**Talking Points About US Nationals and the ICC Preliminary Examination into the Situation in Afghanistan**

The Situation in Afghanistan is in preliminary examination at the International Criminal Court (ICC). In the ICC prosecutor’s 2016 report on preliminary examinations, she announced, that there was a “reasonable basis” to find “war crimes of torture and related ill-treatment, by US military forces deployed to Afghanistan and in secret detention facilities operated by the Central Intelligence Agency.”

**The ICC will not be prosecuting the United States, because it prosecutes individuals not states.**
- The ICC is a criminal court; so, it investigates, prosecutes and sentences individuals, not countries. The Prosecutor may bring charges against individual US nationals, but the ICC will not and cannot bring charges against the United States as a nation or government.

**The ICC will not charge foot soldiers, but high-level officials.**
- The ICC is focused on those “most responsible for the crimes.” These are not the foot soldiers or the individuals carrying out orders.
- The ICC often charges high level military officials who order Rome Statute crimes, usually based on a plan or policy that they have established.
- Individuals who are charged at the ICC may be held responsible through the principle of command responsibility. The principle of command responsibility has been endorsed by the United States and was used at Nuremberg, the ICTY, ICTR, hybrid courts and even some domestic courts. The principle is used to hold accountable leaders who fail to prevent or punish international crimes in a chain of command where they have effective control and had reason to know or could discover that these crimes were about to occur or has occurred.
- Judging by the prosecutor’s report, the ICC will likely charge those at the top of the chain of command for enabling, encouraging or even ordering torture to occur. The ICC may charge high-level US officials--military or public who are found to have known about torture, rape or other ill-treatment of detainees, but did nothing to prevent or punish it.

**The preliminary examination is not a targeted, political attack against US nationals.**
- The ICC’s preliminary examination into the Afghanistan situation does not only include US
nationals but also senior individuals in the Afghan government, the Taliban and other NATO forces.

- The Court is not a political body. The prosecutor would not be making political arguments to secure an arrest warrant or conviction, but she would be making legal arguments. The judges do not judge politics but the law.
- The prosecutor has demonstrated that she will not yield to political pressures for or against prosecuting certain individuals. She prosecutes individuals who are responsible for Rome Statute crimes where the ICC has jurisdiction.
- If there is trial-worthy evidence that senior US nationals are responsible for war crimes according to the definition in the Rome Statute, the ICC judges will authorize arrest warrants. However, if the alleged acts don’t fall into the definition, there is not sufficient evidence or the ICC lacks jurisdiction, the judges will not authorize arrest warrants.

**The Court has jurisdiction over Rome Statute crimes committed in Afghanistan, Lithuania, Poland and Romania, even if the crimes were committed by non-party state nationals like US nationals.**

- ICC jurisdiction over Rome Statute crimes, which include war crimes, genocide and crimes against humanity, can occur through the territory of a state party (Article 12(2)(a) of the Rome Statute), regardless of the nationality of the alleged perpetuator.
- Consequently, the ICC prosecutor may bring a case to the ICC against US nationals for any Rome Statute crimes in these state parties’ territory.

**If the US genuinely investigates or prosecutes its nationals, it can claim complementarity over cases against these nationals.**

- The ICC’s jurisdiction over a case is inadmissible in cases where a domestic court has already genuinely investigated or prosecuted the case.
- The United States can make a request that the Court not investigate, prosecute or try a US national. The United States’ request must include US proceedings planned, completed or underway against a national who the ICC would otherwise prosecute. This request will be granted unless the judges conclude that it is in bad faith, the US proceedings will be a sham or the United States lacks the ability to conduct a fair investigation, prosecution or trial.

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