

U.S. Sanctions on ICC – Israel focus

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By: Maria Reisdorf

Introduction

On 11 June 2020, then-U.S. President Donald J. Trump signed an Executive Order threatening to freeze the assets and suspend travel visas of foreign persons who "directly engaged in any effort" to assist the International Criminal Court (ICC) in their examinations of U.S. personnel or their non-consenting allies, and anyone who has "materially assisted, sponsored, or provided financial, material or technological support" to the ICC. Authorizing the use of these sanctions, Trump declared the situation a "national emergency", calling the court a "threat" to the United States. A more detailed description of the U.S.'s concerns with the investigation into Afghanistan, and why the ICC does have jurisdiction into the situation, can be found here.

As predicted, the Biden administration lifted the sanctions on ICC staff in April 2021, stating that their concerns should be addressed through engagement with stakeholders rather than through sanctions. Despite revoking the Executive Order, the sanctions may have created lasting damage for the ICC and international legal order, and thus dangerously affect victims of atrocity crimes.

Background

In September 2020, U.S. Secretary of State Mike Pompeo announced that the U.S. had sanctioned two ICC officials: Chief Prosecutor Fatou Bensouda, and the Head of Jurisdiction, Complementary, and Cooperation Division Phakiso Mochochoko. In the press conference announcement, Pompeo stated that "[i]ndividuals and entities that continue to materially support those individuals [Bensouda and Mochochoko] risk exposure to sanctions as well", and that the State Department had restricted the issuance of visas for certain individuals involved in these efforts.

It was widely believed that the U.S. sanctions were in response to the ICC's investigations into both the situations of Afghanistan and Palestine. The U.S.' argument comes down to the idea that these alleged perpetrators should only be prosecuted by a non-state party's national courts. As one of these non-state parties, the U.S. refuses to subject its personnel to the same standards of international justice applicable to others; it does not want its own leaders held to a universal standard of respecting human rights and criminal justice. But the ICC operates on the principle of complementarity under article 17 of the Rome Statute and it can only investigate situations in which a state is unwilling or unable to do so themselves. States still have the primary responsibility to prosecute violators themselves. The ICC exerts its jurisdiction only where national judicial systems fail to adequately investigate and prosecute perpetrators.

The U.S. claims that they have conducted several investigations into U.S. military action in Afghanistan, however, many in the international legal community do not recognize these investigation as true attempts at justice. In 2009, the U.S. Department of Justice investigated 101 cases of alleged detainee abuse by the CIA, but never brought any charges related to these cases. In 2014, the U.S. Senate Intelligence Committee released a damning report. The report was a summary of a classified 6,700 page report that detailed the CIA's detention and interrogation scheme, and found that the CIA had covered up its crimes, made false statements to the Justice Department, and that the interrogation techniques used in Afghanistan were much worse – more brutal and widespread – than initially reported. The Report also rebuked the CIA's long-held defense that they believed their "enhanced interrogation techniques" were lawful due to legal opinions from the Justice Department. The Report found that the CIA knew that the techniques approved in the Torture Memos violated international laws.

In a 2015 submission to the UN High Commissioner for Human Rights as part of their Universal Periodic Review, the State Department claimed that it "has conducted thousands of investigations and prosecuted or disciplined hundreds of service members for mistreatment of detainees and other related misconduct since 2001". Yet this information has not been made public and cannot be

corroborated. As such, it seems that despite these ‘investigations’, the U.S. remains unwilling to provide true investigations, prosecutions or adjudication of these alleged atrocity crimes. Thus, for many victims, proceedings before the ICC may be the only and last attempts at justice available.

Impact on Victims

In November 2017, the ICC Office of the Prosecutor (OTP), led by Prosecutor Fatou Bensouda, submitted a request for authorization from the ICC Pre-Trial Chamber to approve launching an inquiry into war crimes and crimes against humanity committed in Afghanistan that included some allegations against Americans. Already, then-U.S. National Security Adviser John Bolton had threatened to place sanctions on the ICC if the Court continued in its investigation of U.S. personnel. The sanctions would impact victims in an obvious way by attempting to pressure the Court into withdrawing its investigations. On top of this, despite the ICC’s commitment not to end their examinations due to this international pressure, the sanctions could still impact victims more insidiously by pressuring them not to come forward with their testimony.

