

On August 6, Trump reimposed a 10 percent tariff on certain aluminum products imported from Canada.¹⁷ Trump stated that the 2019 understanding reached with Canada lifting the prior tariffs had sought to “avoid import surges” but that, in the year immediately following this agreement, imports on these aluminum products “increased 87 percent compared to the prior twelve-month period and exceeded the volume of any full calendar year in the previous decade.”¹⁸ Canada’s Deputy Prime Minister Chrystia Freeland responded by describing these tariffs as “unwarranted and unacceptable,” noting that “[i]n the time of a global pandemic and an economic crisis, the last thing Canadian and American workers need is new tariffs.”¹⁹ She stated that “with the new NAFTA having come into force on July 1st, now is the time to advance North American economic competitiveness—not hinder it,” and promised that Canada would “swiftly impose dollar-for-dollar countermeasures.”²⁰

INTERNATIONAL CRIMINAL LAW

President Trump Authorizes Economic Sanctions and Visa Restrictions Aimed at International Criminal Court

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In the spring of 2020, the Appeals Chamber of the International Criminal Court (ICC) authorized the ICC’s prosecutor to investigate alleged international crimes committed in Afghanistan. The Trump administration strongly condemned this decision. In an escalation of retaliatory measures against the ICC, President Trump signed an executive order authorizing economic sanctions against foreign persons involved in the investigation and visa restrictions against those persons and their immediate family members. The ICC described these actions as a threat to the rule of law.

On April 12, 2019, a Pre-Trial Chamber of the ICC declined to authorize the prosecutor to conduct an investigation into alleged international crimes committed in Afghanistan, reasoning that such an investigation would not advance the interests of justice.¹ On March 5,

¹⁷ Donald J. Trump, Proclamation 10060—Adjusting Imports of Aluminum into the United States, 2020 DAILY COMP. PRES. DOC. NO. 578 (Aug. 6) [hereinafter Proclamation on Aluminum Tariffs] (providing for this tariff, effective August 16, on non-alloyed unwrought aluminum articles, which “accounted for 59 percent of total aluminum imports from Canada during June 2019 through May 2020”).

¹⁸ *Id.*, paras. 3, 6; but see Amanda Coletta & Jeanne Whalen, *Canada Condemns “Entirely Unacceptable” U.S. Tariffs, Pledges to Retaliate with Levies on \$2.7 Billion of Goods*, WASH. POST (Aug. 7, 2020), at https://www.washingtonpost.com/world/the_americas/canada-us-trade-trump-aluminum-tariffs/2020/08/07/793f30ba-d8b0-11ea-a788-2ce86ce81129_story.html (noting that the U.S. Aluminum Association described these numbers as “cherry-picked” as “any increase in imports of non-alloyed aluminum in the first half of 2020 have been offset by a decline in imports of alloyed aluminum, and . . . overall, imports of primary aluminum from Canada are ‘near traditional levels’”).

¹⁹ Office of the Deputy Prime Minister of Canada Press Release, Statement by the Deputy Prime Minister on US Tariffs on Imports of Canadian Aluminum (Aug. 6, 2020), at <https://deputyprime.minister-prime-ministre.gc.ca/en/news/statements/2020/08/06/statement-deputy-prime-minister-us-tariffs-imports-canadian-aluminum>.

²⁰ *Id.*; see also Coletta & Whalen, *supra* note 18 (describing the tariffs that Canada announced it would impose in response).

¹ See Situation in the Islamic Republic of Afghanistan, ICC-02/17-138, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, para. 5

2020, the ICC Appeals Chamber reversed, holding that the Pre-Trial Chamber erred in declining to authorize the investigation.² The Appeals Chamber directly authorized the prosecutor to begin investigations into “alleged crimes committed on the territory of Afghanistan . . . since 1 May 2003, [and] other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties . . . since 1 July 2002.”³ This authorization permits the prosecutor to investigate members of the U.S. armed forces and the U.S. Central Intelligence Agency for alleged crimes committed not only in Afghanistan, but also for alleged related crimes committed in detention centers in Poland, Romania, and Lithuania.⁴

