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Contact: Eric Friedman  
212-382-6754  
[efriedman@nycbar.org](mailto:efriedman@nycbar.org)

Eli Cohen  
212-382-6656  
[ecohen@nycbar.org](mailto:ecohen@nycbar.org)

**STATEMENT BY THE NEW YORK CITY BAR ASSOCIATION REAFFIRMING  
SUPPORT FOR THE INTERNATIONAL CRIMINAL COURT**

The New York City Bar Association (the “City Bar”) reaffirms its strong support for the International Criminal Court (the “ICC” or the “Court”), a treaty-based permanent court that plays a key role in the fight against impunity for atrocity crimes. The City Bar also expresses its concern about recent comments by U.S. Secretary of State Michael R. Pompeo disparaging and threatening by name staff members of the ICC and their families—threats that could be deemed to apply even to U.S. citizens advocating before and assisting in investigations by the ICC.

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, principally through the work of its Committees on International Human Rights, African Affairs, and United Nations, as well as through its Council on International Affairs, the Cyrus R. Vance Center for International Justice, the Task Force on National Security and the Rule of Law, and the Task Force on the Independence of Lawyers and Judges.<sup>1</sup>

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<sup>1</sup> Over the years, the City Bar has issued numerous statements in support of the work of the ICC. See for instance, *Report on the Proposed International Criminal Court*, July 1, 2002, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-on-the-proposed-international-criminal-court> (“The Association of the Bar of the City of New York strongly endorses the creation of a permanent international criminal court to prosecute and punish individuals who commit the most serious crimes under international law.”); letter from City Bar President Bettina Plevan to Secretary of State Condoleezza Rice supporting reference of the Darfur situation to the ICC, Feb. 23, 2005, [https://www.nycbar.org/pdf/report/Darfur\\_letter\\_to\\_Condi.pdf](https://www.nycbar.org/pdf/report/Darfur_letter_to_Condi.pdf); letter from City Bar President Debra Raskin to ICC Prosecutor requesting new assessment of whether the attacks by Boko Haram against Christians constitute crimes against humanity, May 8, 2014, <https://www2.nycbar.org/pdf/report/uploads/20072905-LettertoChiefProsecutorFatouBensoudaoftheInternationalCriminalCourtregardingBokoHaram.pdf>; *Digest of International Criminal Court Investigations in Africa*, May 20, 2016, [https://s3.amazonaws.com/documents.nycbar.org/files/20073083-Digest\\_on\\_International\\_Criminal\\_Court\\_Investigations\\_in\\_Africa\\_AFRICAN\\_5.20.16.pdf](https://s3.amazonaws.com/documents.nycbar.org/files/20073083-Digest_on_International_Criminal_Court_Investigations_in_Africa_AFRICAN_5.20.16.pdf) (“the ICC ‘represents one of the most significant opportunities the world has had to prevent or drastically reduce the deaths and

## THE INTERNATIONAL CRIMINAL COURT

Over the past quarter of a century, international criminal tribunals such as the ICC have played vital roles in advancing the fight against impunity. Based on the 1998 Rome Statute, the Court has jurisdiction to prosecute the most serious crimes of concern to the international community. One hundred and twenty-three countries are parties to the Rome Statute. The U.S. is not a party, although there was a close relationship between the U.S. and the Court under the Presidential administration of Barack Obama. The U.S., under the Clinton Administration, also participated in the drafting of the Rome Statute.

To date, the ICC has exercised jurisdiction over genocide, war crimes, and crimes against humanity. As of July 17, 2018, it also has the authority to exercise limited jurisdiction over the crime of aggression. The ICC is “participating in a global fight to end impunity, and through international criminal justice, the Court aims to hold those responsible accountable for their crimes and to help prevent these crimes from happening again.”<sup>2</sup> Additionally, the ICC plays an important role in promoting the rule of law, by elucidating and applying fundamental standards of due process, and by developing mechanisms for victims to participate and make their voices heard.