Many human rights groups had criticized the Executive Order as overly broad, vague and putting researchers at risk (Bruce Zagaris, "Int'l Criminal Court and U.S. Sanctions" (2020) 36 Intl Enforcement L Reporter 210, 210). The broad wording of the U.S. announcement suggested that sanctions could have also been placed on any victims or witnesses who assisted the Court. Sanctions may prevent victims from coming forward, creating another barrier in ending impunity. These types of sanctions force the ICC to confront the delicate balance between its core mandate of prosecuting individuals for atrocity crimes and its obligations to protect victims and further their interests.

Despite reversing the Executive Order, the sanctions may still have a negative impact on victims as a precedent for the assertion that a non-state party should be able to commit atrocity crimes within the territory of any of the 123 parties to the Rome Statute without being held accountable before the ICC. When lifting the sanctions in April 2021, Secretary of State Antony Blinken made clear that the Biden Administration “continue[s] to disagree strongly with the ICC’s actions relating to the Afghanistan and Palestinian situations” and “maintains our longstanding objection to the Court’s efforts to assert jurisdiction over personnel of non-States Parties such as the United States and Israel”. Yet the importance of the US position may strengthen the precedent set for other states wanting to shield their citizens to make similar arguments - that they should not be held responsible by the ICC for their international crimes either.

Several states could follow suit. Myanmar has argued already that the ICC cannot continue its investigation into the Rohingya crisis as Myanmar is not a State Party. In September 2018, Pre-Trial Chamber I held that the forcible transfer of Rohingya into Bangladesh’s territory gives them jurisdiction to investigate, as Bangladesh is a State Party.

To the same end, some States have withdrawn their membership in a bid to prevent an ICC investigation from proceeding, as an ICC investigation impacts negatively on state governments.

Burundi withdrew its membership to the ICC in October 2017 when the prosecutor signaled her intention to investigate human rights abuses being perpetrated by government forces. Similarly in 2019, the Philippines withdrew from the ICC after the Court launched an inquiry into the government's war on drugs. The ICC has stated that it has jurisdiction over crimes that were committed in Burundi and the Philippines while they were still signatories to the Rome Statute.

Russia, also not a State Party, has claimed the ICC must end its preliminary examination into atrocity crimes commit by Russian personnel in eastern Ukraine. Russia withdrew its signature from the Rome Statute on 16 November 2016 as an attempt to prevent ICC scrutiny of its military activities on Ukrainian territory, despite Ukraine accepting the jurisdiction of the Court. Notwithstanding the U.S.' suggestion that Russia might be manipulating the ICC, Russia, and the other countries mentioned above, could adopt a similar strategy to the U.S.' former policy, adding even more financial and travel restrictions to those living in conflict zones, which could create extremely difficult living situations for any victims of these atrocity crimes turning to the ICC for justice.

Example: Situation in the State of Palestine

A helpful example where a state making similar arguments and pronouncements as the U.S. could further harm victims of atrocity crimes is the Situation in the State of Palestine. Israel has similarly long held that the ICC has no authority to investigate them, and earlier this year, asked the U.S. not to lift the sanctions imposed on the ICC. On 9 March 2021, the ICC sent letters to the parties concerned that they would be investigating the Israeli military, Hamas, and Palestinian armed groups as possible perpetrators of war crimes. The ICC's examination into the 2014 Gaza War and settlements in the West Bank is a good example of where imposing sanctions would harm victims and may prevent them from coming before the ICC for three primary reasons.

First of all, it is a realistic possibility that Israel would impose similar legislation to the Order allowing it to impose sanctions on officers of the ICC and those who cooperate with them. The U.S. sanctions were largely in response to this investigation. The Trump administration was one of Israel's greatest allies in criticizing the ICC. Pompeo called a proposed ICC investigation into Israeli security forces in the West Bank and Gaza Strip a "mockery of justice". Trump promoted the U.S.' decades long argument that the ICC has "no jurisdiction, no legitimacy and no authority" over the nationals of states that have not signed onto the Rome Statute, particularly the U.S. and Israel.

