WHERE DO THEY GO FOR JUSTICE? THE UNITED STATES-INTERNATIONAL CRIMINAL COURT AND CRIMES AGAINST HUMANITY IN AFGHANISTAN

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TABLE OF CONTENTS

INTRODUCTION

In June 2021, Representative Ilhan Omar questioned Secretary of State Antony Blinken during a House Foreign Affairs Committee hearing and stirred controversy. She noted that the United States opposed the International Criminal Court (ICC)'s then-ongoing probe into alleged war crimes and crimes against humanity in Afghanistan and Palestine, whether at the hands of the United States, Israel, Hamas, or the Taliban, and also explained no domestic courts had yet

taken up these matters. The Congresswoman asked Secretary Blinken: "Where do we think victims are supposed to go for justice?"[1]

Representative Omar's comments launched several news cycles' worth of commentary, mostly featuring outrage by some who rejected what they perceived as false moral equivalence between inequivalent actors,[2] followed by pushback to that backlash by many who saw the controversy as a product of bad-faith smears rooted in Islamophobia.[3] However, most failed to identify the underlying context behind her question. Longstanding unresolved tensions exist between the United States and the ICC that most recently culminated in the Court launching an investigation into apparent war crimes and crimes against humanity committed by all parties to the conflict in Afghanistan, including the United States. However, the Court then backed away from that investigation after pressure from the United States. Even as this investigation stalled, the United States' unwillingness to face accountability for its own abuses or those of its powerful allies continued. Thus, even after the controversy became less visible in the press, Representative Omar's original question remained unanswered on the merits: where do the victims of these atrocities find justice?

This article will demonstrate that the outcome of the latest U.S.-ICC clash carries deep ramifications that span far beyond the case in question. At stake: the United States' self-assigned role as a leader

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1. Rep. Ilhan Omar (@Ilhan), TWITTER (June 7, 2021, 3:34 PM), https://twitter.com/Ilhan/status/1401985884191404041.

2. Sarah Ferris, *Dem Leaders Seek To Deescalate Omar Drama,* POLITICO (June 10, 2021), https://www.politico.com/news/2021/06/10/omar-back-under-scrutiny-493055.

3. *Progressives Support Rep. Omar Against Bad-Faith Attacks*, WIN WITHOUT WAR (July 8, 2021), https://winwithoutwar.org/progressives-support-rep-omar-against-bad-faith-attacks/.

defending human rights and the rule of law globally as well as the Court's legitimacy as an arbiter of justice. Part I of this paper first reviews the long history of U.S.-ICC tensions before turning to the specifics of the Court's aborted investigation of U.S. abuses in Afghanistan and the various legal implications of these abuses. Part II outlines accountability efforts already taken within the United States, including gaps in those efforts or areas where it is unclear what steps have been taken. Part III analyzes the high stakes in the aftermath of the U.S.-ICC dispute and recommends paths forward.

I. KEY BACKGROUND OF THE DISPUTE

Soon after taking office, the Biden administration revoked Executive Order 13928, a measure enacted by the former Trump administration that had placed economic sanctions and travel restrictions on the ICC's prosecutor and her senior aide.[4] The Trump administration enacted measures in retaliation of the prosecutor's efforts to investigate apparent war crimes and crimes against humanity committed by the United States in Afghanistan in a blatant attack on the Court and international organizations in general.[5]

Executive Order 13928 was the latest, but not the first flashpoint in tensions between the Court and the United States. No U.S. administration has ever supported ratification of the Rome Statute governing the International Criminal Court. The Clinton administration signed, but did not ratify, the Rome Statute, which signaled tacit support from the United States and a commitment not to work in opposition of the agreement's object and purpose. Nevertheless, the U.S. refrained from begin placed under the scope of the Court's jurisdiction.[6]

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4. Press Release Antony Blinken, Secretary of State, Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court, (April 2, 2021), https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/.

5. John Bolton, *Remarks before the Federalist Society on the International Criminal Court*, JUST SECURITY (Sept. 10, 2018), https://www.justsecurity.org/60674/national-security-adviser-john-bolton-remarks-international-criminal-court/.

6. William J. Clinton, *Statement on the Rome Treaty on the International Criminal Court*, GOV. INFO. (Dec. 31, 2000), https://www.govinfo.gov/content/pkg/WCPD-2001-01-08/pdf/WCPD-2001-01-08-Pg4.pdf.

In a dramatic turn, the George W. Bush administration, led in its efforts at the time by then—U.N. Ambassador John Bolton, announced an un-signing of the former Clinton administration's Rome Statute signature.[7] More aggressively, the George W. Bush administration negotiated bilateral treaties with multiple countries by leveraging foreign aid in an effort to secure immunity for U.S. personnel in those countries.[8] One of the more bizarre turns in the long-running U.S.-ICC conflict was the American Service Members Protection Act of 2002, more colloquially known as the "Hague Invasion Act."[9] This statute, which remains in effect as of this writing, triggered an authorization of military force in response to any detention of U.S. or allied personnel by the Court and barred any cooperation in the Court's investigations.

Paradoxically, instances of synergy have existed between the Court and the United States. American negotiators involved themselves deeply in the process of developing the Court and its procedures from the earliest phases of the project. The U.S. government even explicitly supported referral of certain cases to the Court, such as for the Darfur genocide or crimes by the Lord's Resistance Army. The U.S. government also consistently voiced broad support for accountability for international atrocities.[10]

Although the United States refused to become a member state of the International Criminal Court, the Court nonetheless asserted jurisdiction over the State for its conduct in Afghanistan. However,

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7. John R. Bolton, International Criminal Court: Letter to UN Secretary General Kofi Annan, U.S. DEP'T OF STATE ARCHIVE (May 6, 2002), https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm.

