

(International Criminal Court)) and some of the Court's key officials is an inappropriate, legally questionable move that is more likely to backfire on the United States than advance U.S. (United States) interests. Far more effective mechanisms are available to the United States to address the potential investigation of U.S. (United States) actions in Afghanistan without further undermining the U.S. (United States) commitment to human rights around the globe. While recognizing the shortcomings of the ICC (International Criminal Court), the incoming Biden Administration should quickly lift these sanctions and return to an era of careful, considered, and limited engagement with the Court.

From a War in Afghanistan to U.S. (United States) Sanctions on the ICC (International Criminal Court)

Trump's sanctions on the ICC (International Criminal Court) must be understood against the backdrop of an evolving investigation of crimes, including those by U.S. (United States) citizens, potentially committed in Afghanistan more than a decade ago. In November 2017, nearly fifteen years after those alleged crimes took place, the ICC's (International Criminal Court) Prosecutor, Fatou Bensouda, filed a request with the Pre-Trial Chamber to open an investigation of the situation in Afghanistan, having "determined that there was a reasonable basis to believe" that crimes within the jurisdiction of the Court had been committed by Afghan officials, the Taliban, and U.S. (United States) military and intelligence forces.¹ While the United States is not a party to the *Rome Statute*, (*/rome-statute*) Afghanistan is.² By virtue of the fact that these alleged crimes were committed in Afghanistan, the ICC (International Criminal Court) would have jurisdiction over them.

The ICC (International Criminal Court) Prosecutor's request to open an investigation spotlights the conduct of the U.S. (United States) military and Central Intelligence Agency (CIA (Central Intelligence Agency)) in Afghanistan in the early 2000s.³ At the start of the long war in Afghanistan, acts of torture and related war crimes were committed by the U.S. (United States) military and the CIA (Central Intelligence Agency) at the Bagram Internment Facility and in so-called "black sites" in eastern Europe.⁴ Such actions, even though they were not a standard U.S. (United States) practice and were stopped by an Executive Order from President Obama in 2009,⁵ nonetheless violate basic principles of international humanitarian law. To date, only a few of the direct perpetrators of these abuses have been brought to justice through U.S. (United States) military court martials.⁶ Significantly, U.S. (United States) investigations have not worked their way up the chain of command to hold accountable more senior officials who may have ordered or authorized torture and the targeting of civilians in Afghanistan. As a result, an ICC (International Criminal Court) investigation of Afghanistan could, for the first time, result in an investigation, indictment, and possible prosecution of U.S. (United States) officials.

As a matter of U.S. (United States) law, the Executive Order presents at least two significant problems: the lack of the prerequisite underlying national emergency and an overbroad reach. Trump's sanctions order invoked emergency powers pursuant to the International Emergency Economic Powers Act, the National Emergencies Act, the Immigration and Nationality Act of 1952, and section 301 of Title 3 of the United States Code. Each of these authorities requires a preliminary determination of a national emergency and/or an extraordinary threat to U.S. (United States) national security. Trump's determination that a potential ICC (International Criminal Court) investigation in Afghanistan constitutes a national emergency that poses an "unusual and extraordinary threat to the national security and foreign policy of the United States" is downright pharisaical.



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(International Criminal Court) Executive Order on Day One

Summary

The Biden administration should rescind President Trump's executive order attacking the ICC (International Criminal Court) immediately upon taking office. The new administration will have many urgent action items and it may not be immediately apparent why it should give priority to revoking an order that undermines an institution to which the United States is not a party. This comment explains that the importance of this action extends beyond the illegality of the order and the harm it is causing, to the urgent need to signal that the United States is recommitted to the rule of law. By perverting a tool intended to protect people and deter human rights, and using it instead to attack an institution devoted to those aims, the Trump administration has undermined the rule of law in the United States and expressed its disregard for the global rule of law. When President Trump declared ICC (International Criminal Court) efforts to investigate crimes by U.S. (United States) personnel to be a "national emergency," he abused the discretion afforded presidents to keep the United States safe, essentially placing himself above the rule of law. Moreover, by attacking the judicial independence of the ICC (International Criminal Court), President Trump is seeking to undermine global rule of law. In immediately rescinding the executive order, President Biden will not only undo an illegal action by his predecessor, he will signal to the world a renewed U.S. (United States) commitment to the rule of law.