Echoing Pompeo's words that opening an investigation into U.S. personnel constitutes "attacking America's rule of law", Israeli Prime Minister Benjamin Netanyahu claimed the investigation into Israeli crimes means the country is "under attack", going even further to state that the investigation is the "essence of anti-Semitism". Netanyahu stated that Israel will not cooperate with the investigation and "completely rejects" that Israel has carried out any war crimes. Similar to the U.S.' argument that they have already conducted investigations into their military action in Afghanistan, Netanyahu stated that "Israel is a country with rule of law that knows how to investigate itself".

After the recent conflict escalations in May 2021 that included hundreds of Israeli airstrikes, civilian casualties, and international condemnation, Israel maintained their stance that they have not violated any international laws as they were responding in defence to attacks from Gaza.

Maintaining the claim that the ICC cannot investigate Israel because it has no jurisdiction and because Israel has not violated any international laws and stating that Israel would not cooperate with the investigation, suggests that Israel may further use tools and policies in attempts to prevent international investigations.

Secondly, the ICC does have jurisdiction to investigate the Israel/Palestine situation in the same way it has jurisdiction over the Afghanistan situation. Article 12(2)(a) of the Rome Statute provides "that the Court may exercise its jurisdiction over crimes referred to in article 5 if the "State on the territory or which the conduct in question occurred" is a Party to the Statute or has accepted the Court's jurisdiction". Thus, just as the ICC may exercise jurisdiction over U.S. nationals who allegedly commit atrocity crimes in Afghanistan, the ICC may exercise jurisdiction over Israeli nationals who allegedly commit atrocity crimes in the Occupied Palestinian Territory. In February 2021, the Pre-Trial Chamber determined that an investigation can commence as Palestine is a State Party to the ICC, and that the Court's territorial jurisdiction extends to areas under Israeli occupation (Gaza and the West Bank).

Thirdly, the Israel/Palestine situation is a good example of where sanctions would have harmful effects on victims as imposing these types of sanctions on victims and witnesses who come forward to assist the ICC would likely have devastating effects on Palestinians who already face serious travel and financial restrictions imposed by Israel. Many of the Court's measures that are in place to protect the identity of victims of witnesses would be frustrated by the imposition of further restrictions or sanctions. In many conflict zones, including the forced occupation of Palestine, travel is largely prohibited for Palestinians. If sanctions can be imposed on anyone assisting the ICC, ICC employees may not be allowed to enter regions like Gaza to gather information from victims and witnesses. While securing confidential access to victims and witnesses is often incredibly challenging, it will become even more difficult if those having to protect these victims' identities must protect their own identities as well for fear of reprisal.

Conclusion

In sum, any sanctions or impediments that copy the U.S.' former policy could negatively affect an ICC investigation and hinder international justice. The idea that the ICC should fall mercy to political superpowers is alarming – the ICC must be able to independently investigate all sides of a situation.

The June Executive Order allows for sanctions against those who speak out against the U.S. or their allies. As such, it follows that those who do not speak out against the US, or those who testify in their favour, would not necessarily be sanctioned. Punishing vulnerable populations for testifying, and rewarding them for not testifying (by not imposing sanctions), abhorrently undermines the rule of law. If other States follow suit – Myanmar, Burundi, the Philippines, Russia, Israel or others – the

international community's ability to hold perpetrators of atrocity crimes accountable may weaken. It is important to note the impacts these types of declarations may have on victims and investigators. If sanctions are a consequence of coming forward, victims may become even more hesitant to speak out against perpetrators of these atrocity crimes.

The U.S.' announcement of sanctions was an abuse of power and an unconscionable act of victim harassment and intimidation. These sanctions attacked the rule of law and international order. The U.S. actions attempted to inappropriately interfere with the independence and effectiveness of the Court. The broad wording of the Executive Order put the basic human rights of vulnerable people at further risk.

If the United States is serious about protecting victims and fighting impunity for mass atrocities, it will have to go further than revoking the Executive Order that allowed these sanctions in the first place. If any other countries make similar declarations in the future, the international condemnation must be swift and damning. And the condemnation should be led by the United States.

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About the author

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