## THREATS AGAINST COURT OFFICIALS AND THEIR FAMILIES

The City Bar urges President Donald J. Trump to direct Secretary Pompeo and other representatives of the Administration to cease and refrain from threatening the ICC, ICC officials and their family members, and other persons advocating for or assisting the ICC.<sup>3</sup>

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devastation caused by conflict.’ The ICC was established with several purposes: to ‘help end impunity’ for perpetrators of the most serious crimes, deter those who intend to commit those crimes, encourage national prosecutors to bring those individuals to justice, and obtain justice and truth for victims and their families.”); Vance Center Helps Promote the International Criminal Court in El Salvador, Jan. 2017, <https://www.vancecenter.org/vance-center-helps-promote-the-international-criminal-court-in-el-salvador/>; *Supplement to the Digest of International Criminal Court Investigations in Africa*, Jan. 2018, [https://s3.amazonaws.com/documents.nycbar.org/files/ICC\\_Digest\\_Supplement\\_African\\_1.22.18.pdf](https://s3.amazonaws.com/documents.nycbar.org/files/ICC_Digest_Supplement_African_1.22.18.pdf); letter from NYC Bar President John Kiernan to ICC Prosecutor requesting commencement of a preliminary investigation into ISIS slaughter of Yazidis in Iraq, Apr. 24, 2017, [https://s3.amazonaws.com/documents.nycbar.org/files/Letter\\_to\\_ICC\\_UN\\_4.21.17.pdf](https://s3.amazonaws.com/documents.nycbar.org/files/Letter_to_ICC_UN_4.21.17.pdf); *Celebrating International Justice Day and the 20<sup>th</sup> Anniversary of the International Criminal Court’s Rome Statute*, July 17, 2018, <https://www.nycbar.org/media-listing/media/detail/city-bar-statement-celebrating-international-justice-day-and-the-20th-anniversary-of-the-international-criminal-courts-rome-statute> (taking “this opportunity to express its support for international justice—that is, the prosecution of, inter alia, genocide, war crimes and crimes against humanity before international and hybrid tribunals, as well as domestic courts. The Association also notes the important role that the [ICC] has been playing as one of the key institutions leading the fight against impunity as to atrocity crimes”); and *What John Bolton Gets Wrong About the ICC - Statement of New York City Bar Association President Roger Juan Maldonado*, Sept. 20, 2018, <https://www.nycbar.org/media-listing/media/detail/what-john-bolton-gets-wrong-about-the-icc>. (All links last visited April 21, 2020.)

<sup>2</sup> International Criminal Court, About, available at <https://www.icc-cpi.int/about>.

<sup>3</sup> See Secretary of State Michael R. Pompeo’s Remarks to the Press (March 17, 2020), available at <https://www.state.gov/secretary-michael-r-pompeo-remarks-to-the-press-6/> (“We want to identify those responsible for this partisan investigation and their family members who may want to travel to the United States or engage in activity that’s inconsistent with making sure we protect Americans.”)

Afghanistan has been an ICC State Party since February 2003. The ICC Prosecutor had been examining 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 (primarily the crime of torture). The preliminary examination also alleged that crimes were committed by U.S. armed forces and members of the Central Intelligence Agency (“CIA”), likewise predominantly related to torture. (Crimes by the CIA have also been documented by the U.S. Senate Select Committee on Intelligence.)<sup>4</sup> International crimes committed within Afghanistan since 2003 fall under the ICC’s jurisdiction.<sup>5</sup>

In March 2019, following even broader threats “against the ICC and its personnel” and “any company or state that assists an ICC investigation of Americans” by then-National Security Adviser John Bolton,<sup>6</sup> Secretary Pompeo, while highlighting past U.S. support for international prosecutions such as for crimes committed in the former Yugoslavia and Rwanda, stated that the U.S. would revoke visas for 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.”<sup>7</sup> Subsequently, the State Department revoked the ICC Prosecutor’s visa to travel to the U.S., aside from official travel to the United Nations (which the U.S. is legally obliged to permit).

Just after Secretary Pompeo’s March 2019 statements, the ICC Pre-Trial Chamber declined to allow the “preliminary examination” related to Afghanistan to proceed to the “investigation” stage. At the same time, the Pre-Trial Chamber refused to include crimes allegedly committed in other ICC States Parties as part of the Afghanistan investigation. However, after appeal of the Pre-Trial Chamber’s decision, nearly one year later on March 5, 2020, the ICC Appeals Chamber authorized the opening of the Afghanistan investigation, also including crimes sufficiently linked to the situation in Afghanistan, even if the crimes occurred in other ICC States Parties.

On the very day the ICC Appeals Chamber announced its decision to open the Afghanistan investigation, Secretary Pompeo stated that President Trump’s Administration would take “all

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<sup>4</sup> See Report of the Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program. 2014 S. Report 113-228, 113<sup>th</sup> Congress, 2<sup>nd</sup> Session, Dec. 9, available at <https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf>. Only a heavily redacted summary of the report is publicly available.