8. Stephen Pomper, *The Int'l Criminal Court's Case against the United States in Afghanistan: How it happened and what the future holds*, JUST SECURITY (Nov. 13, 2017), https://www.justsecurity.org/46990/international-criminal-courts-case-u-s-afghanistan-happened-future-holds/.

9. American Servicemembers Protection Act, Pub. L. No. 107-206 (Aug. 2, 2002) [hereinafter "ASPA"].

10. *See, e.g., The International Criminal Court and the United States*, HUM. RTS. WATCH (Sep. 2, 2020, 12:00 AM), https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states; AMERICAN SOCIETY OF INTERNATIONAL LAW, TASK FORCE ON POLICY OPTIONS FOR U.S. ENGAGEMENT WITH THE ICC (April 2021), https://www.asil-us-icc-task-force.org/uploads/2021-ASIL-Task-Force-Report-on-US-ICC-Engagement-FINAL.pdf; Jane Stromseth, *The United States and the International Criminal Court: Why Undermining the ICC Undercuts U.S. Interests*, 47 GEORGIA J. OF INT'L AND COMP. L. 639 (2019).

per the Rome Statute, the Court's jurisdiction had several limitations. First, only a small list of crimes were subject to investigation and prosecution by the Court: war crimes, crimes against humanity, and genocide.[11] Within these contours, further limitations existed on the cases taken up by the Court.

A matter can come before the Court in one of three ways: upon referral by a member state, by referral from the United Nations Security Council, or upon the Prosecutor's own initiation, known as *proprio motu* authority, with approval of a Pre-Trial Chamber.[12] Situations taken up by the Court through state referral or *proprio motu* channels must have occurred on the territory of or by the nationals of a member state.[13] From there, the Prosecutor applies another screen to assess the case's gravity and complementarity. A gravity review entails an assessment of the scope and impact of the crimes.

"Complementarity" refers to the principle that the Court may not proceed if the state with jurisdiction is pursuing its own genuine investigations or prosecutions.[14] The final screen applied to potential cases is the Court must find that pursuing the case would serve the "interests of justice."[15]

Afghanistan ratified the Rome Statute and became a member state of the Court in 2003.[16] In 2007, the Prosecutor initiated a preliminary examination into crimes committed in Afghanistan by all parties to the conflict and, a decade later, requested authority from the Pre-Trial Chamber to initiate a formal investigation.[17] Although the Pre-Trial Chamber initially declined to authorize, the Appeals Chamber

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11. Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 (1998), 2187 U.N.T.S. 90 (1998), at art. 5-85-8 [hereinafter Rome Statute].

12. BETH VAN SCHAACK AND RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT 3-12 (2015).

13. *Id.*

14. *Id.*

15. *Id.*

16. INTERNATIONAL CRIMINAL COURT, STATE PARTIES TO THE ROME STATUTE (2004), https://asp.icc-cpi.int/en_menus/asp/states%20parties/asian%20states/Pages/afghanistan.aspx.

17. CENTER FOR CONSTITUTIONAL RIGHTS, ACCOUNTABILITY FOR INTERNATIONAL CRIMES IN AFGHANISTAN (April 5, 2021), https://ccrjustice.org/home/what-we-do/our-cases/accountability-international-crimes-afghanistan.

reversed the decision and paved the way for the formal investigation to begin in March 2020.[18]

The United States continued to insist that, as a non-member of the Court, its personnel could not be subjected to its jurisdiction.[19] In September 2021, the new Prosecutor Karim A.A. Khan announced that he would move away from investigating any crimes in Afghanistan besides those committed by the Taliban and the armed group known as Islamic State-Khorasan Province.[20] Effectively, this announcement meant the ICC succumbed to U.S. pressure and would cease investigating U.S. crimes. This development only reinforced the question of if, and how, the U.S. could ever be held to account for its crimes in Afghanistan.

II. UNITED STATES CRIMES IN AFGHANISTAN

The question of who has the power to secure justice, and how that justice will be secured, is more than a legal or academic exercise. There are real victims and survivors whose lives and well-being depend on the answer. In the case of crimes committed by U.S. personnel in Afghanistan, it is important to note that there is no full, official accounting of what happened. However, there is publicly available information which this article relies upon that provides pieces in the overall puzzle in the form of declassified government documents, journalism, non-criminal investigations, and reports by non-governmental organizations.

The United States' Central Intelligence Agency (CIA) operated a program facilitating rendition, detention, enforced disappearances, secret detention, and torture in a network of overseas "black sites" from 2002 to 2009.[21] In these sites, men were subjected to cruel and

18. *Id.*

19. Blinken, *supra* note 4.

20. Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorization to resume investigations in the Situation in Afghanistan (September 27, 2021), https://www.icc-cpi.int/Pages/item.aspx?name=2021-09-27-otp-statement-afghanistan.

