

## **Litigating U.S. Policy Toward the International Criminal Court**

### **Introduction**

While academics and non-governmental organizations frequently challenge United States policy toward the International Criminal Court (I.C.C.) in articles and conference rooms, they rarely do so in courtrooms. Following the Trump administration's issuance of Executive Order 13928, authorizing the imposition of sanctions on those who cooperate with I.C.C. efforts to investigate, arrest, detain, or prosecute U.S. personnel or allies, or who materially assist in these efforts,<sup>1</sup> however, four international law professors and the Open Society Justice Initiative decided to recur to the courts. Their October 2020 complaint, filed in federal court in New York, challenged the legality of the order and its implementing regulations on a number of different grounds.

In a blogpost explaining their decision to sue, Professors Diane Marie Amann, Margaret deGuzman, Gabor Rona, and Milena Sterio wrote that the Executive Order undermined Nuremberg's legacy of holding to account those who commit international crimes and caused them to fear that their constitutionally protected work, such as advising the I.C.C. Prosecutor on Afghanistan or other matters and commenting on the U.S.-I.C.C. relationship more generally, was at risk.<sup>2</sup> This *Insight* explains and analyzes this litigation, and situates it in the broader context of U.S. policy toward the I.C.C., including the Biden administration's recent revocation of the Executive Order on April 1, 2021.<sup>3</sup>

### **Background**

While the U.S. relationship with the I.C.C. has always been complex, it hit a new low after the I.C.C. Appellate Chamber authorized I.C.C. Prosecutor Fatou Bensouda to

commence an investigation into alleged crimes committed in Afghanistan since May 2003, as well as those linked to the conflict in Afghanistan and committed on the territory of other states parties to the Rome Statute since July 2002. The March 2020 decision allows the Prosecutor to explore acts allegedly committed by the CIA in Afghanistan, Poland, Romania, and Lithuania.<sup>4</sup> Although the U.S. is not a party to the Rome Statute and has not consented to its jurisdiction, the Rome Statute provides for the Court's jurisdiction over nationals of non-states parties for conduct occurring in the territory of states parties.<sup>5</sup> In response to the Appellate Chamber's ruling, in June 2020, then-President Donald Trump relied on the International Emergency Economic Powers Act (IEEPA) to declare a national emergency via Executive Order 13928, stating that the investigation of alleged crimes by U.S. personnel "threaten[s] to impinge upon the sovereignty" of the U.S., impedes "critical national security and foreign policy work," and "threaten[s] the national security and foreign policy" of the United States.<sup>6</sup> The Executive Order empowered the Secretary of State to designate "foreign persons" who directly engage in efforts by the I.C.C. to investigate, arrest, detain, or prosecute U.S. personnel or U.S. allies without their consent, or who have "materially assisted" such persons or activities.<sup>7</sup>

The consequences of designation under the IEEPA include blocking of assets, prohibitions on interactions with sanctioned individuals, and negative immigration consequences, and due to their severity, have been compared to "civil death."<sup>8</sup> Under section 3 of the Executive Order, persons are prohibited from "the making of any contribution or provision of funds, goods, or services by, to, or for the benefit" of any designated person. "Foreign" persons who engage in these activities with designated individuals are subject to designation themselves, as well as possible enforcement of civil and criminal penalties under the IEEPA. In September 2020, then-Secretary of State Michael Pompeo designated I.C.C. Chief Prosecutor Fatou Bensouda and Head of the Jurisdiction, Complementarity, and Cooperation Division Phakiso Mochochoko.<sup>9</sup>

## **The Litigation**

Plaintiffs filed their complaint on October 1, 2020, alleging that the Executive Order and its implementing regulations violated their First and Fifth Amendment rights, were *ultra vires* under the IEEPA, and violated the Administrative Procedures Act (APA). Plaintiffs alleged that they ceased activities such as advising the Office of the Prosecutor on a wide range of issues, leading training seminars for NGOs and victims' rights groups about engagement with the I.C.C., submitting amicus curiae briefs, and publicly commenting on the U.S.-I.C.C. relationship, for fear of potential civil and criminal penalties. As remedies, Plaintiffs sought declaratory relief that the Executive Order and regulations violated the First and Fifth Amendments, were *ultra vires* to the IEEPA, and violated the APA. Plaintiffs

requested preliminary and permanent injunctions prohibiting the defendants from designating them under the Executive Order or regulations or from enforcing the IEEPA's civil and criminal penalties against them.

