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SANCTIONED JUDGE SPEAKS:

A CONVERSATION WITH ICC JUDGE KIMBERLY PROST

For *Judicature International*, ICC Judge Kimberly Prost reflects on the sanctions imposed on her by the United States, the practical consequences for judges carrying out their duties, and the broader implications for judicial independence and international courts.

With Kimberly Prost & David Collins

Judicial independence is a foundational principle of the rule of law. Yet judges on international courts have increasingly found themselves confronting an unusual form of pressure: targeted sanctions imposed by governments in response to judicial decisions. Among those affected is **KIMBERLY PROST**, a judge of the International Criminal Court (ICC), who was sanctioned by the United States after participating in a judicial decision authorizing an investigation that included potential conduct by U.S. personnel.

In this excerpt from an interview published in *Judicature International*, acting judge of the New Zealand Court of Appeal **DAVID COLLINS**, chair of *Judicature International*'s editorial board, speaks with Prost about the the practical and institutional consequences of sanctions imposed on judges performing their judicial duties.

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DAVID COLLINS: Judge Prost, thank you for joining us. Could you tell us your understanding of the reasons why the United States has issued sanctions against you and other judges and officials of the ICC?

KIMBERLY PROST: As a sitting judge, I never speculate on what the reasoning is behind the decision of the United States government to impose these sanctions. What I refer to is what they have said. Basically, they've issued an executive order, and, under that order, anyone involved in cases related to the United States or its allies — and, in particular, the current factual circumstances, Israel — will be subject to sanctions by the U.S. for participating in those investigations and prosecutions.

The reason that a number of the judges who have been sanctioned have been speaking out is because we interpret that to mean that they have an expectation that we either won't do those cases or we will decide those cases the way that the United States wishes, and that's the purpose of the sanctions, to get us to either not do the cases or to decide the cases the way the U.S. says we should, which as I think anyone reading this would see immediately is an outrageous and blatant attack on the independence of the judiciary and on the rule of law.

It is fundamental that judges decide on the evidence, the facts, and the law, and not on such extraneous pressures being brought to bear. So that's my understanding of what these sanctions are about.

COLLINS: How did you personally come to be the subject of the sanctions? What did you do that triggered this event?

PROST: My case is probably the most extreme in my view, simply because I worked on sanctions for five years. As the ombudsperson for the Security Council, Al-Qaeda Sanctions Committee, my job was to bring fair process to the UN list. And the purpose of sanctions — which I spoke to all the time — was to deter conduct, change conduct, and stigmatize. It is not a punishment.

In my case, five years ago, I sat temporarily in the appeals chamber, replacing a judge. And in that, in the case of the request of the prosecutor to authorize the investigation in Afghanistan, that was an investigation writ large: the Taliban forces, the Afghan forces, or the other forces who were present, and it included a component related to United States authorities, but it was certainly not the centerpiece of the request of the prosecutor.

That request for, well, you can read the decision to understand, had been refused at the pretrial chamber level for various reasons. We unanimously overturned that decision, and all five of us authorized the investigation to proceed. A year later, the prosecutor said very clearly, "I'm deprioritizing the United States portion. I'm not looking at that. I'm prioritizing Taliban and other matters, and that's what we've seen in the charges brought." And so it's not even an active investigation. That's why I'm sanctioned. I have nothing else to do with any case, not Israel-Gaza, not Afghanistan, no U.S. cases. So to me, that's a punishment, but there we are.

> "These sanctions are not globally binding . . . but there's widespread compliance worldwide."
> *– Kimberly Prost*

COLLINS: Could you please explain what the sanctions against you involve?