21. SENATE SELECT COMMITTEE ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY 'S DETENTION AND INTERROGATION PROGRAM, EXECUTIVE SUMMARY, 178 (Dec. 3, 2014), https://www.feinstein.senate.gov/public/_cache/files/7/c/7c85429a-ec38-4bb5-968f-

gruesome abuses. Most of the American public's understanding of U.S. torture seems to revolve around "waterboarding," a practice simulating the excruciating experience of drowning.[22] Indeed, one detainee in the program appeared to be broken down by the tactic to the extent that he automatically began walking to the waterboard and lying down when interrogators would snap their fingers.[23] After one session in which he hysterically pleaded for mercy, he became unresponsive and required medical intervention.[24] The abuse was much more complicated and widespread than just the waterboarding sessions. Extreme sleep deprivation, beatings, confinement in coffin-like spaces, mock executions, and stress positions were common.[25] Many who survived the black sites now live with life-long consequences, including severe mental illness such as paranoia and psychosis.[26]

Specific to what happened in Afghanistan, it appears there were at least four black sites in the country.[27] One infamous location known as the Salt Pit was described by an interrogator as "the closest thing he had seen to a dungeon," and explained to the Senate Intelligence Committee in a partially-declassified report:

> [T]he windows at Detention Site Cobalt [the Salt Pit] were blacked out and detainees were kept in total darkness. The [redacted] guards monitored detainees using headlamps and loud music was played constantly in the facility. While in their cells, detainees were shackled to the wall and given buckets for human waste. Four of the twenty cells at the facility included a bar across the top of the cell. Later reports describe detainees being shackled to the bar with

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289799bf6d0e/D87288C34A6D9FF736F9459ABCF83210.sscistudy1.pdf [hereinafter Torture Report].

22. Eric Wiener, *Waterboarding: A Tortured History*, NPR (Nov. 3, 2007), https://www.npr.org/2007/11/03/15886834/waterboarding-a-tortured-history.

23. Torture Report, *supra* note 21, at 43.

24. *Id.*

25. *Id.*

26. Matt Apuzzo, Sheri Fink and James Risen, *How U.S. Torture Left a Legacy of Damaged Minds*, N.Y. TIMES (Oct. 8, 2016), https://www.nytimes.com/2016/10/09/world/cia-torture-guantanamo-bay.html.

27. Amnesty Int'l, *USA: Crimes and impunity: Full Senate Committee report on CIA secret detentions must be released, and accountability for crimes under International law ensured,* AMR 51/1432/2015 (Apr. 2015), https://www.amnesty.org/en/documents/amr51/1432/2015/en/ [hereinafter *CIA Secret Detentions*].

> their hands above their heads, forcing them to stand, and therefore not allowing them to sleep.[28]

At least one detainee's imprisonment at the Salt Pit was hidden from the International Committee of the Red Cross.[29]

In the Salt Pit and elsewhere in Afghanistan's black sites, detainees were chained to the ceiling clad only in diapers and left that way for days or weeks.[30] Some were prevented from sleeping for days and experienced hallucinations as a result.[31] Many began to behave like dogs in a kennel, cowering when their cell doors were opened.[32] One detainee was "hung by his wrists from a bar above his head with his toes just reaching the floor (the so-called 'strappado' position).[33] This, he says, was like being stretched on a medieval rack and was 'so painful that no one put in this position could stand it for even a moment.' He would be left there for six to eight hours before being brought back for further interrogation."[34]

Another man named Gul Rahman died of hypothermia after interrogators doused him in cold water and chained him half-naked to the concrete floor overnight.[35] His family still has not been able to get information from the U.S. government about what happened to his body.[36] Still, others were subjected to humiliating nudity and sexual assault including penetration with foreign objects.[37] One man was submitted to sexual assault with such "excessive force" that he

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28. Torture Report, *supra* note 21, at 49.

29. *CIA Secret Detentions*, *supra* note 27, at 56.

30. THE CONSTITUTION PROJECT, THE REPORT OF THE CONSTITUTION PROJECT'S TASK FORCE ON DETAINEE TREATMENT 73 (Apr. 2013), https://detaineetaskforce.org/pdf/Full-Report.pdf.

31. *CIA Secret Detentions, supra* note 27, at 32.

32. Torture Report, *supra* note 21, at 50, n. 240.

33. RENDITION PROJECT, *CIA Prisoners, Hassan Bin Attash*, https://www.therenditionproject.org.uk/prisoners/hassan-binattash.html# (last visited Nov. 29, 2021).

34. *Id.*

35. Hajira Hematyara, *The CIA killed my father. What did they do with his body?* WASH. POST (Nov. 30, 2018), https://www.washingtonpost.com/opinions/the-cia-killed-my-father-what-did-they-do-with-his-body/2018/11/30/f743ba66-ed08-11e8-96d4-0d23f2aaad09_story.html.

36. *Id.*

37. Torture Report, *supra* note 21, at 100, n. 584.

continues to suffer from rectal prolapse.[38] These are the known abuses, but Senate investigators warned the "full details of the CIA interrogations there remain largely unknown" because "multiple uses of sleep deprivation, required [forced] standing, loud music, sensory deprivation, extended isolation, reduced quantity and quality of food, nudity, and 'rough treatment' of CIA detainees" in Afghanistan went undocumented.[39]

The Rome Statute identifies torture as a crime against humanity[40] and a war crime,[41] and defines it as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused."[42] Of course, the applicability of the Rome Statute to U.S. behaviors remains a subject of intense dispute between the parties. But even setting the Rome Statute aside and looking purely at international agreements that the U.S. has willingly ratified, torture is overwhelmingly, clearly, and indisputably a grave crime.[43]

The Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) affirms in Article 2 that the prohibition on torture cannot be derogated from under any circumstances,[44] and the United States signed the treaty in 1988 and ratified it in 1992.[45] The International Convention on Civil and Political Rights, which the United States signed in 1977 and ratified in 1992,[46] prohibits torture in Article 7.[47] Common Article 3 of the

38. *Id*.

39. *Id*. at 51.

40. Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 (1998), 2187 U.N.T.S. 90 (1998), at art. 7(1)(f) [hereinafter Rome Statute].

41. *Id.* at 4.

