

INTRODUCTORY NOTE TO EXECUTIVE ORDER 13928 ON BLOCKING PROPERTY
OF CERTAIN PERSONS ASSOCIATED WITH THE INTERNATIONAL CRIMINAL COURT
BY BETH VAN SCHAACK*
[September 9, 2020]

Introduction

On June 11, 2020, President Donald J. Trump issued Executive Order 13928 Blocking Property of Certain Persons Associated with the International Criminal Court under the authority vested in him by the International Emergency Economic Powers Act (IEEPA) and other federal statutes.¹ Although the Trump Administration had earlier threatened aggressive action against the International Criminal Court (ICC),² the issuance of the E.O. followed a ruling by the ICC Appeals Chamber authorizing the Prosecutor to commence an investigation into the situation in Afghanistan, which might implicate U.S. persons.³ The E.O. declared the ICC's "illegitimate assertion of jurisdiction" over U.S. personnel and the personnel of "certain of its allies" to be "an unusual and extraordinary threat to the national security and foreign policy of the United States" within the meaning of IEEPA. It is a sweeping measure, blocking all property within the United States owned by designated natural or legal person (section 1); barring any contribution or provision of funds, goods, or services to, or for the benefit of, designated persons (section 3), including even the donation of food, clothing, or medicine (section 2). The E.O. also authorized the imposition of certain immigration restrictions, including suspension of entry into the United States of ICC officials and their immediate family members (Section 4).

As first issued, E.O. 13928 was a "naked E.O." in the sense that it was not accompanied by an annex containing the names of sanctioned entities or individuals.⁴ On September 2, 2020, however, Secretary of State Mike Pompeo officially designated two individuals under the E.O.: the ICC's Chief Prosecutor, Gambian jurist Fatou Bensouda, and the head of the Office of the Prosecutor (OTP)'s Jurisdiction, Complementarity, and Cooperation Division, Phakiso Mochochoko of Lesotho.⁵ The pair now appear on the Specially Designated Nationals and Blocked Persons list (SDN), managed by the Department of Treasury's Office of Foreign Assets Control (OFAC).⁶ Technically, Bensouda was sanctioned under §1(a)(i)(A) of the E.O. for having directly engaged in investigations of U.S. personnel; Mochochoko was sanctioned under §1(a)(i)(C) for having materially assisted the Prosecutor in these efforts. Targeting civil servants engaged in prosecuting the worst crimes known to humankind marks an extraordinary application of a tool ordinarily deployed against *génocidaires*, drug kingpins, terrorists, organized crime syndicates, and adversarial regimes; accordingly, the global reaction among U.S. allies, members of Congress, multilateral bodies, and civil society organizations to the issuance of the E.O., and the designation of the two ICC officials, was swift and critical.⁷

Background

Afghanistan ratified the treaty establishing the ICC in 2003. The OTP began to receive submissions from civil society organizations and others about crimes being committed in Afghanistan by all parties, including U.S. forces and personnel who stood accused of committing custodial abuses that rose to the level of war crimes. As has been the practice, the OTP opened a preliminary examination (PE) to explore whether jurisdiction existed, whether the Court's gravity thresholds had been met, whether principles of complementarity suggested the matter would be inadmissible, and whether there were countervailing interests of justice that would counsel against opening a full investigation.⁸

The PE progressed until 2017, when the OTP moved to open a formal investigation. Because the Prosecutor was proceeding *proprio motu* in the absence of a state or Security Council referral, she needed to secure the permission of a Pre-Trial Chamber (PTC) of the ICC.⁹ In its submission, the OTP suggested that it would consider not only custodial abuses by U.S. personnel within Afghanistan, but also abuses committed in so-called "black sites" associated with the armed conflict in Afghanistan and established by the U.S. Central Intelligence Agency on the territory of other ICC member states in Europe (Poland, Romania, and Lithuania).¹⁰ Acts alleged include instances of torture, cruel and humiliating treatment, and sexual violence. The PTC, however, declined to authorize the opening of an

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investigation, reasoning that although the situation was otherwise admissible, any investigation was unlikely to be successful (in part because the cooperation of key states was unlikely to be forthcoming), so the OTP should desist “in the interests of justice.”¹¹

