

# Not court in favour: Trump, the ICC – and international law



**Noura Abughris looks at the imposition of sanctions on the International Criminal Court ('ICC') by the Trump administration and asks: 'Would EU do it?'**

On 11 June 2020, President Donald Trump issued an executive order that authorised economic and travel sanctions against staff members of the International Criminal Court ('ICC'). The executive order was directed to ICC staff members who are involved in investigating the actions of United States personnel and any of its allies, for possible war crimes committed in Afghanistan and elsewhere.

In the executive order, Trump stated that the ICC investigations 'threaten to subject current and former US government and allied officials to harassment, abuse and possible arrest.'<sup>1</sup> He added that such actions by the ICC 'threaten to infringe upon the sovereignty of the United States and impede the critical national security and foreign policy work of the US government and allied officials.'<sup>2</sup> Finally, he asserted that '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 US personnel'.<sup>3</sup>

The executive order would block the financial assets of court employees and prevent them and their immediate relatives from entering the United States.

The language of the order is sufficiently broad that it could, in theory, apply to a victim, a witness, a lawyer or even an academic that cooperates with an ICC investigation or court proceedings.

## International response

Trump's announcement has received mixed responses from the international community. While Israel's prime minister, Benjamin Netanyahu, welcomed the order, the Dutch Minister of Foreign Affairs Stef Blok, the French Foreign Minister Jean-Yves Le Drian and the UK Foreign Secretary Dominic Raab have all expressed their support for the court and its staff members.

The United Nations Human Rights Office also expressed its support for the court, by stating 'the independence of the ICC and its ability to operate without interference must be guaranteed so that it can decide matters without any improper influence, inducement, pressures, threats of interference, direct or indirect, from any quarter or for any reasons'.<sup>4</sup>

Over 174 individuals, including former US war crimes ambassadors and international lawyers working in war crime tribunals, have signed a letter urging the president to rescind the order.



The Hague-based ICC investigates and tries individuals charged with the most serious crimes committed in the international community

## Could the same thing happen in the European Union?

Like the United States, the European Union has its own sanctions regime. EU sanction measures are designed to support specific EU Common Foreign and Security Policy objectives and/or UN Security Council Resolutions.

EU law sanction decisions are prepared by the European External Action Service and agreed by the Council of the European Union. They may target governments, non-state entities and even individuals. They may come in many forms, including arms embargoes, financial restrictions, trade restrictions, or visa or travel bans.

While it is very unlikely the EU would sanction ICC staff members (indeed, upon Trump's signing of the executive order, the EU expressed 'grave concern about the announced measures'<sup>5</sup> and urged 'the US to reverse its position'),<sup>6</sup> it is not unimaginable that the EU could announce similar measures against individuals working in a court in a third country. Indeed, in 2012, 14 Belarusian judges were included on a list of EU restrictive measures announced in response to elections 'inconsistent with international standards'.<sup>7</sup>

However, the credibility

of the EU sanctions regime lies in its compliance with the rule of law, its legality and the ability of restrictive measures to be challenged in a court of law. For example, the EU has an overriding obligation to protect human rights. Such an obligation is laid out in the EU Charter of Fundamental Rights and the European Convention

**THE ICC'S JURISDICTION REMAINS A CONTROVERSIAL TOPIC FOR MANY ACADEMICS, LAWYERS AND GOVERNMENTS AROUND THE WORLD.**

for the Protection of Human Rights and Fundamental Freedoms ('ECHR'). Restrictive measures that encroach on individuals' human rights can therefore be challenged at the Court of Justice of the European Union and/or the European Court of Human Rights.

A blanket ban imposed on any individual for being affiliated with a court or participating in legal proceedings, would likely be deemed disproportionate by the European courts, in

## WHAT IS THE ICC?

The International Criminal Court ('ICC') is an international court based in The Hague. It investigates and tries individuals charged with the most serious crimes committed in the international community: genocide, war crimes, crimes against humanity and the crime of aggression. It was set up in 2002 under the auspices of the Rome Statute, a multilateral treaty that serves as the court's governing document. To date, the ICC has 123 member states, including Afghanistan. However, the United States is not a member of the court or a party to the Rome Statute.

particular as the ban extends to direct family members. In such circumstances, Article 263 of the Treaty on the Functioning of the European Union, which deals specifically with judicial review of EU acts, would likely

be invoked to challenge such measures.

The imposition of sanctions on individuals based solely on their employment by a court would likely be deemed a disproportionate violation

of a multitude of fundamental human rights, including the right to security and liberty (Article 5 ECHR), the right to fair trial (Article 6 ECHR), the right to seek employment (Article 8 ECHR) and the right to protection of property (Article 1 of Protocol 1 ECHR).

Hence, within an EU law context, any move by the EU to impose sanctions similar to those ordered by Trump would likely be deemed unlawful and annulled by the EU courts.

**Conclusion**

Economic sanctions remain one of the US’s most powerful foreign policy tools. There is no doubt that Trump’s decision is, if in keeping with his disdain for multilateral institutions, unusual and could potentially

introduce a precedent for the imposition of similar measures against other organisations.

While highly contentious, there are some that agree with Trump’s actions: the ICC’s jurisdiction remains a controversial topic for many academics, lawyers and governments around the world. However, the divisive nature of the executive orders highlights the difficult interplay created between pursuing state sovereignty through the use of economic sanctions and protecting individual human rights.

Noura Abughris is a solicitor at the law firm Carter-Ruck.  
WWW.CARTER-RUCK.COM

**LINKS AND NOTES**

- 1 [www.whitehouse.gov/presidential-actions/executive-order-blocking-property-certain-persons-associated-international-criminal-court](http://www.whitehouse.gov/presidential-actions/executive-order-blocking-property-certain-persons-associated-international-criminal-court)
- 2 Ibid.
- 3 Ibid.
- 4 [www.reuters.com/article/us-warcrimes-afghanistan-trump-un-idUSKBN23J1JB](http://www.reuters.com/article/us-warcrimes-afghanistan-trump-un-idUSKBN23J1JB)
- 5 [https://eeas.europa.eu/headquarters/headquarters-homepage/80954/international-criminal-justice-statement-high-representative-following-us-decision-possible\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/80954/international-criminal-justice-statement-high-representative-following-us-decision-possible_en)
- 6 Ibid.
- 7 The judges were included for meting out sentences to political activists, and acts such as protesting against vote rigging. In 2016, the EU suspended the Belarus restrictive measures in recognition of the Belarus government’s role in the negotiation of the Minsk Accords, which meant lifting sanctions against 169 individuals (including the judges).

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