Argument

Introduction

The Biden administration will have no shortage of urgent tasks on January 20, 2021. President Trump and his allies have wreaked such havoc on U.S. (United States) political, economic, and social systems that it is hard to know where to start seeking to undo the damage. Moreover, the United States, like much of the rest of the world, is under attack by one of the deadliest viruses the world has ever known, which has caused staggering losses of life and shattered the economy. Why then should the new administration focus its attention on an executive order that seeks to undermine the International Criminal Court (ICC (International Criminal Court)), an institution to which the United States is not a party and whose work does not directly affect the lives of most Americans? The answer is not—or not only—that the executive order is an illegal exercise of executive authority that violates the free speech rights and threatens the livelihoods of people who work for global justice. Rather, it is that the executive order symbolizes the Trump administration's disregard for the rule of law within the United States and around the world. As U.S. (United States) Senator Patrick Leahy tweeted:

The Trump Administration's announcement of sanctions against the ICC (International Criminal Court) prosecutor exposes the fallacy of the White House's professed commitment to the rule of law, and will further undermine U.S. (United States) leadership on international justice.¹

Rescinding the executive order will thus signal that the United States intends once again to respect and promote global values, including respect for human rights, fairness, accountability, and judicial independence.

By perverting a tool intended to protect people and deter human rights, and using it instead to attack an institution devoted to those aims, the Trump administration has undermined the rule of law in the United States and expressed its disregard for the global rule of law. When President Trump declared ICC (International Criminal Court) efforts to investigate crimes by U.S. (United States) personnel to be a "national emergency," he abused the discretion afforded presidents to keep the United States safe, essentially placing himself above the rule of law. Moreover, by attacking the judicial independence of the ICC:

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Argument Continued

Background: Executive Orders Under the International Emergency Economic Powers Act

The Trump administration has adopted many policies and engaged in many actions that violate human and civil rights and flout international laws and norms. From unleashing federal law enforcement on peaceful protesters to separating children from their families at the U.S. (United States) border and essentially imprisoning them, there is no shortage of examples of horrifying policy decisions from the past four years. Even in this climate, however, Executive Order 13928 stands out as particularly concerning. The Executive Order perverts a tool intended to protect people and deter human rights abuses, using it instead to attack people who have dedicated their lives to the pursuit of justice for egregious human rights violations, including crimes against humanity and genocide.

The Executive Order was issued pursuant to the International Emergency Economic Powers Act (IEEPA (International Emergency Economic Powers Act)), which Congress enacted to enable the president to take extraordinary action in the face of serious threats to U.S. (United States) national security constituting national emergencies. Since it was enacted in 1977, IEEPA (International Emergency Economic Powers Act) has most often been used to address national emergencies stemming from the policies of foreign governments. For instance, the first such emergency was declared after the hostage taking at the U.S. (United States) embassy in Iran in 1979, and remains in effect today. Over the years, IEEPA (International Emergency Economic Powers Act) emergencies have been declared in several dozen countries, including Afghanistan, Iraq, Libya, and Syria. More recently, IEEPA (International Emergency Economic Powers Act) emergencies have been declared with regard to threats that are not linked to particular territories. These address such threats to U.S. (United States) security as the proliferation of chemical and biological weapons. terrorism.

transnational crime, and malicious cyber-enabled activities.² Additionally, IEEPA (International Emergency Economic Powers Act) has sometimes been invoked in response to serious human rights violations in countries such as Sudan and Venezuela.

Executive Order 13928 “Blocking Property of Certain Persons Associated with the International Criminal Court” is the first time the IEEPA (International Emergency Economic Powers Act) has been used to target an international organization, let alone an organization devoted to preventing serious human rights abuses such as genocide, crimes against humanity, and war crimes. In the Executive Order, President Trump asserted that ICC (International Criminal Court) efforts to investigate or prosecute U.S. (United States) personnel are “an unusual or extraordinary threat to the national security and foreign policy of the United States,” and “declare[d] a national emergency to deal with that threat.”³ To address this asserted threat, the Executive Order authorizes the Secretary of State, in consultation with the Secretary of the Treasury and Attorney General, to designate for sanctions any foreign person who has engaged in any effort by the ICC (International Criminal Court) to investigate or prosecute personnel of the United States or its allies that are not ICC (International Criminal Court) parties, or who has “materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of,” such activities.⁴ The kinds of assistance prohibited under the Order are very broad, including, among other things, contributing funds, goods, or services for the benefit of a designated person. The consequence of designation under the Executive Order is that all property and property interests of the designated person in the United States are blocked.

Given the serious consequences of engaging with a designated person, designation leads to what has been described as “civil death.”⁵ Since the majority of international transactions are conducted in U.S. (United States) dollars, they involve a bank in the United States. Any such transactions by, or on behalf of, designated persons are blocked. Many financial institutions, even outside the United States, refuse to deal with designated persons. As Human Rights Watch has noted, the fear of losing access to U.S. (United States) banks causes financial institutions around the world to refuse to engage in transactions involving designated persons.⁶

In addition to consequences for designated persons, the Executive Order can be enforced against anyone who interacts with such a person in one of the prohibited ways. Unlike designation, which requires foreign citizenship, any person can be penalized for illegal interactions with a designated person. The consequences of such interactions include civil penalties of the greater of up to \$307,922, or twice the value of the transaction that violated the order, and criminal fines of up to \$1,000,000 and twenty years in prison.⁷

Since the Trump Administration, in September 2020, designated ICC (International Criminal Court) Prosecutor Fatou Bensouda and Phakiso Mochochoko, head of her office’s Jurisdiction, Complementarity and Cooperation Division, they have experienced serious consequences, as has the ICC (International Criminal Court) itself. Bensouda and Mochochoko’s travel is severely curtailed and they are unable to access many financial institutions. Additionally, the sanctions have affected the ICC’s (International Criminal Court) ability to secure financial resources and services to support its work. Moreover, personnel within the ICC (International Criminal Court) who could be subject to enforcement action for assisting Bensouda and Mochochoko have had to be walled off from working with them. All of these limitations undermine the ICC’s (International Criminal Court) ability to fight for justice for international crimes.

The Executive Order is Illegal

On October 1, 2020, I joined the Open Society Justice Initiative and three other law professors in filing a lawsuit challenging the legality of the Executive Order and its implementing Regulations.⁸ Each of the plaintiffs has reason to fear both designation under the Executive Order and enforcement of civil and criminal penalties for violating its provisions. First, we are all dual citizens, which may qualify us as “foreign persons” who can be designated for sanctions under the Executive Order. Although neither the Executive Order nor the Regulations define this term, it has

been interpreted to include dual citizens in other regulations issued under IEEPA (International Emergency Economic Powers Act).⁹ Second, each of us provides various kinds of assistance to Prosecutor Bensouda and her office. These include, among other things, directly advising the prosecutor's office, filing *amicus* briefs supportive of the prosecutor's positions in cases, engaging in conferences and other exchanges of ideas and information with members of the prosecutor's office, and publishing books, articles, and other material that provides advice to that office.

As we allege in the complaint, the Executive Order and Regulations are illegal for several reasons. First, they violate our First Amendment free speech rights by prohibiting us from providing speech-based assistance and services to the ICC (International Criminal Court) Prosecutor and her office. As the law professor plaintiffs have explained in publications about our lawsuit, the Executive Order means that we cannot do our jobs effectively.¹⁰ Our professional work focuses on preventing serious crimes such as genocide, war crimes, and crimes against humanity, including by speaking and writing about the work of the ICC (International Criminal Court) Prosecutor and her office. Additionally, one of the plaintiffs, Diane Amann, has had to stop her work as Special Advisor to the Prosecutor on Children in and affected by Armed Conflict,¹¹ and the Open Society Justice Initiative has had to limit its engagement in important work to reform the ICC (International Criminal Court) prosecutor's office, among other initiatives.¹² Other important activities that we have had to stop include contributing to *amicus* briefs and speaking publicly about the work of the Prosecutor. Such activities violate the Executive Order and could subject us to civil and criminal enforcement penalties, as well as to designation for providing the prosecutor's office with "material assist[ance]," "support," or "services." Indeed, on January 4, 2021, the court issued an order enjoining the defendants from enforcing IEEPA's (International Emergency Economic Powers Act) civil or criminal penalty provisions against us based on our First Amendment claims.

A second reason the Executive Order and Regulations are illegal is that they lack the clarity required by the Fifth Amendment regarding what conduct is prohibited, thus permitting arbitrary enforcement. In particular, by failing to define "foreign persons" they lack clarity as to which persons are subject to designation; and by failing to define "materially assisted," "material [...] support," and "services to or in support of", they are ambiguous as to which acts subject a person to designation or enforcement. As a result, the plaintiffs have had to stop engaging in a wide range of activities that support the ICC's (International Criminal Court) global justice efforts for fear of arbitrary enforcement.