The ruling produced a “storm of criticism,” which covered everything from the PTC’s perceived infringement on prosecutorial discretion and concerns that the judges had caved to U.S. pressure.¹² The Prosecutor appealed, and the Appeals Chamber reversed, reasoning that the PTC had over-stepped its role at this stage of the proceedings.¹³ The OTP can now commence its investigation, which will encompass the entire Afghanistan situation—an enormous crime base spanning almost two decades, including potential crimes committed by the Taliban, other armed groups, Al Qaida and the Islamic State in Iraq and the Levant (ISIL), the Haqqani Network, and Afghan national forces. As such, alleged U.S. custodial abuses constitute only a small component of this wider investigation, albeit a highly salient one.

Significance

It remains to be seen to what extent the issuance of the E.O., and the sanctions thereunder, will meaningfully constrain the OTP as the investigation proceeds. That said, the ramifications for these two individuals, the work of the Court, and the project of international justice writ large are potentially expansive. Appearing on the SDN list has been described as being subject to “civil death,” given the degree to which designated individuals are barred from many ordinary transactions—professional and personal.¹⁴ Other individuals who might interact with SDNs face two distinct risks, depending upon their nationality and presence in the United States. U.S. persons, or those with a U.S. nexus, face potential criminal and civil liability if they provide any sort of “support” (which goes undefined in the law) to designated individuals. Non-U.S. persons risk being designated themselves if they materially assist or provide financial, material, or technological support to an SDN. Given the uncertainty about the outer reach of the E.O., the lack of a firm definition of key terms, and the fear of robust enforcement by the Trump Administration, many civil society organizations and human rights advocates working to advance justice in the whole range of ICC situation countries—including the Central African Republic, Myanmar, Sudan, and the Democratic Republic of Congo—report acute anxiety around continuing their work for fear that they will run afoul of the E.O.¹⁵

For individuals placed on the SDN list, there is little legal recourse. U.S. courts have historically been quite deferential to sanctions determinations. Although Presidents must report and renew their national emergency declarations with Congress, Congress cannot overturn sanctions determinations absent new legislation. U.S. allies are crucial to the enforcement of unilateral sanctions issued by the United States; however, European states have already sought to curtail unilateral sanctions imposed by the Trump Administration in other contexts (e.g., with respect to Iran) in the form of blocking directives and other forms of resistance. Such reactive measures may accelerate in response to this E.O. targeting an international justice institution that European states strongly support. Sanctions experts have also raised concerns that this controversial E.O., coupled with the vast extension of U.S. sanctions authorities by the Trump Administration, will undercut all U.S. sanctions programs, provoke amendments to IEEPA, and accelerate a larger geopolitical trend toward the replacement of the dollar as the world’s reserve currency.¹⁶

ENDNOTES

- 1 85 Fed. Reg. 36139. The E.O. is available at <https://www.whitehouse.gov/presidential-actions/executive-order-blocking-property-certain-persons-associated-international-criminal-court>.
- 2 See *National Security Adviser John Bolton Remarks to Federalist Society*, LAWFARE (Sept. 10, 2018), <https://www.lawfareblog.com/national-security-adviser-john-bolton-remarks-federalist-society>.
- 3 Situation in the Islamic Republic of Afghanistan, Judgement on the Appeal against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17 OA4 (Mar. 5, 2020), https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF.
- 4 See Adam M. Smith, *Dissecting the Executive Order on Int’l Criminal Court Sanctions: Scope, Effectiveness, and Tradeoffs*, JUST SECURITY (June 15, 2000), <https://www.justsecurity.org/70779/dissecting-the-executive-order-on-intl-criminal-court-sanctions-scope-effectiveness-and-tradeoffs/>.
- 5 Dep’t State, Press Briefing, <https://twitter.com/statedept/status/1301157735652831232?s=12>.
- 6 Dep’t Treasury, *Blocking Property of Certain Persons Associated with the International Criminal Court Designations*