Even before the Appeals Chamber’s decision, the Trump administration had strongly resisted the prospect of an ICC investigation regarding Afghanistan that could encompass alleged crimes committed by U.S. citizens.⁵ In April 2019, the United States revoked ICC Prosecutor Fatou Bensouda’s visa because her request for authorization of an investigation into Afghanistan had described members of the U.S. armed forces and the Central Intelligence Agency as potential perpetrators of war crimes.⁶ When the Pre-Trial Chamber denied the prosecutor’s request in April of 2019, Trump praised the decision as a “major international victory . . . for the rule of law,” but also warned that “[a]ny attempt to target American, Israeli, or allied personnel for prosecution will be met with a swift and vigorous response.”⁷

In the months following the decision of the Appeals Chamber, Trump administration officials reacted angrily to the prospect of U.S. personnel being investigated by the ICC. Secretary of State Mike Pompeo asserted that “we will not stand by as our people are threatened by a kangaroo court.”⁸ He also accused the ICC of being “grossly ineffective and corrupt,” stating that the ICC has operated for eighteen years and secured only four convictions.⁹ Secretary of Defense Mark Esper praised U.S. military personnel and asserted that the United States

(Mar. 5, 2020), available at https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF [<https://perma.cc/L7PZ-V3CT>] (describing the Pre-Trial Chamber’s opinion).

² *Id.*, paras. 19–46 (finding it was error for the Pre-Trial Chamber to deny the prosecutor’s request on the basis that “an investigation would not serve the interests of justice”).

³ *Id.*, para. 79.

⁴ See *id.*, paras. 65–78; see also Situation in the Islamic Republic of Afghanistan, ICC-02/17-7-Conf-Exp, Request for Authorisation of an Investigation Pursuant to Article 15, para. 49 (Nov. 20, 2017), available at <https://www.legal-tools.org/doc/db23eb/pdf> (identifying Poland, Romania, and Lithuania as countries where the CIA operated clandestine sites and subjected militants to acts constituting crimes over which the ICC has jurisdiction).

⁵ See Jean Galbraith, Contemporary Practice of the United States, 113 AJIL 169 (2019) (discussing a 2018 speech by John Bolton, then the U.S. National Security Advisor, criticizing the ICC for attempting to investigate U.S. involvement in Afghanistan).

⁶ See Jean Galbraith, Contemporary Practice of the United States, 113 AJIL 625 (2019).

⁷ Donald J. Trump, Statement on the International Criminal Court’s Decision Not to Authorize an Investigation into the Situation in Afghanistan, 2019 DAILY COMP. PRES. DOC. NO. 224 (Apr. 12).

⁸ U.S. Dep’t of State Press Release, Secretary Michael R. Pompeo at a Press Availability with Secretary of Defense Mark Esper, Attorney General William Barr, and National Security Advisor Robert O’Brien (June 11, 2020), at <https://www.state.gov/secretary-michael-r-pompeo-at-a-press-availability-with-secretary-of-defense-mark-esper-attorney-general-william-barr-and-national-security-advisor-robert-obrien> [<https://perma.cc/H3CA-C2WZ>].

⁹ *Id.*

maintains the right to try its own citizens and that they will never “be subjected to the judgments of unaccountable international bodies.”¹⁰

On June 11, 2020, Trump issued an executive order declaring a national emergency with respect to the ICC’s actions and authorizing economic sanctions and visa restrictions against those involved in conducting investigations against U.S. personnel or against the personnel of a U.S. ally without that ally’s consent.¹¹ The Executive Order authorizes economic sanctions against “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.¹²

Additionally, those persons who fit the above criteria and their immediate family members could also be denied “unrestricted immigrant and nonimmigrant entry into the United States.”¹³

¹⁰ *Id.*

¹¹ Exec. Order No. 13,928, 85 Fed. Reg. 36,139 (June 11, 2020); see also Uzay Yasar Aysev, *Can the International Criminal Court Hold the Trump Administration in Contempt?*, JUST SECURITY (June 30, 2020), at <https://www.justsecurity.org/71498/can-the-international-criminal-court-hold-the-trump-administration-in-contempt> (noting that the reference to U.S. allies is probably meant to refer to Israel, given the ICC investigation into the situation in Palestine). Although Trump authorized sanctions, the executive branch did not immediately specify any persons to whom these sanctions would apply in practice. See 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), at <https://www.justsecurity.org/70796/trumps-icc-EO-will-undercut-all-u-s-sanctions-programs-is-that-why-treasury-isnt-conspicuously-on-board>. On September 2, Trump administration officials announced the imposition of certain sanctions—most notably on Bensouda and on Phakiso Mochochoko, the Director of the Jurisdiction, Complementarity and Cooperation Division within the Office of the Prosecutor. Haley S. Anderson, *Why Them? On the U.S. Sanctions Against Int’l Crim. Court Officials*, JUST SECURITY (Sept. 2, 2020), at <https://www.justsecurity.org/72275/why-them-on-the-u-s-sanctions-against-intl-criminal-court-officials>.

