace, security and the wellbeing of the people. Frivolous, ungrounded and otherwise inconclusive investigations would infringe on fundamental individual rights without serving the interests of justice or the universal values underlying the Statute and are not the function of the Court.

As seen above, the US has long opposed the ICC and claims that the ICC has no jurisdiction or authority to investigate and try nationals of the US since they are not parties to the Rome Statute and the ICC. The position of the US is based primarily on the customary international law principle that a

“treaty does not create either obligations or rights for a third State without its consent.” The US has declined to accede to the Rome Statute, and is thus considered a third State. The US asserts that, not being a party to the Rome Statute, the US is free of any obligations set forth in Rome Statute, as well as “any organ created by the treaty.”

The Rome Statute has a few Articles that deal with the issue of third States and the jurisdiction of the Court. One of these is Article 13, which says that it may be exercised by the Court if ”…b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initialized an investigation in respect of such a crime in accordance with article 15.” Article 13 has previously been relied upon by the ICC to investigate other non-State parties, such as Sudan.

However, in the case of Afghanistan the Office of the Prosecutor in 2017 relied upon another section of the Rome Statute, namely Article 12(2)(a) “…which provides that the Court may exercise its jurisdiction over crimes referred to in article 5 if the “State on the territory of which the conduct in question occurred” is a Party to the Statute or has accepted the Court’s jurisdiction..” Article 12(2)(a) has also been used by the ICC when investigating the displacement of the Rohingya population from Myanmar to Bangladesh.

Afghanistan is a State Party and thus, according to the ICC, the Court may exercise jurisdiction over all alleged crimes committed on Afghan territory since 1 May 2003. In the request, the OTP further explains in paragraph 45 how they have jurisdiction over non-States parties:

“The Rome Statute is not unique among treaty regimes in envisaging the exercise of criminal jurisdiction by a party to a treaty over the nationals of another State….Those treaty regimes do not exclude nationals of States that are not parties to the relevant treaty. Indeed, such crimes attract universal opprobrium and thus demand repression by each of the members of the international community on behalf of the whole.”

Stated more plainly in the paper written by Chile Eboe-Osuji, President of the ICC, *US Founders respected International Law*, membership of a State to the Rome Statute:

“…imports for the country concerned the complementary regime of the Rome Statute as an applicable regime of jurisdiction within that territory. That being the case, even Americans within that territory are bound by that regime of jurisdiction. The United States Supreme Court said so in terms in *Neely v Henkel*,180 US 109 (1901) [US Supreme Court], subject to any applicable treaty regime between that country and the United States.”

As stated in the case of Neely, on page 180 U.S. 123, where the appellant was a US national: “…such citizenship does not give him an immunity to commit crime in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled.” Thus, as Judge Eboe-Osuji points out, it

would not follow common sense to suggest it improper to investigate or prosecute an American citizen for a crime they allegedly committed in the territory of a foreign State since that would also suggest it would be improper for the US to investigate and prosecute foreign individuals or persons who are suspected of committing crimes within the US.

On 12 April 2019, the Pre-Trial Chamber II of the ICC decided to reject the Prosecutor's Request to investigate alleged crimes in Afghanistan, not because the relevant requirements as regards to both jurisdiction and admissibility were not met, but because an investigation would not serve the interests of justice, though this was later overturned by the Appeals Chamber. In the Decision, the Pre-Trial Chamber II stated that, as laid out above, the "…conduct that have allegedly occurred in full or in part on the territory of Afghanistan or of other State Parties fall under the Court's jurisdiction, irrespective of the nationality of the offender." In addition, the Court clarified that:

"…as to the Agreement of 30 September 2014 between the United States and Afghanistan pursuant to article 98, requiring the consent of a sending State to surrender a national of that State to the Court, the Chamber concurs with the Prosecution that the agreements entered into pursuant to article 98(2) of Statute do not deprive the Court of its jurisdiction over persons covered by such agreements…Indeed, the very purpose of article 98 is to regulate how the Court's exercise of jurisdiction should be enforced." (for more details, see *Afghanistan Investigation Gets the Green Light from the Appeals Chamber of the International Criminal Court.*)

Therefore, as indicated by Judge Eboe-Osuji, if a territorial State or the State of nationality of the suspect is unwilling or unable to investigate a crime, the jurisdiction of the ICC is engaged, as a court of last resort. Thus, the ICC is following its mandate as stated in the Rome Statute by attempting to investigate alleged crimes committed by the US in Afghanistan seeing as the US refuses to investigate nor cooperate; or in the case of President Trump, undermining and overruling the military justice system by pardoning two Army officers accused of war crimes in Afghanistan against the wishes of former Chair of the Joint Chiefs of Staff General Martin Dempsey.

Conclusion

As already stated, the purpose of the ICC is to prosecute the most serious international crimes, including war crimes, crimes against humanity and genocide. The duty to prevent and enforce accountability for these grave crimes is a customary international obligation owed by all States. The actions of the US against the ICC interfere with the independence and effectiveness of the ICC's judiciary as well as impacts the ability of lawyers and investigators to carry out their duties, whether as personnel of the Court or those who engage with the Court. According to the Rome Statute Articles 42 and 54(1)(a) and (b), the Office of the Prosecutor must act independently when conducting investigations and prosecutions before the Court. In order to fulfil that mandate, it is required that the Prosecutor be able to pursue all relevant facts and evidence and be able to effectively investigate and prosecute alleged crimes.

The threats and sanctions against the Court and its personnel is not only shameful as sanctions are typically employed against corrupt regimes which have engaged in serious human rights abuses, not independent courts, but could significantly impact the Prosecutor's ability, and that of the Court, to carry out their necessary functions as dictated by the Rome Statute. In addition, the US threats and sanctions could have future repercussions as it could have an effect on the willingness of the OTP to initiate investigations, examinations and prosecutions against other countries, especially those countries that are politically powerful and might follow the US example. Finally, if the US is so deeply concerned over the jurisdiction of the Court, the easiest solution would be if the US itself committed to investigate those persons and organizations that allegedly committed these heinous crimes, thus depriving the Court of their jurisdiction. Such investigations have occurred before, such as with the UK and would not unprecedented. (see: Robert J Currie and Dr. Joseph Rikhof, International and Transnational Criminal Law, Third Edition, Irwin Law Inc. 2020, p.219) The unwillingness of the US to contemplate investigating their own people and organizations raises the question whether the US was even interested under the Trump administration in pursuing its own potential war criminals or in seeking justice.

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