

March 25, 2019

## **STATEMENT BY THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION INTERNATIONAL CRIMINAL COURT COMMITTEE:**

### **THE UNITED STATES AND THE ICC**

The Committee expresses concern about U.S. Secretary of State Michael R. Pompeo's recent announcement regarding an intended travel ban against International Criminal Court ("ICC") officials working on the Afghanistan situation. The ban is crafted to revoke visas from ICC personnel and staff who are "directly responsible for any ICC investigation of U.S. personnel," including those who "take or have taken action to request or further such an investigation." Secretary Pompeo suggested that the ban could also extend to ICC staff working on the Israel/Palestine situation, and that the administration is "prepared to take additional steps, including economic sanctions if the ICC does not change its course." Secretary Pompeo's statement follows on the heels of an address by National Security Adviser John Bolton, in a speech to the Federalist Society last year, which made even broader threats.

The International Criminal Court is an independent and impartial judicial institution designed to prosecute only the gravest crimes of concern to the international community—including genocide, crimes against humanity, and war crimes. It has numerous open investigations and prosecutions regarding mass atrocity crimes in many countries, and has 123 States Parties that support it.

While the United States is not a party to the ICC Statute, Afghanistan is a State Party, so the conduct of U.S. nationals in Afghanistan is within the Court's jurisdiction.

The Afghanistan preliminary examination, which alleges crimes were committed by U.S. armed forces and members of the Central Intelligence Agency ("CIA"), is mostly focused on horrific atrocity crimes believed to have been committed by the Taliban and affiliated groups (including crimes against humanity and war crimes through "intimidation, targeted killings and abductions of civilians"), as well as allegations involving Afghan Armed Forces. The inquiry regarding U.S. nationals is most predominantly related to torture, including acts by CIA officials well-documented by the United States Senate Committee on Intelligence. The Afghanistan preliminary examination also makes reference to crimes on the territory of other ICC States Parties, which presumably refers to Poland, Romania, and/or Lithuania, also known to have housed secret CIA "black site" prisons.

The United States has every interest in ensuring that violations of the federal torture statute or similar violations under the Uniform Code of Military Justice are prosecuted. Moreover, under the "complementarity" regime in Article 17 of the ICC's Statute, a country can avoid Court action by conducting its own investigations and prosecutions. Rather than trying to obstruct the work of the ICC, the United States should commit to thoroughly investigating and, where justified, prosecuting these cases, thereby precluding them from ever appearing on the ICC's docket. This is the path chosen by the U.K., which has to date conducted extensive investigations (although no prosecutions yet) in the wake of similar allegations against U.K. forces in Iraq.

The tactics first announced by John Bolton, and now furthered through this recent move, are reminiscent of strategies that have backfired on the U.S. in the past. When the U.S. pursued under the

Bush Administration a campaign to obtain so-called “Article 98” or “Bilateral Immunity Agreements,” countries that lost U.S. military assistance by refusing to enter such agreements turned to China instead.

A show-down between the ICC and the United States benefits neither. The optics for the United States—insisting on a policy of “exceptionalism” by which its nationals are above the law—are extremely poor. Secretary Pompeo’s statement, which highlights past U.S. support for international prosecutions such as those for crimes committed in the former Yugoslavia and Rwanda, only illustrates the hypocrisy of the U.S. providing support for international justice only when non-U.S. nationals are prosecuted. If anything, the U.S.’s policy of exceptionalism sets broader and exceedingly troubling precedent for leaders worldwide, some of whom will be all too willing to follow suit in order to insulate their nationals from accountability.

Pompeo pledged America’s “enduring commitment to the rule of law, accountability, and justice.” The U.S. should follow that pledge and, rather than attacking a judicial institution, commit itself to pursuing the rule of law domestically, by conducting its own investigations, and, as warranted, prosecutions.

**--ABILA ICC COMMITTEE**  
**Professor Jennifer Trahan, Chair**