42. *Id.* at 3.

43. *Id*. at 4.

44. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2.2, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 [hereinafter CAT].

45. *Status of Ratification Interactive Dashboard*, U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, https://indicators.ohchr.org (last visited Nov. 14, 2021).

46. *Id.*

47. International Convention on Civil and Political Rights, art. 7, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

Geneva Conventions, ratified by the United States in 1955[48] and widely understood to be binding as a matter of customary international law,[49] prohibits torture in the context of an armed conflict.[50] These same provisions of international law not only prohibit torture but require accountability for violations.

The prohibition on torture is also firmly embedded within U.S. domestic law. The CAT was incorporated by Congress into U.S. law via what is often called the "torture statute,"[51] and the War Crimes Act also affirms the prohibitions of the Geneva Conventions.[52] Additionally, U.S. federal courts have forcefully reiterated the prohibition on torture, including in the landmark case *Filártiga v. Peña-Irala*, in which the court stated "[a]mong the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture."[53] Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind."[54]

III. ACCOUNTABILITY AND COMPLEMENTARITY

As previously discussed, a key element in all cases before the International Criminal Court is the principle of complementarity. The Court is meant to be a court of last resort. As such, the Rome Statute makes clear that the ICC's jurisdiction will not apply if the state investigates the same criminal behavior on its own. This is true even if the state's investigation leads to a decision not to prosecute.[55] Thus, one exit ramp from this heated dispute could have been a demonstration of complementarity from the United States. Indeed,

48. *What is International Humanitarian Law?*, INT'L COMM. OF THE RED CROSS, 1 (2004), https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf.

49. Definition of War Crimes, Rule 156. Serious Violations of International Humanitarian Law Constitutes War Crimes, INT'L COMM. OF THE RED CROSS (2005), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156.

50. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

51. 18 U.S.C. § 2340(a).

52. 18 U.S.C. § 2441.

53. Filártiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

54. *Id.*

55. Rome Statute, *supra* note 11, at 10.

former National Security Advisor John Bolton denounced the Court, explaining:

> [The ICC is] superfluous, given that domestic U.S. judicial systems already hold American citizens to the highest legal and ethical standards. When violations of law do occur, the United States takes appropriate and swift action to hold perpetrators accountable. We are a democratic nation with the most robust system of investigation, accountability, and transparency in the world. We believe in the rule of law, and we uphold it. We don't need the ICC to tell us our duty or second-guess our decisions.[56]

Thus, to determine whether the principle of complementarity could still be demonstrated in this case since the ICC has declined to pursue its investigation further, it is essential to assess what accountability steps the United States government has already taken.

The U.S. Congress has conducted investigations into post-9/11 torture. In 2009, the Senate Armed Service Committee released a report documenting its findings after examining torture committed by the military.[57] Perhaps most prominently, the Senate Select Committee on Intelligence conducted an investigation over the course of seven years based on the C.I.A.'s own documentation and produced an accompanying report that remains classified in its full 6,000-page form.[58] However, a nearly 600-page partially redacted Executive Summary was released in 2014.[59]

The executive branch also conducted investigations. In particular, the Office of Professional Responsibility (OPR) created a review within the Department of Justice.[60] This investigation looked into the conduct of lawyers within the Office of Legal Counsel ("OLC") who

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56. Bolton, *supra* note 5.

57. S. COMM. ON ARMED SERVICES, 110TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY, (Comm. Print 2018), https://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final_April-22-2009.pdf.

58. Torture Report, *supra* note 21, at 1.

59. *Id*.

60. OFFICE OF PROFESSIONAL RESPONSIBILITY, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECT TERRORIST (July 29, 2009), https://fas.org/irp/agency/doj/opr-final.pdf [hereinafter OPR Report].

authored permission slip-esque memos, often referred to as "torture memos."[61] In these memos, the lawyers distorted the law to justify a policy of torture and give a facade of lawfulness to the torture program.[62] As one scholar described the memos, they "were based upon terminally faulty legal reasoning, deliberately obtuse interpretations of settled international law, the omission of adverse facts and precedents, and the inappropriate, and at times, knowingly erroneous, use of inapposite case law, statutes, and scholarly work," concluding the memos "were necessarily faulty" as the attorneys who wrote them were "tasked with justifying the unjustifiable."[63] In its report summarizing the investigation, OPR concluded OLC attorneys had engaged in professional misconduct.[64] The Department of Justice ultimately overruled OPR's recommendations and declined to recommend disciplinary action.[65]

Some people were prosecuted for their role in carrying out the crime of torture, but they were almost entirely within the U.S. military court-martial system, and such prosecutions were limited to low-level officers.[66] Outside the military justice system, one contract interrogator employed with the CIA was prosecuted for exceeding authorized tactics and torturing a detainee until he died.[67]

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61. *See, e.g.,* Andrew Cohen, *The Torture Memos, Ten Years Later,* THE ATLANTIC (Feb. 6, 2012), https://www.theatlantic.com/national/archive/2012/02/the-torture-memos-10-years-later/252439/.

62. *See* Jake Romm, *No Home in this World: The Case against John Yoo before the International Criminal Court,* 20 INT'L. CRIM. L. R. 862, 862-63 (2020).

63. *Id.*

64. OPR report, *supra* note 60, at 260.

65. DAVID MARGOLIS, OFFICE OF THE DEPUTY ATTORNEY GENERAL, MEMORANDUM OF DECISION REGARDING THE OBJECTIONS TO THE FINDINGS OF PROFESSIONAL MISCONDUCT IN THE OFFICE OF PROFESSIONAL RESPONSIBILITY'S REPORT OF INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS, 2 (Jan. 5, 2010), https://fas.org/irp/agency/doj/opr-margolis.pdf.

