



NEW YORK
CITY BAR

June 10, 2020

Re: Reaffirming Support for the International Criminal Court In Light of Recent Criticism of Current Investigations

Dear Members of Congress:

The New York City Bar Association (the “City Bar”) takes this opportunity to reaffirm its support for the International Criminal Court (the “ICC” or the “Court”), a treaty-based permanent court that has been playing a key role in the fight against impunity for atrocity crimes. Since its establishment in 1870, the City Bar has worked to advance and defend the rule of law in New York, in the United States, and internationally. The City Bar has long advocated for the ICC, most recently with a statement expressing its serious concern about negative comments about the ICC by Secretary of State Michael R. Pompeo, including threats made by name against individual ICC staff members and their families, which builds upon statements made over one year ago by then National Security Advisor John Bolton to which the City Bar also responded.

We write now to address recent public letters from members of the Senate and the House of Representatives to Secretary Pompeo regarding the ICC’s current investigations. The letters suggest that the ICC’s preliminary examination regarding crimes in Israel/Palestine and its investigation regarding crimes in Afghanistan are politicized and baseless. These recent letters misconstrue the Court’s jurisdiction and incorrectly characterize its investigations as political.

I. The House and Senate Letters Intimate that the ICC Is Attacking Both Israel and the United States.

Both letters suggest that the Court is targeting Israel,¹ or Israel and the United States.² However, it is important to note that the ICC does not prosecute States but *individuals*—and only persons who are implicated in genocide, war crimes and/or crimes against humanity who have not been brought to justice elsewhere. The ICC does not investigate or prosecute States.³

¹ Letter by Benjamin L. Cardin and Rob Portman to US Secretary of State Pompeo, dated May 13, 2020, at <https://www.portman.senate.gov/sites/default/files/2020-05/20200513%20Senate%20Letter%20to%20Pompeo%20re%20ICC%20Israel.pdf> (all websites last visited June 10, 2020).

² Letter by House members to US Secretary of State Pompeo, date May 12, 2020, at <https://www.aipac.org/-/media/publications/policy-and-politics/legislative-action/2020/luria-gallagher-final.pdf>.

³ Rome Statute of the International Criminal Court, *entered into force* July 1, 2002, UN Doc. A/CONF.183/9, 2187 UNTS 90, *reprinted in* 37 ILM 999 (July 17, 1998), Art. 1 (jurisdiction over “persons”).

II. The House and Senate Letters Contend that the Court’s Jurisdiction is Limited to Nationals of State Parties.

Both letters state that “[n]either the United States nor Israel are members [*sic*] of the ICC,” and thereby deny that the Court could have jurisdiction over crimes by Israeli or US nationals. Notably, however, the ICC operates on the principles of nationality *and* territoriality.⁴ The latter means that the Court has jurisdiction over conduct that occurs on the territory of an ICC State Party, regardless of whose nationals are involved. Afghanistan is a State Party. (Whether the same holds true for Palestine, and, if so, precisely where there is jurisdiction, remains an issue awaiting decision, as discussed below.)

While the United States government may take the position that the Court cannot exercise jurisdiction over nationals of non-party states, that argument is not consistent with how the 1998 Rome Statute is structured or how basic principles of territorial jurisdiction operate. Territorial jurisdiction supplies the basis for the United States to prosecute foreign nationals alleged to have committed crimes in America. It was also the basis for the Sierra Leone Special Court’s prosecution (fully supported by the United States) of former Liberian President Charles Taylor. His home country, Liberia, was not a party to the agreements creating the Special Court, just as the United States is not a party to the ICC’s Statute.

III. The House and Senate Letters Claim that the ICC Cannot Investigate Because Israel and the United States Have Robust Judicial Systems with the Capacity to Conduct their Own Investigations.

Both letters allege that domestic prosecution mechanisms preclude ICC prosecutions. The Senate letter states, “ICC rules prohibit it from prosecuting cases against a country that *has a robust judicial system* willing and able to prosecute war crimes of its personnel. Therefore, the ICC’s mandate should not supersede Israel’s robust judicial system, including its military justice system.”⁵ The House letter contains similar language claiming that Israel and the US “are both able and willing to carry out investigations and prosecute offenders.”⁶

These assertions misstate the Rome Statute’s complementarity regime. The ICC need not cede jurisdiction simply because a country “has a robust judicial system,” or merely asserts that it is “able and willing” to investigate or prosecute. The statute requires the Court to step aside only if states *actually* investigate and/or prosecute. If Israel were to investigate and/or prosecute the crimes under examination, that *would* divest the ICC of jurisdiction; the same would be true for the United States. As of yet, however, neither country appears to be doing so.

⁴ *Id.*, Art. 12.

⁵ Senate letter, *supra* note 1 (emphasis added).

⁶ House letter, *supra* note 2.

IV. The House and Senate letters Suggest that the ICC Is Making Determinations Regarding Statehood in the Context of Israel/Palestine.

Both letters suggest that for the ICC to opine on issues relating to Palestinian borders would jeopardize a potential Israeli/Palestinian peace process. This dramatically misstates the role of the ICC.

The Prosecutor has made a request to Chambers to clarify whether she has jurisdiction to proceed regarding the situation in Israel/Palestine,⁷ and this remains an open question, having been briefed to the judges. When the Pre-Trial Chamber rules (which ruling could presumably be appealed), the ruling will *only* be about *ICC jurisdiction* – *i.e.*, the applicability of the Rome Statute’s jurisdictional provisions to the crimes in question. Any ruling will have none of the profound consequences that both letters erroneously suggest. The Court is not being asked to make – nor would it be authorized to make – any decision as to statehood in connection with Palestine or the Palestinian Territories.