- (Sept. 2, 2020), <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20200902>. The full SDN is available at: <https://www.treasury.gov/ofac/downloads/prgrlistmlst.txt>.
- 7 See Beth Van Schaack, *The Int'l Criminal Court Executive Order: Global Reactions Compiled*, JUST SECURITY (Sept. 1, 2020), <https://www.justsecurity.org/72256/the-intl-criminal-court-executive-order-global-reactions-compiled/>.
- 8 Rome Statute of the International Criminal Court art. 53, July 17, 1998, 2187 U.N.T.S. 90.
- 9 *Id.* art. 15(3).
- 10 Situation in the Islamic Republic of Afghanistan, Public Redacted Version of "Request for Authorization of an Investigation Pursuant to Article 15", Case No. ICC-02/17-7-Red (Nov. 20, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF.
- 11 Situation in the Islamic Republic of Afghanistan, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17-33 (Apr. 12, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF.
- 12 Dapo Akande & Talita de Souza Dias, *The ICC Pre-Trial Chamber Decision on the Situation in Afghanistan: A Few Thoughts on the Interests of Justice*, EJIL:TALK! (Apr. 18, 2019), <https://www.ejiltalk.org/the-icc-pre-trial-chamber-decision-on-the-situation-in-afghanistan-a-few-thoughts-on-the-interests-of-justice/>.
- 13 See *supra* note 3.
- 14 Beth Van Schaack, *A Test for the US Posture on the Int'l Criminal Court: "Safe Harbor" Licenses?*, JUST SECURITY (Sept. 4, 2020), <https://www.justsecurity.org/72305/a-test-for-the-us-posture-on-the-intl-criminal-court-safe-harbor-licenses/>.
- 15 See Diane Marie Amann, *I help children in armed conflict. The President is forcing me to stop*. JUST SECURITY (June 29, 2020), <https://www.justsecurity.org/71048/i-help-children-in-armed-conflict-the-president-is-forcing-me-to-stop/>.
- 16 Rob Berschinski, *Trump's ICC EO Will Undercut All U.S. Sanctions Programs—Is That Why Treasury Isn't Conspicuously on Board?*, JUST SECURITY (June 16, 2020), <https://www.justsecurity.org/70796/trumps-icc-co-will-undercut-all-u-s-sanctions-programs-is-that-why-treasury-isnt-conspicuously-on-board>.

EXECUTIVE ORDER 13928 ON BLOCKING PROPERTY OF
CERTAIN PERSONS ASSOCIATED WITH THE INTERNATIONAL
CRIMINAL COURT*
[June 11, 2020]

EXECUTIVE ORDERS
**Executive Order on Blocking Property Of
Certain Persons Associated With The
International Criminal Court**

NATIONAL SECURITY & DEFENSE | Issued on: June 11, 2020



By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.) (NEA), section 212(f) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182 (f)), and section 301 of title 3, United States Code,

I, DONALD J. TRUMP, President of the United States of America, find that the situation with respect to the International Criminal Court (ICC) and its illegitimate assertions of jurisdiction over personnel of the United States and certain of its allies, including the ICC Prosecutor's investigation into actions allegedly committed by United States military, intelligence, and other personnel in or relating to Afghanistan, threatens to subject current and former United States Government and allied officials to harassment, abuse, and possible arrest. These actions on the part of the ICC, in turn, threaten to infringe upon the sovereignty of the United States and impede the critical national security and foreign policy work of United States Government and allied officials, and thereby threaten the national security and foreign policy of the United States. The United States is not a party to the Rome Statute, has never accepted ICC jurisdiction over its personnel, and has consistently rejected ICC assertions of jurisdiction over United States personnel. Furthermore, in 2002, the United States Congress enacted the American Service-Members' Protection Act (22 U.S.C. 7421 et seq.) which rejected the ICC's overbroad, non-consensual assertions of jurisdiction. The United States remains committed to accountability and to the peaceful cultivation of international order, but the ICC and parties to the Rome Statute must respect the decisions of the United States and other countries not to subject their personnel to the ICC's jurisdiction, consistent with their respective sovereign prerogatives. The United States seeks to impose tangible and significant consequences on those responsible for the ICC's transgressions, which may include the suspension of entry into the United States of ICC officials, employees, and agents, as well as their immediate family members. 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 over personnel of the United States and our allies, as well as personnel of countries that are not parties to the Rome Statute or have not otherwise consented to ICC jurisdiction.