66. *By the Numbers, Finding of the Detainees Abuse and Accountability Project*, HUM. RTS. WATCH (Apr. 25, 2006), https://www.hrw.org/report/2006/04/25/numbers/findings-detainee-abuse-and-accountability-project [hereinafter *DAA Project*].

67. *Former CIA Contractor Speaks Out About Prisoner Interrogation*, PBS NEWSHOUR (Apr. 20, 2015), https://www.pbs.org/newshour/show/convicted-former-cia-contractor-speaks-prisoner-interrogation.

This means, to date, there have been no criminal investigations into the actions of senior U.S. officials who planned and carried out the crime of torture.[68] Famously, soon after being elected to replace the administration responsible for these crimes, then-President Obama declared his desire to "look forward, not backward."[69]

This was exactly what happened.[70] In 2009, Attorney General Eric Holder appointed U.S. attorney John Durham to conduct a "review" of interrogations during the Bush administration to determine whether formal criminal investigations should follow.[71] Steven Rapp, the Ambassador at Large for War Crimes serving during the Obama administration, argued in the midst of the Durham review that the work of the "independent counsel appointed by Attorney General Eric Holder" would be complicated. He explained:

> [I]f there were cases that could be pursued, they would involve very complex issues as to whether people could be held criminally liable, at what level there could be individual responsibility, and whether the causes of death or injury could now be proven. A number of other issues would also have to be evaluated," but concluded that it was "a genuine investigation that I think satisfies the standard of complementarity if we were a member of the ICC.[72]

However, Rapp's analysis was deeply flawed for multiple reasons.[73] First, Durham was not an independent counsel. He was an attorney already within the Department of Justice and working under

68. DAA Project, *supra* note 66.

69. David Johnston & Charlie Savage, *Obama Reluctant to Look into Bush Programs,* N.Y. TIMES (Jan. 11, 2009), https://www.nytimes.com/2009/01/12/us/politics/12inquire.html.

70. ERIC HOLDER, DEP'T OF JUSTICE, ATTORNEY GENERAL ERIC HOLDER REMARKS REGARDING A PRELIMINARY REVIEW INTO THE INTERROGATION OF CERTAIN DETAINEES (Aug. 24, 2009), https://www.justice.gov/opa/speech/attorney-general-eric-holder-regarding-preliminary-review-interrogation-certain-detainees.

71. *Id.*

72. *Press Briefing with Stephen J. Rapp Ambassador-at-Large for War Crimes Issues,* U.S. MISSION GENEVA (Jan. 22, 2010), https://geneva.usmission.gov 2010/01/22/stephen-rapp/.

73. Scott Horton, *Rapp for the Defense,* HARPER'S MAG. (Jan. 26, 2010), https://harpers.org/2010/01/rapp-for-the-defense/ (examining and critiquing Rapp's comments).

its supervision.[74] Additionally, he was not conducting a criminal investigation, only a preliminary review to determine whether actual criminal proceedings should follow.[75] Further, the scope of Durham's mandate was limited in an important way: he was not to explore criminal culpability for anyone who relied upon the OLC memos and acted within their scope.[76] This limitation was a significant caveat, as it meant senior U.S. officials who created and authorized the torture program would not be investigated. Further, the limited scope also meant clear acts of torture under the bad-faith auspices of the OLC memos would escape review.[77]

President Obama personally wrote to CIA employees at the time to assure them that anyone who followed Department of Justice (DOJ) advice in using "enhanced" interrogation techniques would not face prosecution:

> The men and women of the CIA have assurances from both myself, and from Attorney General Holder, that we will protect all who acted reasonably and relied upon legal advice from the Department of Justice that their actions were lawful. The Attorney General has assured me that these individuals will not be prosecuted and that the Government will stand by them.[78]

By limiting the Durham investigation so narrowly, the Obama administration helped to ensure the Bush administration's efforts to evade accountability were successful.

Indeed, at the conclusion of Durham's review, he recommended investigations into the deaths of two detainees in custody, but otherwise closed his preliminary review without full criminal investigation or prosecution.[79] Moreover, those recommended

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74. *Id*.

75. *Id*.

76. *Id*.

77. *Id*.

78. Statement to Employees by Director of the Central Intelligence Agency Leon E. Panetta on the Release of Department of Justice Opinions (Apr. 16, 2009), https://fas.org/irp/news/2009/04/cia041609.html.

79. ERIC HOLDER, DEP'T OF JUST., STATEMENT OF ATTORNEY GENERAL ERIC HOLDER ON CLOSURE OF INVESTIGATION INTO THE INTERROGATION OF CERTAIN DETAINEES (Sept. 15, 2014), https://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-closure-investigation-interrogation-certain-detainees [Hereinafter Holder Press Release].

investigations into the two detainee deaths never materialized into any charges.[80] Multiple survivors of the U.S. torture program have since come forward to say that they were not afforded an opportunity to be interviewed as part of the Durham investigation, and indeed there appears to be no evidence suggesting any survivors were interviewed.[81] No concluding reports or findings from the Durham investigation have been made public by the Justice Department as of the date of this writing.