V. The House and Senate Letters Claim that the ICC’s Actions Are Political.

The ICC is a judicial institution with professional staff, and includes U.S. nationals among its Prosecutors. Its judges come from around the world, including from countries that are important allies of the United States. The Court has delivered multiple acquittals, reflecting its many procedural protections designed to ensure due process. Earlier U.S. concerns about the prospect of such a court prompted the drafters to adopt a number of procedural checks and balances that were ultimately built into the Rome Statute, such as not permitting the Prosecutor to open an investigation on her own (*proprio motu*) authority, but rather requiring approval by a Pre-Trial Chamber in the absence of a referral from a State Party or the United Nations Security Council.⁸

While all allegations concerning the crimes will need to be thoroughly investigated and, if they proceed, prosecuted, the suggestion in both letters that the ICC is politicized and subject to misuse ignores the strong preliminary indications that war crimes and/or crimes against humanity *were* committed in the situations at issue. The United Nations Independent Commission of Inquiry on the 2014 Gaza conflict documented serious allegations of wrongdoing by *both* Israeli forces and Palestinian armed groups, which the Commission characterized as war crimes.⁹ A report of the U.S. Senate Select Committee on Intelligence¹⁰ documented numerous crimes committed by U.S. forces in Afghanistan, as well as in other ICC States Parties such as Poland, Romania, and Lithuania related to the so-called “enhanced interrogations” program. The Prosecutor has also received information suggesting similar crimes were committed by Afghan Armed Forces and has

⁷ “Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine,” dated Jan. 22, 2020, at https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF.

⁸ Rome Statute, Art. 15.

⁹ Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1, A/HRC/29/CRP.4, June 24, 2015, at <https://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/ReportCoIGaza.aspx>.

¹⁰ Report of the US Senate Select Committee on Intelligence, S. Report 113-288, 113th Congress, 2nd Session, Dec. 9, 2014, at <https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf> (redacted summary).

reason to believe that the Taliban and affiliated groups committed widespread crimes against humanity and war crimes.¹¹

In contrast to the Court's methodical approach in these matters, the letters from members of the Senate and House bring politics into the judicial process by suggesting that credible allegations of war crimes and crimes against humanity should *not even be investigated* — at least not with respect to U.S. and Israeli nationals. Notably, neither letter complains about the prosecution of Palestinian or Afghan nationals or members of the Taliban.

The United States has historically been a leader in the field of international justice, spearheading the war crimes prosecutions before the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East (Tokyo). More recently, the United States has been strongly supportive of the creation and work of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia. The rule of law relies on neutral institutions such as the ICC, which is supported by 123 UN Member States. We believe that the United States should support the ICC's on-going mission to end impunity for genocide, crimes against humanity, and/or war crimes – *wherever committed*.

VI. The House and Senate Letters Dangerously Invite the U.S. Secretary of State to Obstruct the Work of the ICC.

Perhaps most troublingly, each letter calls for the Secretary of State to take steps to block the work of the Court. In so doing, the letters implicitly endorse Secretary Pompeo's threats against ICC staff and their families¹² and explicitly contravene universal principles of judicial independence.¹³ Seemingly spurred on by these two letters, Secretary Pompeo has recently threatened "we will exact consequences"¹⁴ should the Court proceed. We reiterate in the strongest terms our demand that Secretary Pompeo cease making such threats.

VII. The New York City Bar Association Has Long Advocated for America's Support of the International Criminal Court.

In addition to pursuing values long supported by the United States, the ICC docket largely aligns with U.S. foreign policy objectives. This includes prosecuting the crimes in Darfur that the George W. Bush administration acknowledged to constitute genocide.¹⁵ It also includes the

¹¹ Publicly Redacted Version of Request for Authorisation of an Investigation Pursuant to Article 15, para. 22, ICC-02/17-7-Conf-Exp (Nov. 20, 2017), at https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF.

¹² Secretary Michael R. Pompeo's Remarks to the Press, March 17, 2020, at <https://www.state.gov/secretary-michael-r-pompeo-remarks-to-the-press-6/>.

¹³ See e.g., U.N. Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>.

¹⁴ The International Criminal Court's Illegitimate Prosecutions, Press Statement, Michael R. Pompeo, Secretary of State, May 15, 2020, at <https://www.state.gov/the-international-criminal-courts-illegitimate-prosecutions/>.

¹⁵ FRONTLINE, *On Our Watch*, transcript, at <https://www.pbs.org/wgbh/pages/frontline/darfur/etc/script.html> (remarks of then US Secretary of State Colin Powell).

prosecution of members of the so-called “Lord’s Resistance Army” for atrocities committed in Uganda, which led to Congress’ passage of the “Lord’s Resistance Army Disarmament and Northern Uganda Recovery Act of 2009.”¹⁶

Even if members of Congress do not believe that the ICC deserves U.S. support, the tone and political posture of the House and Senate letters undermine the rule of law by encouraging the Secretary of State to impede the ICC’s work. This, in turn, projects a view of the United States as not only unwilling to adhere to the rule of law, but actively thwarting the rule of law, and sets a troubling example for countries whose democracies are more fragile than our own.

All major U.S. allies other than Israel support the Court’s anti-impunity mandate – that genocide, crimes against humanity, and war crimes must be prosecuted. We urge the members of the House and Senate to support international justice and the work of the ICC, emphasize that this support should not exist only where it is politically expedient, and request that members of Congress refrain from engaging in conduct that can be seen as delegitimizing the work of the Court.

Respectfully,

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Task Force for the Independence of Lawyers & Judges

Jessenia Vazcones-Yagual, Co-Chair
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Lauren Melkus, Chair
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¹⁶ Lord’s Resistance Army Disarmament and Northern Uganda Recovery Act of 2009, S.1067, 111th Congress, Public Law 172 (2009-10).