On January 4, 2021, the District Court granted in part Plaintiffs' request for a preliminary injunction, by prohibiting Defendants from enforcing IEEPA's civil or criminal penalty provisions against Plaintiffs for conduct laid out in their complaint and the court's Opinion and Order.<sup>10</sup> The covered speech activities include participation in meetings with members of the Office of the Prosecutor (OTP), as well as the designated individuals; providing presentations, advice, and training to members of the OTP; conducting and supervising research in support of the OTP; and submitting amicus curiae briefs supporting the Office of the Prosecutor.<sup>11</sup>

The Court found that Plaintiffs were likely to succeed on the merits of the First Amendment claim because the Executive Order and regulations restricted Plaintiffs' speech, were content-based restrictions subject to strict scrutiny review, and failed to meet that standard because they "swe[pt] far more broadly" than necessary to achieve the government's stated interest in protecting U.S. personnel and allies from I.C.C. investigation, arrest, detention, and prosecution without their consent.<sup>12</sup> In a footnote, the Court added that even if intermediate scrutiny applied, Plaintiffs would still likely prevail because the order and regulations "burden[ed] substantially more speech than necessary."<sup>13</sup> The Court also found Plaintiffs faced irreparable harm by forgoing the exercise of their First Amendment rights, and that the balance of equities favored granting the injunction since "the proffered national security justification for seeking to prevent and potentially punish Plaintiffs' speech [was] inadequate to overcome Plaintiffs' and the public's interest in the protection of First Amendment rights."<sup>14</sup>

On the other hand, the Court concluded that Plaintiffs were unlikely to establish standing on the designation claims, since designation requires a specific determination by the Secretary of State, in consultation with the Secretary of Treasury and the Attorney General, and is discretionary even when a foreign person meets the specified criteria.<sup>15</sup> Accordingly, Plaintiffs did not "face a credible threat" of imminent enforcement against them.<sup>16</sup> The Court also determined that Plaintiffs would probably not succeed on their Fifth Amendment claims because they were unlikely to establish standing to challenge as unconstitutionally vague specific terms related to designation since they were "not injured by the alleged vagueness."<sup>17</sup> The Court found the *ultra vires* claim was not ripe for adjudication because predictions about the Office of Foreign Assets Control's future conduct and interpretation of specific regulatory language were speculative and therefore not properly before the Court.

Although the Court's opinion left the Executive Order and implementing regulations intact, the litigation is significant in at least two ways. First, the Biden administration terminated the national emergency and revoked the Executive Order on April 1, 2021. This litigation, as part of a broader effort by civil society to challenge the use of sanctions against I.C.C. personnel and those who cooperate with them as an effective or suitable U.S. foreign policy tool, may have played a role in motivating the new administration to take action.<sup>18</sup> Second, the litigation was an important precedent from an academic freedom perspective. It freed Plaintiffs from fear of civil and criminal penalties for conducting and supervising research in support of the OTP, as well as participating in meetings with two of the I.C.C.'s highest officials; presenting, training, and advising members of the OTP; and submitting amicus curiae briefs. Participation in such activities is essential for U.S.-based scholars and NGOs to have a voice in debates in the international justice community, by evaluating, assessing, influencing, and seeking to improve the quality of justice in the I.C.C. and beyond. While the Court's language on Plaintiffs' Fifth Amendment and APA claims was not particularly helpful for challenging the Executive Order and regulations on their own terms, the Biden administration's revocation of the order ultimately rendered these claims moot. Nonetheless, should a future administration decide to issue a similar order, the Court's decision may make similar legal challenges difficult, particularly due to its findings about standing and ripeness.

## **Conclusion**

This litigation and the executive actions which both prompted and mooted it are yet another example of the complex relationship between the United States and the I.C.C. Despite its revocation, the Biden administration appears to continue to share many of the concerns that engendered the initial Executive Order. The new order provides that the U.S. "continues to object . . . [to the I.C.C.'s] assertions of jurisdiction" over personnel of non-states parties, including the U.S. and its allies, without their consent or a UN Security Council referral, and that it "will vigorously protect" U.S. personnel from the Court's jurisdiction.<sup>19</sup> U.S. Secretary of State Antony Blinken echoed these statements the day after the revocation of the Executive Order, explicitly disagreeing with the I.C.C.'s actions relating to Afghanistan and Palestine.<sup>20</sup>

At the same time, the new order contains language rejecting an antagonistic approach to the Court. It specifies that threatening and imposing financial sanctions against the Court, its staff, and those who assist it "are not an effective or appropriate strategy for addressing the United States' concerns."<sup>21</sup> Further, Secretary Blinken signaled a desire to return to a more collaborative approach, adding that "support for the rule of law, access to justice, and accountability for mass atrocities are important U.S. national security interests that

are protected and advanced by engaging with the rest of the world,” and praising efforts to reform the Court to “prioritize its resources and to achieve its core mission of serving as a court of last resort.”<sup>22</sup> How the U.S. government balances its vigorous objections to jurisdiction with its desire to influence and engage with the Court remains to be seen.<sup>23</sup> Although litigation against the current U.S. administration is unlikely to be their tool of choice going forward, academia and civil society will undoubtedly be watching and making their voices heard in upcoming debates.