John Yoo, lead author of the "torture memos," enjoys a prestigious position as a law professor and frequent media contributor.[82] Jay Bybee, who signed off on many of those same "torture memos," is a federal judge.[83] Donald Rumsfeld, who as Defense Secretary oversaw, authorized, and pushed to expand torture techniques, passed away in June 2021, remaining a free man who spent his retirement years developing mobile gaming applications.[84] James Mitchell, who made millions of dollars working as a contractor with the CIA to help design its torture techniques now sells memoirs of his crimes and speaks about them frequently on cable news and at think tanks.[85] Unfortunately, there is a very long list of individuals

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80. Scott Shane, *No Charges Filed in Harsh Tactics Used by the C.I.A.,* N.Y. TIMES (Aug. 30, 2012), https://www.nytimes.com/2012/08/31/us/holder-rules-out-prosecutions-in-cia-interrogations.html.

81. Spencer Ackerman, *Former CIA Detainees Claim US Torture Investigators Never Interviewed Them*, THE GUARDIAN (Nov. 11, 2014, 5:54 PM), https://www.theguardian.com/us-news/2014/nov/11/libyan-cia-detainees-torture-inquiry-interview; *US: CIA Torture is Unfinished Business*, HUM. RTS. WATCH (Dec. 1, 2015, 9:20 AM), https://www.hrw.org/news/2015/12/01/us-cia-torture-unfinished-business.

82. Fran Quigley, *Torture, Impunity, and the Need for Independent Prosecutorial Oversight of the Executive Branch*, 20 CORNELL J. OF L. AND PUB. POL'Y 271, 308 (2010), https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1327&context=cjlpp.

83. *Id*.

84. Graison Dangor, *Rumsfeld–Defense Secretary Who Led U.S. To War In Iraq–Dead At 88*, FORBES (June 30, 2021, 6:51 PM), https://www.forbes.com/sites/graisondangor/2021/06/30/rumsfeld-defense-secretary-the-led-us-to-war-in-iraq-dead-at-88/?sh=27085e9b7f7e.

85. Dror Ladin, *There's So Much We Still Don't Know About the CIA's Torture Program. Here's How the Government Is Keeping the Full Story a Secret,* TIME (Feb. 7, 2020, 8:19 AM), https://time.com/5779579/cia-torture-secrecy/ (discussing James Mitchell's memoirs); *Psychologists Behind CIA 'Enhanced Interrogation' Program Settle Detainees' Lawsuit*, NPR (Aug. 17, 2017, 2:52 PM),

intimately involved in planning, carrying out, and working to cover up the crime of torture, who now live lucrative and free lives.

IV. WHAT'S AT STAKE

Having examined what is known about the atrocities planned and perpetrated by U.S. officials in Afghanistan, as well as the scope of accountability efforts, an inescapable conclusion emerges: by failing to conduct genuine criminal investigations or prosecutions into the senior officials responsible for the crime of torture, the United States has not met the complementarity standard of the International Criminal Court.[86] Thus, the principle of complementarity cannot be met, and additionally the ICC has elected not to intervene even as this sort of case is precisely where the ICC was designed to step in: when grave crimes have occurred, yet the responsible state has not been held accountable or even provided full transparency. Before discussing what potential steps toward justice may still be available, it is essential to assess the stakes and the broader consequences that stem from a continued delay in accountability.

A. Consequences Within the United States

The government's decision to embrace a policy of torture, followed by the choice to award a de facto amnesty to those responsible, has had significant consequences within the United States. Culturally, torture has been absorbed by the American public as a justifiable policy option in some circumstances, rather than a crime of international atrocity that is never permissible. This acceptance of torture is reflected in recent opinion polling, as a majority of Americans surveyed consistently indicate support for using torture against people suspected of acts of terror.[87] In 2016,

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https://www.npr.org/sections/thetwo-way/2017/08/17/544183178/psychologists-behind-cia-enhanced-interrogation-program-settle-detainees-lawsuit (discussing money paid by the CIA to its contractors).

86. *See* Kaveri Vaid, *What Counts as State Action under Article 17 of the Rome Statute—Applying the ICC's Complementarity Test to Non-Criminal Investigations by the United States into War Crimes in Afghanistan* 44 N.Y.U. J. INT'L L. & POL. 573 (2012) (analyzing the complementarity standard and explaining why U.S. non-criminal investigations do not comply).

87. *See e.g.* Christopher Ingraham, *Let's Not Kid Ourselves: Most Americans are Fine with Torture, Even When You Call it "Torture,"* WASH. POST (Dec. 9,

Americans elected Donald Trump for President after he campaigned on "bring[ing] back waterboarding, and a hell of a lot worse." He also stated, "[D]oes torture work? . . . Absolutely."[88] Particularly striking was President Trump's direct use of the word "torture," as even the Bush-era officials who had actually approved and conduct had hesitated to label it as such. Trump's campaign rhetoric and subsequent election indicated a cultural willingness to openly embrace and defend torture as an option.

Popular media has also reflected these trends, with numerous films and television shows depicting U.S. torture as heroic, an unfortunate necessity, or a tool that makes us all safer, rather than a crime that is unjustifiable in any circumstances.[89] Many Americans received their information about torture from the hit show *24*, in which protagonists frequently engaged in torture as acts of heroism to protect the country.[90] A senior military official expressed concern with how the show popularized the notion of torture, saying, "The kids see it, and say, 'If torture is wrong, what about *24*?'"[91] Unfortunately, *24* portrayed what was already reality: those who torture were, and often still are, lauded as patriotic officials acting out of necessity.

Moreover, *24* does not stand alone in this depiction of torture as acceptable or even necessary. Another film to take this approach was

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2014), https://www.washingtonpost.com/news/wonk/wp/2014/12/09/lets-not-kid-ourselves-most-americans-are-fine-with-torture-even-when-you-call-it-torture/; Chris Kahn, *Exclusive: Most Americans Support Torture Against Terror Suspects,* REUTERS (Mar. 30, 2016, 3:15 AM), https://www.reuters.com/article/us-usa-election-torture-exclusive/exclusive-most-americans-support-torture-against-terror-suspects-reuters-ipsos-poll-idUSKCN0WW0Y3.