PROST: Well, it's interesting because I, of course, had interviewed a number of people subject to UN sanctions in my prior role, and I had an understanding. And with UN sanctions, it's even more severe because it is globally binding. These sanctions are not globally binding. They're binding only on Americans and in the United States, but there's widespread compliance worldwide. I never really appreciated it until I was dealing with it personally, the extent of the effect of the sanctions. So immediately all your credit cards are canceled because it doesn't matter where they're issued, whether they were issued in Netherlands or Canada, the systems, the companies, Visa, MasterCard, Amex, etc., and the SWIFT system, whether legally or not, they are under the influence and control of the United States. So that's an immediate effect. And, in this day and age, it's quite a shocking development because you don't appreciate how much you use them.

Just things like ordering an Uber, booking a hotel, all of these things, you need a credit card. Then you could have the banks withdraw banking services. In my case, I have some limited banking services, both in Europe and in Canada, and I have a debit card, but it's unpredictable when it's going to work. The example I've been giving: I came to New Zealand, assured it would work across the board. But I went to order breakfast the first morning, and it was declined. I had no cash, so I wasn't having breakfast.

Then you have this array of uncertainty anytime you try to transfer

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money. My banks will transfer the funds, but some of the receiving banks just bounce the transaction. Or worse yet, I've had money blocked, which, given it is outside of the United States, handled by a European bank, is in my view clearly illegal.

It's very frustrating. It's every day. Add to that all those American companies that we're all so dependent on. Amazon account gone. My famous story: Alexa won't talk to me!

And the other things I would mention, because, well, I've worked in the sanctions world, so perhaps it's less hard, although it's still hard for me, but I have colleagues who have spent their whole lives in criminal justice, who have worked on the bench domestically, some at the Rwanda Tribunal, and they are now on a list with those implicated in terrorism and organized crime, and you're treated just the same. Psychologically, that's really difficult to accept. And then there's the very painful situation for some of my colleagues who have children, for example, in the United States, and their visas are canceled. So a whole range of implications arises from the sanctions.

COLLINS: Is there any form of legal redress that you as an individual might have in the United States against the sanctions?

PROST: Well, funny you ask that because, of course, I have a bit of a sanctions background, and I participated in an online blog for the sanctions world just about a week or so after I was sanctioned. It was such an interesting story. And I said then, and I continue to say, I think there are some real issues with my sanctioning as well as with the whole process. I am considering my options very seriously, but it's a complicated matter. Of course, these sanctions can always be challenged in U.S. courts, so I continue to actively consider my options. That's all I'll say for the moment.

> "People should know that this is going on, that the court is being threatened in this way, that the rule of law is being threatened in such a blatant way."
> – *Kimberly Prost*

COLLINS: Could you elaborate on what these sanctions mean for judicial independence — that fundamental golden thread that runs through all judicial activities?

PROST: Well, this is where I make the point every time I speak, and I make it very clearly on behalf of myself and my colleagues: I can assure you that, while we clearly see this — adversely affecting our judicial independence — as the intention, it has no impact whatsoever. These sanctions are futile in trying to destroy our independence.

We continue to assess our cases objectively in accordance with the law and to render justice fairly and for the victims. So these efforts to coerce us, to intimidate us, these are not successful, and that's the same for the prosecutors. And that will be the same should they impose sanctions on the court itself, which they have yet to do, though there has certainly been mention of it. The court will find ways to deal with it. It will be difficult, but we will be resilient and find ways to ensure the work of the court continues, because it's such imperative work.

But the reason, as I said, that we're speaking out is because people should know that this is going on, that the court is being threatened in this way, that the rule of law is being threatened in such a blatant way. But as I say, it will not affect how we continue to do our business.

Read the full interview: ***https://duke.is/sanctioned-judge-speaks.***

KIMBERLY PROST is a judge on the International Criminal Court (ICC) and a former *chef de cabinet* to the ICC president. She previously served as the first ombudsperson for the UN Security Council's Al-Qaida Sanctions Committee.

DAVID COLLINS is an acting judge on New Zealand's Court of Appeal. A 2018 graduate of Duke Law School's Master of Judicial Studies program, he chairs *Judicature International*'s editorial board and served as Distinguished Judge in Residence in 2019.