**About the Authors:** Nienke Grossman is Professor of Law and Co-Director of the Center for International and Comparative Law at the University of Baltimore School of Law. Ellen Pruitt is a 2L and International Law Concentrator at the University of Baltimore School of Law.

---

<sup>1</sup> Exec. Order No. 13,928, 85 Fed. Reg. 36139 (Jun. 11, 2020).

<sup>2</sup> Diane Marie Amann, Margaret deGuzman, Gabor Rona & Milena Sterio, *Why We Are Suing President Trump*, JUST SEC. (Oct. 8, 2020), <https://www.justsecurity.org/72733/why-we-are-suing-president-trump/>.

<sup>3</sup> Exec. Order No. 14,022, 86 Fed. Reg. 65 (Apr. 1, 2021).

<sup>4</sup> Situation in the Islamic Republic of Afghanistan, Case No. 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, ¶¶ 65–79 (Mar. 5, 2020), [https://www.icc-cpi.int/CourtRecords/CR2020\\_00828.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF).

<sup>5</sup> Rome Statute of the International Criminal Court art. 12(2), July 17, 1998, 2187 U.N.T.S. 90.

<sup>6</sup> Exec. Order No. 13,928, 85 Fed. Reg. 36139 (Jun. 11, 2020).

<sup>7</sup> *Id.*

<sup>8</sup> Beth Van Schaack, *Executive Order 13928 on Blocking Property of Certain Persons Associated with the International Criminal Court*, 60 INT’L LEGAL MATERIALS 18, 19 (2021).

<sup>9</sup> 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>.

<sup>10</sup> *Open Soc’y Justice Initiative v. Trump*, No. 1:20-cv-08121, 2021 U.S. Dist. LEXIS 405, at \*41 (S.D.N.Y. 2021).

<sup>11</sup> *Id.* at \*23–24.

<sup>12</sup> *Id.* at \*27–30.

<sup>13</sup> *Id.* at \*29 n.7.

<sup>14</sup> *Id.* at \*40.

<sup>15</sup> *Id.* at \*20–21.

<sup>16</sup> *Id.* at \*21.

<sup>17</sup> *Id.* at \*30–31.

<sup>18</sup> Another lawsuit was filed on similar grounds in the US District Court for the Northern District of California by Professors Leila Sadat, Alexa Koenig, and Naomi Roht-Arriaza, and American Civil Liberties Union attorney Steven Watt. See <https://www.aclu.org/cases/sadat-v-trump-challenge-trumps-international-criminal-courts-sanctions-regime>, for more information.

<sup>19</sup> Exec. Order No. 14,022, 86 Fed. Reg. 65 (Apr. 1, 2021).

<sup>20</sup> Press Statement from Anthony Blinken, Sec’y of State, U.S. Dep’t of State, Ending Sanctions and Visa Restrictions Against Personnel of the International Criminal Court (Apr. 2, 2021), <https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/>. On March 3, 2021, the Prosecutor announced the opening of an investigation into the Situation in Palestine, including in Gaza, the West

---

Bank, and East Jerusalem. Statement of Fatou Bensouda, Chief Prosecutor, Int'l Crim. Ct., Respecting an Investigation of the Situation in Palestine (Mar. 3, 2021), <https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine>.

<sup>21</sup> Exec. Order No. 14,022, 86 Fed. Reg. 65 (Apr. 1, 2021).

<sup>22</sup> Press Statement from Anthony Blinken, *supra* note 18.

<sup>23</sup> Readers may wish to read the recent report on the I.C.C. issued by ASIL's Task Force on Policy Options for US Engagement. AM. SOC'Y INT'L L., ASIL TASK FORCE ON POLICY OPTIONS FOR U.S. ENGAGEMENT WITH THE ICC (2021), <https://www.asil-us-icc-task-force.org/uploads/2021-ASIL-Task-Force-Report-on-US-ICC-Engagement-FINAL.pdf>.