Finally, the Executive Order and Regulations are *ultra vires* under IEEPA (International Emergency Economic Powers Act) because they seek to regulate activities that are protected by statute. Under 50 U.S.C. § 1702(b)(3), the president may not use IEEPA (International Emergency Economic Powers Act) to "regulate or prohibit [...] the importation from any country, or the exportation to any country, whether commercial or others, [...] of any information or informational materials, including but not limited to, publications, films, posters [...]". Many of the activities in which the plaintiffs have engaged in the past, which they are prohibited from engaging in under the Executive Order, constitute such importation and exportation of information and, as such, cannot be regulated under IEEPA (International Emergency Economic Powers Act).

The Executive Order Undermines U.S. (United States) Interests, Including the Rule of Law

In addition to being illegal, the Executive Order undermines U.S. (United States) interests. First, it is unlikely to accomplish its stated objective of deterring the ICC (International Criminal Court) from investigating and prosecuting personnel from the United States and its non-party state allies. Indeed, the Executive Order may increase the ICC's (International Criminal Court) resolve to pursue the situation involving such personnel. For any court, it is important to demonstrate impartiality and independence from political influence. This is particularly true for a court like the ICC (International Criminal Court) that is young and still seeking to establish its legitimacy. If ICC (International Criminal Court) decision-making were influenced, or perceived to be influenced, by political pressure from a powerful state, its legitimacy would be negatively affected, and state support for the Court would likely suffer. The need to avoid a perception of outside influence may encourage the Court to proceed against U.S. (United States) personnel. Moreover,

as William Burke-White has noted, unlike more typical targets of sanctions such as corrupt government leaders, persons who work for global justice are motivated by conscience rather than wealth.¹³ Instead of cowering to bully tactics like the threat of illegal sanctions, they tend to respond to such affronts with renewed determination. Finally, the ferocity of the U.S. (United States) attack on the Court may signal that U.S. (United States) personnel have “something to hide,” further spurring investigation.¹⁴

Nor has the Executive Order undermined support for the Court around the world. Indeed, it has had the opposite effect. Despite the significant challenges the ICC (International Criminal Court) has faced in recent years, many governments spoke out swiftly and strongly after the Executive Order was issued.¹⁵ Within days of the Order’s promulgation, sixty-seven ICC (International Criminal Court) member countries, including important U.S. (United States) allies, issued a statement expressing their “unwavering support for the court as an independent and impartial judicial institution.”¹⁶ Ten members of the Security Council, including France and the United Kingdom, stated their “commitment to uphold the principles and values enshrined in the *Rome Statute* (*/rome-statute*) and to preserve its integrity, undeterred by any threats against the Court, its officials, and those cooperating with it.”¹⁷ Again in November 2020, seventy-one ICC (International Criminal Court) member countries reaffirmed their support for the Court in a statement to the U.N. (United Nations) General Assembly, stating: “Any attempt to undermine the independence of the Court should not be tolerated.”¹⁸ Many other such statements have been made in support of the ICC (International Criminal Court) since the Executive Order was issued and the designations were made.¹⁹

Additionally, as Beth Van Schaack has pointed out, the Executive Order undermines any legitimate efforts to preempt the ICC’s (International Criminal Court) exercise of jurisdiction over U.S. (United States) personnel. Under the ICC’s (International Criminal Court) complementarity regime, it may not exercise jurisdiction in cases where a state with jurisdiction is doing so genuinely.²⁰ The best way to avoid ICC (International Criminal Court) prosecution of U.S. (United States) personnel is therefore to conduct credible national investigations and prosecutions. The Trump administration’s attacks on the Court would make any such efforts appear disingenuous.

Even more important than the Executive Order’s negative impact on the objective of avoiding ICC (International Criminal Court) investigation and prosecution of U.S. (United States) personnel is the Order’s detrimental effect on the rule of law. The United Nations has called the rule of law:

[A] principle of governance in which all persons, institutions and entities [...] are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.²¹

The Executive Order expresses the Trump Administration contempt for the rule of law, both nationally and internationally.

At the national level, the Executive Order shows the president’s disregard for constraints on the exercise of executive power. In an effort to ensure presidents have the ability to address a broad range of threats to national security, courts have granted them significant discretion in determining what constitutes an emergency under IEEPA (International Emergency Economic Powers Act).²² However, to declare that the threat of ICC (International Criminal Court) investigation rises to the level of a national emergency is so ludicrous that it signals the president considers himself above the law. Unlike typical IEEPA (International Emergency Economic Powers Act) emergencies such as threats from ruthless dictatorships, terrorist organizations, and nuclear proliferation, ICC (International Criminal Court) investigations

and prosecutions seek to prevent human rights abuses by punishing those responsible for particularly egregious

violations. Sanctioning ICC (International Criminal Court) personnel is such a flagrant violation of discretion as to seek to position the president as outside the rule of law.