88. James Masters, *Donald Trump Says Torture 'Absolutely Works'—But Does It?*, CNN (Jan. 26, 2017, 11:37 AM), https://www.cnn.com/2017/01/26/politics/donald-trump-torture-waterboarding/index.html.

89. Mark Hughes Cobb, *Torture Prevalent in Movies, UA Researchers Say*, TUSCALOOSANEW.COM (Feb. 10, 2020, 7:01 AM), https://www.tuscaloosanews.com/story/news/local/2020/02/10/torture-prevalent-in-movies-ua-researchers-say/1738573007/.

90. Jane Mayer, *Whatever It Takes*, THE NEW YORKER (Feb. 11, 2007), https://www.newyorker.com/magazine/2007/02/19/whatever-it-takes (quoting U.S. Army Brigadier General Patrick Finnegan).

91. *Id*.

Zero Dark Thirty, which critics have derided as "torture porn."[92] After spending significant time graphically depicting CIA torture, the film shows torture as instrumental in leading the U.S. government directly to Osama bin Laden, a fact that is demonstrably false.[93] Even worse, children's media has adopted similar depictions of torture. For example, extended torture scenes are played for a laugh in the original *Shrek* and *Minions* films.[94]

Furthermore, these depictions of torture are found in areas outside of fictionalized media. Even sources of information intended to be serious, official, and rigorous, such as museums, seem to have absorbed the perspective that torture may be justifiable, or at least debatable as an option, in certain circumstances. For example, the International Spy Museum in Washington, D.C. installed an exhibit on post-9/11 U.S. torture.[95] Rather than educating visitors that torture is an abhorrent crime with no exceptions or explaining that the torture program was a heinous chapter in U.S. history, the display featured a mock waterboard for guests to lie on.[96] The display even showed cartoon drawings illustrating torture techniques and a video from the former officials who were responsible for the torture program explaining their rationale.[97] Museum guests were then asked to vote on whether they supported the use of torture to prevent future

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92. Alex von Tunzelmann, *Zero Dark Thirty's Torture Scenes are Controversial and Historically Dubious,* THE GUARDIAN (Jan. 15, 2013, 8:42 AM), https://www.theguardian.com/film/filmblog/2013/jan/25/zero-dark-thirty-reel-history.

93. *Id*.

94. IMO Quest, *Gingy Torture Scene from Shrek*, YOUTUBE (Feb. 1, 2015), https://www.youtube.com/watch?v=U88CwRjbnY4 (featuring a clip from the movie *Shrek* originally produced by Dreamworks Animation Studios); Fandango Family, *Minions—Torturing Minions Scene | Fandango Family*, YOUTUBE (Aug. 17, 2018), https://www.youtube.com/watch?v=GxTVW-f9D98 (featuring a clip from the movie *Minions* originally produced by Illumination Entertainment).

95. Julian Borger, *Guantánamo Lawyers See Issues in Torture Exhibit at Spy Museum*, THE GUARDIAN (May 27, 2019, 1:00 AM), https://www.theguardian.com/us-news/2019/may/27/international-spy-museum-washington-torture-exhibit-guantanamo.

96. Emma Loop & Jason Leopold, *Democratic Senators Have Been Privately Pushing a Major Museum to Change a Controversial Torture Exhibit*, BUZZFEED (Dec. 19, 2019, 10:49 AM), https://www.buzzfeednews.com/article/emmaloop/senators-intelligence-committee-spy-museum-torture.

97. *Id*.

attacks.[98] Trivial though some of the examples may seem, they are evidence of a society that is ignorant to the truth of what happened. These examples illustrate a society that has been conditioned to view torture as at least acceptable in some circumstances, if not admirable, or even humorous.

Another domestic consequence of the failure to hold torturers accountable is that many of them have returned to government. Examples include Gina Haspel, who oversaw a torture site and helped destroy videos of torture sessions, yet was promoted to CIA Director under the Trump administration.[99] Steven Bradbury, another attorney who collaborated to produce the torture memos and was also appointed to a senior role in the Trump administration as General Counsel for the Department of Transportation.[100] Not only did a president successfully seek office based in part on a campaign promise to bring back torture, but he also welcomed alumni of the torture program into his administration.[101] These developments have perpetuated a culture of impunity for abuses and signaled that involvement in an atrocity such as torture is not an obstacle to regaining power in the U.S. government.

B. Credibility in Pressing for Accountability Worldwide

In addition to the compounding harms emanating from impunity for torture that can be seen within the United States, there are also global consequences. It is already the case that the torture program, the lack of accountability for those who perpetuated it, and U.S. attacks on the International Criminal Court have given other governments a ready-made excuse to justify their own crimes and

98. *Id*.

99. Amanda Holpuch, *Who is Gina Haspel? Donald Trump's Pick for CIA Chief Linked to Torture Site,* THE GUARDIAN (May 9, 2018, 9:24 AM), https://www.theguardian.com/us-news/2018/mar/13/who-is-gina-haspel-trump-cia-director-torture-site-link.

100. Rebecca Morin, *'Torture Memo' Author Nominated for Trump Administration Post,* POLITICO (June 5, 2017, 10:40 PM), https://www.politico.com/story/2017/06/05/trump-nominee-torture-bradbury-239167.