I therefore determine that any attempt by the ICC to investigate, arrest, detain, or prosecute any United States personnel without the consent of the United States, or of personnel of countries that are United States allies and who are not parties to the Rome Statute or have not otherwise consented to ICC jurisdiction, constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States, and I hereby declare a national emergency to deal with that threat. I hereby determine and order:

* This text was reproduced and reformatted from the text available the official website of the Trump Administration (visited September 13, 2020), <https://www.whitehouse.gov/presidential-actions/executive-order-blocking-property-certain-persons-associated-international-criminal-court/>.

Section 1. (a) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

(i) any foreign person determined by the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General:

(A) 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;

(B) to have directly engaged in any effort by the ICC to investigate, arrest, detain, or prosecute any personnel of a country that is an ally of the United States without the consent of that country's government;

(C) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any activity described in subsection (a)(i)(A) or (a)(i)(B) of this section or any person whose property and interests in property are blocked pursuant to this order; or

(D) 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 this order.

(b) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted before the date of this order.

Sec. 2. I hereby determine that the making of donations of the types of articles specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to section 1(a) of this order would seriously impair my ability to deal with the national emergency declared in this order, and I hereby prohibit such donations as provided by section 1(a) of this order.

Sec. 3. The prohibitions in section 1(a) of this order include:

(a) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to section 1(a) of this order; and

(b) the receipt of any contribution or provision of funds, goods, or services from any such person.

Sec. 4. The unrestricted immigrant and nonimmigrant entry into the United States of aliens determined to meet one or more of the criteria in section 1(a) of this order, as well as immediate family members of such aliens, or aliens determined by the Secretary of State to be employed by, or acting as an agent of, the ICC, would be detrimental to the interests of the United States, and the entry of such persons into the United States, as immigrants or nonimmigrants, is hereby suspended, except where the Secretary of State determines that the entry of the person into the United States would not be contrary to the interests of the United States, including when the Secretary so determines, based on a recommendation of the Attorney General, that the person's entry would further important United States law enforcement objectives. In exercising this responsibility, the Secretary of State shall consult the Secretary of Homeland Security on matters related to admissibility or inadmissibility within the authority of the Secretary of Homeland Security. Such persons shall be treated as persons covered by section 1 of Proclamation 8693 of July 24, 2011 (Suspension of Entry of Aliens Subject to United Nations Security Council Travel Bans and International Emergency Economic Powers Act Sanctions). The Secretary of State shall have the responsibility for implementing this section pursuant to such conditions and procedures as the Secretary has established or may establish pursuant to Proclamation 8693.

Sec. 5. (a) Any transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this order is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

Sec. 6. Nothing in this order shall prohibit transactions for the conduct of the official business of the Federal Government by employees, grantees, or contractors thereof.

Sec. 7. For the purposes of this order:

(a) the term "person" means an individual or entity;

(b) the term "entity" means a government or instrumentality of such government, partnership, association, trust, joint venture, corporation, group, subgroup, or other organization, including an international organization;

(c) the term “United States person” means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States;

(d) the term “United States personnel” means 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;

(e) the term “personnel of a country that is an ally of the United States” means any current or former military personnel, current or former elected or appointed official, or other person currently or formerly employed by or working on behalf of a government of a North Atlantic Treaty Organization (NATO) member country or a “major non-NATO ally”, as that term is defined by section 2013(7) of the American Service-Members’ Protection Act (22 U.S.C. 7432 (7)); and

(f) the term “immediate family member” means spouses and children.

Sec. 8. For those persons whose property and interests in property are blocked pursuant to this order who might have a constitutional presence in the United States, I find that because of the ability to transfer funds or other assets instantaneously, prior notice to such persons of measures to be taken pursuant to section 1 of this order would render those measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in this order, there need be no prior notice of a listing or determination made pursuant to section 1 of this order.

Sec. 9. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including adopting rules and regulations, and to employ all powers granted to me by IEEPA as may be necessary to implement this order. The Secretary of the Treasury may, consistent with applicable law, redelegate any of these functions within the Department of the Treasury. All departments and agencies of the United States shall take all appropriate measures within their authority to implement this order.

Sec. 10. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to submit recurring and final reports to the Congress on the national emergency declared in this order, consistent with section 401(c) of the NEA (50 U.S.C. 1641(c)) and section 204(c) of IEEPA (50 U.S.C. 1703(c)).

Sec. 11. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

THE WHITE HOUSE,
June 11, 2020.