



International Criminal Court: U.S. Sanctions in Response to Investigation of War Crimes in Afghanistan

June 19, 2020

President Trump issued an executive order on June 11, 2020, authorizing sanctions, in part, against any foreign person found to be acting in support of the International Criminal Court (ICC) Prosecutor’s investigation of U.S. personnel. The decision comes three months after the ICC Prosecutor’s opening of an investigation into alleged war crimes related to the Afghanistan conflict, which has [provoked](#) condemnation and concern from the United States.

Executive Order Authorizing U.S. Sanctions

In [Executive Order 13928](#), President Trump declared that the ICC’s assertion of jurisdiction over U.S. military, intelligence, and other personnel in the course of investigating actions allegedly committed by those personnel in or relating to Afghanistan “constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States.” Invoking authorities provided in the [National Emergencies Act](#) and the [International Emergency Economic Powers Act](#), the President declared that the ICC activities establish grounds for a national emergency to deal with the threat.

To implement the order, the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, is tasked with identifying any “foreign person” that

- has directly engaged in the ICC’s efforts “to investigate, arrest, detain, or prosecute any United States personnel without the consent of the United States,” or similarly engaged in such activities targeting personnel of a U.S. ally without consent of that person’s government;
- has “materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of,” any ICC efforts described above; or
- is “owned or controlled by, or [has] 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.”

Congressional Research Service

<https://crsreports.congress.gov>

IN11428

Any person identified as having engaged in any of these activities can be subject to having property and interests in property blocked if that property is under U.S. jurisdiction. In addition, the Secretary of State, in consultation with the Secretary of Homeland Security, is authorized to deny entry into the United States of any designee under the “inadmissible aliens” provision of immigration law (8 U.S.C. 1182(f)).

As of the date of this Insight, no designations have been made.

ICC-Related Action Concerning the Situation in Afghanistan

The ICC Office of the Prosecutor (OTP) [announced](#) in 2007 that it had received evidence of war crimes and crimes against humanity related to the conflict in Afghanistan, a state party to the [Rome Statute](#) that established the ICC, and that the OTP was conducting a preliminary examination of the situation. In November 2017, Prosecutor Bensouda requested permission from the ICC Pre-Trial Chamber to initiate a formal investigation of possible crimes committed by the Taliban, Afghan security forces, and U.S. personnel in Afghanistan since May 2003 and related crimes committed in other ICC member states since July 2002. In the request, the OTP [stated](#) that there was a “reasonable basis” to believe that U.S. armed forces and Central Intelligence Agency (CIA) personnel had committed “[w]ar crimes of torture, outrages upon personal dignity and rape and other forms of sexual violence” on the territory of Afghanistan or in “secret detention facilities” in ICC member states Poland, Lithuania, and Romania, “primarily in the period 2003-2004.”

The United States has asserted that it has completed criminal investigations into all U.S. personnel alleged to have committed such crimes, and therefore the ICC cannot exercise jurisdiction over these allegations, pursuant to the principle of complementarity ([Article 17](#) of the Rome Statute), which prevents the ICC from prosecuting individuals when a national judicial system has already effectively done so. The findings of the ICC Prosecutor, however, [asserted](#) that no U.S. investigations “examined the criminal responsibility of those who developed, authorised or bore oversight responsibility for” the alleged actions amounting to war crimes, and therefore complementarity would not bar the ICC’s investigation.

On April 12, 2019, the Pre-Trial Chamber [denied](#) the ICC Prosecutor’s request to open an investigation into the situation in Afghanistan, stating that the passage of time, political changes in Afghanistan, and a lack of cooperation from relevant governments made the otherwise valid investigation unlikely to “serve the interests of justice.” On March 5, 2020, however, the ICC Appeals Chamber [reversed and amended](#) the Pre-Trial Chamber’s decision, finding that the Pre-Trial Chamber erred in rejecting the ICC Prosecutor’s interests of justice determination, and authorizing the ICC Prosecutor to open a formal investigation. It is possible the investigation could result in individual criminal charges.

U.S.-ICC Relationship and Administration Policy

The United States helped draft the Rome Statute but is not [party](#) to the treaty due to sovereignty concerns and possible exposure of U.S. personnel to prosecution. Congress enacted [legislation](#) in 2002 to protect U.S. personnel from ICC actions, prohibiting U.S. cooperation with the ICC, and authorizing the President to free U.S. personnel detained by or on behalf of the ICC. U.S. [law](#) nonetheless permits the federal government to [assist](#) ICC efforts on a [case-by-case](#) basis, and the United States has [supported](#) the ICC’s activities in some cases.

Trump Administration officials have [signaled](#) increasing [opposition](#) to ICC actions, including the Afghanistan investigation and the ICC’s acceptance of jurisdiction over the state of Palestine earlier this year. In addition to sanctions, the Trump Administration has [restricted](#) ICC personnel travelling in the United States and has [threatened](#) possible prosecution of ICC officials.

Congressional Involvement in U.S.-ICC Relations

Congress has expressed both [support for](#) and [opposition to](#) the activities of the ICC, and it has placed restrictions on ICC accession. Congress has the means under the [National Emergencies Act and International Emergency Economic Powers Act](#) to terminate the national emergency, which would in turn revoke the authority to impose sanctions outlined in E.O. 13928. The NEA, at Section 202 ([50 U.S.C. 1622](#)), lays out the requirements and procedure to advance a joint resolution to terminate the declaration; Section 207 of IEEPA ([50 U.S.C. 1706](#)) reinforces the NEA procedure. On the other hand, Congress may choose to support the Administration's decision to seek policy changes in the ICC through sanctions; Congress could take no action. Wherever Congress lands on the policy debate, the ICC's activities are once again in the spotlight and could attract attention in the form of oversight and an assessment of current law to determine whether it appropriately protects U.S. foreign policy interests, ensures due process for U.S. personnel, and promotes accountability for atrocities.

Author Information

Matthew C. Weed
Specialist in Foreign Policy Legislation

Dianne E. Rennack
Specialist in Foreign Policy Legislation

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.