101. Jonathan Turley, *Gina Haspel's CIA Nomination is a Women's Milestone We'd be Wise to Avoid*, USA TODAY (Mar. 18, 2018, 5:18 PM), https://www.usatoday.com/story/opinion/2018/03/14/gina-haspel-nomination-welcome-u-s-where-torture-rocket-fuel-your-career-jonathan-turley-column/423619002/.

impunity. The Trump-era Executive Order pushed many actors to point out that the United States could have avoided such a clash with the Court by utilizing its own justice system to hold abusers accountable.[102] The International Bar Association stated, "Instead of harassing ICC staff, the U.S. should get its own house in order by providing and demanding genuine accountability."[103]

A key example of how U.S. efforts to shield itself from accountability undermine its stated goals of holding others accountable occurred in the case of Serbia, as the United States consistently threatened to cut off aid to Serbia in order to incentivize the country to comply with the International Criminal Tribunal for the former Yugoslavia (ICTY).[104] Yet the U.S. actually subsequently suspended aid because Serbia refused to sign a bilateral agreement shielding U.S. personnel from the ICC.[105] The message was clear: the United States government expects accountability for other States but immunity for itself. Accordingly, in 2014, former U.N. Special Rapporteur on Torture, Juan Méndez, warned that U.S. refusal to hold torturers accountable was bolstering the arguments of other governments seeking to ignore their own accountability requirements.[106] Indeed, in 2014, North Korea's Foreign Ministry chided the international community for focusing on its human rights abuses while ignoring "inhuman torture practiced by the CIA."[107] Then in 2018, an Iranian official denounced the United States as a

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102. Beth Van Schaack, *The Int'l Criminal Court Executive Order: Global Reactions Compiled*, JUST SECURITY (Sept. 1, 2020), https://www.justsecurity.org/72256/the-intl-criminal-court-executive-order-global-reactions-compiled/ (quoting the International Bar Association).

103. *Id*.

104. Steven Woehrel, *U.S. Conditions on Aid to Serbia,* CONGRESSIONAL RESEARCH SERVICE 3 (Jan. 7, 2008), https://sgp.fas.org/crs/row/RS21686.pdf.

105. *35 Nations Losing Military Aid Over World Tribunal Stance,* L.A. TIMES (July 2, 2003), https://www.latimes.com/archives/la-xpm-2003-jul-02-fg-court2-story.html.

106. *"If the US Tortures, Why Can't We Do It?"—UN Expert Says Moral High Ground Must be Recovered*, U.N. OFFICE OF THE HIGH COMMISSIONER ON HUM. RTS. (Dec. 11, 2014), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15406&LangID=E.

107. Ray Sanchez, *World reacts to U.S. torture report,* CNN (Dec. 10, 2014), https://www.cnn.com/2014/12/10/world/senate-torture-report-world-reaction.

"rogue regime," asking, "When will the international community say enough is enough and force [the] U.S. to act like a normal state?"[108]

The Biden administration's State Department released its first Country Reports on Human Rights Practice early in 2021, in an effort to "promot[e] human rights and accountability for rights abuses and violations."[109] United States Agency for International Development headed by Samantha Power issued a celebratory tweet when Sudan elected to join the ICC, calling it a "key step toward ending impunity."[110] But such statements stand in stark contrast to the looming reality that the United States itself has not embraced such accountability.

The ICC dispute, followed by the Court's decision to back away from holding the U.S. government accountable, now gives the United States government an opportunity to change course, perhaps the last opportunity to meaningfully demonstrate that it will affirmatively choose accountability and break ties with the past. Ignoring this opportunity would instead solidify this dynamic and gut any remaining credibility the United States may have in working to promote human rights worldwide or demand accountability of others. Indeed, as former General Counsel to the Navy Alberto Mora—a consistent voice for accountability from the earliest days of the torture program—noted recently, "By failing to hold ourselves accountable, we join company with all those regimes that would similarly claim the right to act with impunity and to hold themselves exempt from the requirements of international law—an awful precedent that gives shelter to rogue nations."[111]

108. Van Schaack, *supra* note 102 (quoting Iranian official).

109. DEP'T OF STATE, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (March 30, 2021), https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/.

110. Samantha Power (@PowerUSAID), TWITTER (Aug. 3, 2021, 9:01 AM), https://twitter.com/PowerUSAID/status/1422588502894653440.

111. Alberto Mora, Director, ABA Rule of Law Initiative, Keynote Address at American Bar Association Law Day Celebration (March 3, 2021) (on file with author).

C. Ramifications for the International Criminal Court and International Justice

When Secretary of State Antony Blinken announced the Biden administration would be rescinding Trump-era Executive Order 13928, thus ending the economic sanctions and visa restrictions that had previously been imposed upon ICC personnel, he nonetheless made sure to specify that the United States would continue to resist the ICC's jurisdiction.[112] Blinken stated, "We continue to disagree strongly with the ICC's actions relating to the Afghanistan and Palestinian situations. We maintain our longstanding objection to the Court's efforts to assert jurisdiction over personnel of non-States Parties such as the United States and Israel."[113] He then supportively alluded to critiques of the Court: "We are encouraged that State Parties to the Rome Statute are considering a broad range of reforms to help the Court prioritize its resources and to achieve its core mission of serving as a court of last resort in punishing and deterring atrocity crimes."[114] Interestingly, he also reiterated a U.S. commitment to international investigative mechanisms "to realize the promise of justice for victims of atrocities," but specifically for "Iraq, Syria, and Burma."[115]

This statement from the Secretary of State neatly summarized many of the challenges to international justice mechanisms generally, and the International Criminal Court specifically. The ICC is regarded by many as suffering from a crisis of legitimacy.[116] