Biden Plans to Repeal Trump-Era Sanctions on ICC

March 31, 2021

By Colum Lynch, Robbie Gramer

Foreign Policy

<https://foreignpolicy.com/2021/03/31/biden-remove-international-criminal-court-icc-sanctions-from-trump>

The Biden administration plans as early as this week to revoke a Trump-era executive order levying sanctions on the prosecutor of the International Criminal Court (ICC) and a top deputy, removing another source of friction in U.S. relations with key allies, including many of America’s European counterparts, according to two sources familiar with the decision.

The expected move is likely to ease a state of open hostility by the U.S. government toward the Hague-based international tribunal, which clashed bitterly with the Trump administration over its efforts to investigate possible war crimes by American personnel in Afghanistan and Israeli security forces in the Palestinian territories. But it is unlikely to end tension between the court and the Biden administration, which, like prior administrations, contends that the tribunal lacks standing to prosecute Israeli and U.S. nationals. Neither country has ratified the 1998 treaty creating the international court.

Sources familiar with the matter said the move could happen as soon as this week or next, but an official cautioned that no formal decision has yet been announced.

The expected move comes after months of pressure on the Biden administration from human rights groups and European governments after former President Donald Trump left office. In February, more than 80 groups signed an [open letter](https://archive.vn/o/xgLFd/https%3A/www.hrw.org/news/2021/02/17/more-80-non-governmental-organizations-faith-based-groups-and-academic-institutions) urging the Biden administration to repeal the Trump-era sanctions, calling them a “betrayal of the U.S. legacy in establishing institutions of international justice.”

It also comes after the ICC judges this week upheld the conviction and 30-year prison sentence of a Congolese warlord, Bosco Ntaganda, for atrocities committed during an ethnic conflict in the Democratic Republic of the Congo in 2002 to 2003. The United States played a key role in Ntaganda’s apprehension and transfer to the ICC, an example that experts point to as showing how U.S. cooperation with the ICC can advance global human rights and accountability measures.

“In what should be the normal course of things, the State Department would be extolling today’s decision and we would be basking in praise for our role,” said Todd Buchwald, a former ambassador and special coordinator for global criminal justice, at the U.S. State Department. “But with the sanctions in place, it’s hardly credible for us to claim credit.”

The Trump administration took a hostile approach to the Hague-based court, viewing its efforts to scrutinize alleged war crimes by Israeli forces in the Palestinian territories and American personnel in Afghanistan as an affront to those countries’ sovereignty. Trump issued a sweeping executive order in June 2020, authorizing the imposition of economic sanctions against any ICC officials participating in the investigation of “allied personnel without that ally’s consent.”

Executive Order 13928 was issued months after the court’s judges [authorized](https://archive.vn/o/xgLFd/https%3A/www.washingtonpost.com/world/asia_pacific/icc-afghanistan-us-troops-investigation/2020/03/05/82b039a2-5ee2-11ea-ac50-18701e14e06d_story.html) an investigation into alleged war crimes by U.S. service members and intelligence officers. It followed an April 2019 decision to revoke a U.S. travel visa for Fatou Bensouda, a Gambian lawyer who serves as the ICC chief prosecutor.

Last September, then-Secretary of State Mike Pompeo [announced](https://archive.vn/o/xgLFd/https%3A/twitter.com/statedept/status/1301157735652831232?s=12) the imposition of a series of travel restrictions and financial sanctions on Bensouda and a senior aide, Phakiso Mochochoko, for engaging in “illegitimate attempts to subject Americans to its jurisdiction,” and he threatened to sanction and individuals who provided the prosecutor with material support for their investigation.

Trump’s executive order, issued under a specious national emergency, was due to expire in June. Advocates said it is important for the White House to revoke it now to send a signal to the world that the United States is committed to international accountability for atrocities.

“They could just let the measure run out of time,” said Richard Dicker, an expert on the court at Human Rights Watch. “But that would hardly represent a robust ‘return to multilateralism’ as they have been projecting to friends and allies. It would also undercut their credibility to champion Washington’s support for justice where crimes against humanity are committed.”

“If the administration finally does repeal the order, it deserves credit for that,” he added.

There are other pressure points. The Biden administration must respond by April 5 to a lawsuit challenging the constitutionality of Trump’s executive order. In October, the Open Society’s Justice Initiative and four law professors sued the United States, claiming that the executive order violated core constitutional rights, including freedom of speech.

“The Trump executive order, an assault on the premier institution of international justice, is at odds with the Biden administration’s professed aim of reasserting America’s support for human rights in the world. It’s past time for the order to be rescinded,” said James Goldston, a former ICC trial attorney who serves as executive director of the Open Societies Justice Initiative.

A State Department spokesperson, speaking on condition of anonymity, declined to confirm a decision had been taken but acknowledged by email that “[m]uch as we disagree with the ICC’s actions relating to the Afghanistan and Palestinian Situations, the administration is thoroughly reviewing sanctions pursuant to Executive Order 13928 as we determine our next steps.”

The criminal court was established by treaty at a 1998 conference in Rome to prosecute perpetrators of the most serious crimes and came into force in 2002. The Clinton administration signed the treaty in December 2000, but the George W. Bush administration “unsigned” it in May 2002, voicing fears that the prosecutor might carry out frivolous investigations into Americans and their allies.

Bush and his successor Barack Obama never fully embraced the court, but they found ways to support or at least not impede its investigations that suited American interests. In March 2005, the Bush administration abstained on a United Nations Security Council vote authorizing an investigation into mass atrocities in Darfur, Sudan, and the Obama administration voted in favor of a 2011 decision by the Security Council to open an ICC investigation into crimes committed in Libya. But the United States has never ratified the treaty.

Even with the massive shift in foreign policy from Trump to President Joe Biden, the Biden administration is still hewing to past criticisms of the ICC, particularly over its investigations on Israeli-Palestinian issues. Secretary of State Antony Blinken rebuked the ICC earlier this month when it announced it would open an investigation into alleged Israeli crimes in Palestinian territories.

“The United States firmly opposes and is deeply disappointed by this decision,” Blinken said in a statement. “The ICC has no jurisdiction over this matter. Israel is not a party to the ICC and has not consented to the court’s jurisdiction, and we have serious concerns about the ICC’s attempts to exercise its jurisdiction over Israeli personnel.”

Human rights experts have praised some of the Biden administration’s early moves, including ending the so-called Muslim travel ban and reengaging the United Nations. But some say they’ve been disappointed by the slow pace of Biden’s efforts to roll back Trump-era policies, including waiting months before making a decision on the ICC sanctions.

After Trump, “they’ve done a reasonable job but they’ve also had a pretty low bar to clear,” said Akila Radhakrishnan, president of the Global Justice Center, a nonprofit advocacy group.

Radhakrishnan said even if Biden lifts the sanctions, the fact that the United States imposed sanctions in the first place could still cause lasting damage to Washington’s reputation on global human rights.

“What it shows is that the U.S. is willing to allow things like self-interest to get in the way of independent judicial institutions when it finds them inconvenient for its own policies,” she said. “That, considering the things we say we stand for and advocate for worldwide, is deeply problematic.”