<sup>5</sup> See Rome Statute, Article 12(2)(a) (creating jurisdiction on the territory of ICC States Parties); Afghanistan deposited its instrument of accession to the Rome Statute on 10 February 2003. UN Treaty Collection, Rome Statute of the International Criminal Court, available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10&chapter=18&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=en).

<sup>6</sup> National Security Advisor John R. Bolton Address, Protecting American Constitutionalism and Sovereignty from International Threats, Sept. 10, 2018, transcription available at <https://www.lawfareblog.com/national-security-adviser-john-bolton-remarks-federalist-society>.

<sup>7</sup> See Secretary of State Michael R. Pompeo’s Remarks to the Press, March 15, 2019, available at <https://translations.state.gov/2019/03/16/remarks-to-the-press-2/> (“These visa restrictions will not be the end of our efforts. We are prepared to take additional steps, including economic sanctions if the ICC does not change its course.”).

necessary measures” to shield U.S. nationals from any such investigation.<sup>8</sup> And on March 17, 2020, Secretary Pompeo named publicly two ICC staffers who he claimed “were helping drive” the Prosecutor’s efforts, and alleged that the investigation was “putting Americans at risk”; he intimated the U.S. might take action against them as well as other ICC personnel and their families.<sup>9</sup>

## **THE UNITED STATES SHOULD PROMOTE JUSTICE – NOT OBSTRUCT IT**

Confrontation between the ICC and the U.S. benefits neither. For the U.S. to insist on exempting its nationals from the law degrades this country’s reputation and its security. Secretary Pompeo’s March 15, 2019 statement, which highlighted past U.S. support for international prosecutions, such as for crimes committed in the former Yugoslavia and in Rwanda, illuminates the hypocrisy of providing support for international justice only in cases involving actions committed by foreign nationals. Moreover, this exceptionalism sets an exceedingly troubling precedent for leaders worldwide, to insulate their own actions and/or those of their nationals from accountability, even for crimes committed against Americans or U.S. allies. Threats towards individual staffers of an international criminal tribunal (and their families) additionally run counter to this nation’s tradition of respect for international law and for the rule of law, and are highly inappropriate.

First, the U.S. has every interest in ensuring that violations of the federal torture statute or similar violations under the Uniform Code of Military Justice are prosecuted.<sup>10</sup> The U.S. adopted these laws to prevent and punish heinous crimes and to promote order and discipline within its armed forces.

Second, under the “complementarity” regime in Article 17 of the Rome Statute, the ICC is a court of last resort. Consequently, any country can avoid ICC proceedings by conducting its own investigations and – if warranted – prosecutions. Rather than trying to obstruct the work of the ICC, the U.S. should commit to thoroughly investigating and, where justified, prosecuting cases related to torture, thereby precluding such cases from appearing on the ICC’s docket.

Third, U.S. efforts to obstruct the work of the ICC have backfired in the past. When the George W. Bush Administration launched a campaign to obtain so-called “Article 98” or “Bilateral Immunity Agreements,” some countries that lost U.S. military assistance by refusing to enter such agreements turned instead to the People’s Republic of China for assistance.

Secretary Pompeo has pledged America’s “enduring commitment to the rule of law, accountability, and justice.”<sup>11</sup> The U.S. should honor that pledge and, rather than attacking a key judicial institution and its personnel, commit itself to pursuing the rule of law domestically, by

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<sup>8</sup> Deirdre Shesgreen, “Pompeo says US will take ‘all necessary measures’ to bar war crimes probe of military,” USA TODAY, March 5, 2020, available at <https://www.usatoday.com/story/news/world/2020/03/05/pompeo-says-us-shield-troops-international-war-crimes-probe/4897766002/>.

<sup>9</sup> Secretary Michael R. Pompeo’s Remarks to the Press, March 17, 2020, available at <https://www.state.gov/secretary-michael-r-pompeo-remarks-to-the-press-6/>.

<sup>10</sup> 18 U.S.C. § 2340-2340A and 10 U.S.C. § 928. Art. 128.

<sup>11</sup> See n. 7.

conducting its own investigations, and, as warranted, its own prosecutions. Doing so would uphold America's obligations, enhance its reputation for adhering to the rule of law – and obviate the need for ICC prosecutions.

It is of the utmost importance, for all the reasons stated above, that Secretary Pompeo cease the disparagement of the Court and its personnel, lift the travel restrictions on ICC personnel, and avoid obstructing the work of the Court.

**About the Association**

*The mission of the New York City Bar Association, which was founded in 1870 and has 24,000 members, is to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world. [www.nycbar.org](http://www.nycbar.org)*