¹² Exec. Order No. 13,928, *supra* note 11. The Executive Order also bans donations and contributions of funds, goods, or services to these individuals. *Id.*; see also David Scheffer, *The Self-Defeating Executive Order Against the International Criminal Court*, JUST SECURITY (June 12, 2020), at <https://www.justsecurity.org/70742/the-self-defeating-executive-order-against-the-international-criminal-court> (considering that the sanctions are so sweeping that even lawyers who file amicus briefs could be targeted).

¹³ Exec. Order No. 13,928, *supra* note 11 (also authorizing the secretary of state to restrict entry of agents of the ICC into the United States if he or she determines this entry to be “detrimental to the interests of the United States”).

Trump invoked the International Emergency Economic Powers Act (IEEPA) in his authorization of economic sanctions.¹⁴ The IEEPA empowers the president to regulate the use of any property within U.S. jurisdiction “in which any foreign country or a national thereof has any interest,”¹⁵ but only when the president does so to address “an unusual and extraordinary threat with respect to which a national emergency has been declared.”¹⁶ When the IEEPA was first enacted in 1977, presidents largely targeted foreign governments and geographical regions.¹⁷ Since then, presidents have increasingly targeted “groups and individual persons . . . engaged in specific activities.”¹⁸ This Executive Order is the first such order invoking the IEEPA to target individuals for their participation in an international organization.¹⁹

In response, the ICC issued a statement “express[ing] profound regret at the announcement of further threats and coercive actions . . . against the Court and its officials.”²⁰ The statement continued:

These are 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, representing all regions of the world.

These 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.

An attack on the ICC also represents an attack against the interests of victims of atrocity crimes, for many of whom the Court represents the last hope for justice.²¹

On the day before the Executive Order issued, ten states parties to the Rome Statute who are presently members of the UN Security Council issued a joint statement reiterating their commitment to the ICC and to preserving its independence.²²

¹⁴ *See id.*

¹⁵ 50 U.S.C. § 1702(a)(1)(B).

¹⁶ *Id.* § 1701(b).

¹⁷ CHRISTOPHER A. CASEY, IAN F. FERGUSSON, DIANNE E. RENNACK & JENNIFER K. ELSEA, CONG. RESEARCH SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 22 (2020), available at <https://fas.org/sgp/crs/natsec/R45618.pdf> [<https://perma.cc/EJ27-SRM6>].

¹⁸ *Id.* at 23.

¹⁹ *See id.* at 16, fig. 1 (documenting every executive order invoking the IEEPA since its enactment).

²⁰ Int’l Criminal Court Press Release, Statement of the International Criminal Court on Recent Measures Announced by the US (June 11, 2020), at <https://www.icc-cpi.int/Pages/item.aspx?name=200611-icc-statement>.

²¹ *Id.*; *see also* Int’l Criminal Court Press Release, ASP President O-Gon Kwon Rejects Measures Taken Against ICC (June 11, 2020), at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1527> [<https://perma.cc/PVS2-8FJD>] (“deeply regret[ting]” the U.S. actions).

²² United Nations, *International Criminal Court Members of the Council on the ICC and Sudan – Virtual Media Stakeout*, YOUTUBE (June 10, 2020), at <https://www.youtube.com/watch?v=FVEKk1hcRhA>. The executive order also drew sharp criticism from commentators. *See, e.g.*, Diane Marie Amann, *I Help Children in Armed Conflict. The President Is Forcing Me to Stop*, JUST SECURITY (June 29, 2020), at <https://www.justsecurity.org/71048/i-help-children-in-armed-conflict-the-president-is-forcing-me-to-stop>; Scheffer, *supra* note 12 (criticizing the U.S. justification for sanctions as “hyperbolically-charged words of scant truth or meaning”); Berschinski, *supra* note 11 (arguing that the executive order will “delegitimize[e]” U.S. sanctions programs).