Likewise, the Executive Order signals that the United States considers itself above the rule of international law. To be sure, U.S. (United States) exceptionalism with respect to the ICC (International Criminal Court) pre-dates the Trump administration. Even the Obama administration, which promoted many rule of law efforts around the world, including supporting ICC (International Criminal Court) investigations, never sought to join the Court. It also declined to prosecute U.S. (United States) personnel responsible for torture, extraordinary rendition, and other serious human rights violations. However, in using sanctions to target persons who fight human rights violations rather than those who commit them, the Trump administration expressed a new level of contempt for the application of international law to the United States

Ironically, one of the few positive actions the Trump Administration has taken with respect to rule of law promotion overseas is the expansion and use of sanctions against *foreign* personnel suspected of serious human rights violations. The Administration has made active use of the Global Magnitsky Human Rights Accountability Act, designating numerous suspected human rights violators for sanctions, and has adopted an Executive Order that expands the scope of such sanctions.²³ The juxtaposition of these actions with the Executive Order highlights the extent to which the Administration sees the United States as beyond the reach of international law. As Mark Kersten has written, the Administration's view seems to be: "If you're American, look like an American, or are a friend of America, international criminal justice must not apply to you."²⁴

This extreme exceptionalism both positions the United States and its allies outside the reach of justice efforts, and, relatedly, signals that they are free to commit human rights abuses. Dictators and others around the world who know that U.S. (United States) political or economic interests align with their own are likely emboldened by the Executive Order to engage in repressive actions that violate human rights. The Order gives them comfort that the world's most powerful government may protect them from accountability efforts.

Finally, the Executive Order vitiates the rule of law by seeking to undermine the independence of a judicial institution. The clear intent of the Executive Order is to coerce the ICC (International Criminal Court) to stop investigating persons from the United States and its allies. In an interview with the American Enterprise Institute, Ambassador-at-Large for Global Criminal Justice Morse Tan threatened that unless the *ICC (International Criminal Court) Statute (/rome-statute)* is revised to preclude such investigations, the United States will seek to shutter the institution.²⁵ Such bullying of a judicial institution is a tactic typically employed by dictators to undermine rule of law.

Many states and governmental and non-governmental organizations have reacted with outrage to U.S. (United States) efforts to undermine the ICC's (International Criminal Court) independence.²⁶ The International Bar Association declared itself "appalled by the United States Government's continued campaign to intimidate ICC (International Criminal Court) staff," and asserted that "[t]he unprecedented punitive application of sanctions on a legitimate judicial institution is a shameful move to undermine the Court's authority [...]"²⁷ The American Bar Association adopted a policy "urg[ing] all national governments to observe, respect, and protect the independence of the International Criminal Court,"²⁸ and noted:

In a time when democracy is in retreat globally, such an attack against the ICC (International Criminal Court) and its professional staff by the United States—historically the leading exemplar of democracy and a just rule of law, of which an independent judiciary is an indispensable part—gives fodder to those who cite such attacks as a legitimate basis to undermine judicial independence in their countries.²⁹

In sum, the Executive Order undermines the rule of law both inside the United States and abroad by positioning the

United States and its president above the law, and by attacking the independence of a judicial institution.

Conclusion

According to the United Nations, respect for rule of law requires:

[M]easures to ensure adherences to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participate in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.³⁰

By rescinding the Executive Order on day one, the Biden Administration can signal a recommitment to these principles. This signal will be important to U.S. (United States) allies who have watched with dismay for four years as the United States pursued policies more in line with those of a corrupt dictatorship than a beacon of democracy and justice.

Endnotes — (click the footnote reference number, or ↩ symbol, to return to location in text).

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(defining “foreign person” as “any citizen or national of a foreign state (including any such individual who is also a citizen or national of

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("IEEPA (International Emergency Economic Powers Act) contains a broad grant of authority to declare national emergencies"). ↩

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24. **Mark Kersten**, *Trump's Sanctions Against International Criminal Court Staff Aren't Just 'Bad', They're Racist*, JUST. IN CONFLICT ([HTTPS://JUSTICEINCONFLICT.ORG/](https://justiceinconflict.org/)) (JUSTICE IN CONFLICT) (Sep. 10, 2020), available online. (<https://justiceinconflict.org/2020/09/10/trumps-sanctions-against-international-criminal-court-staff-arent-just-bad-theyre-racist/>) ↩
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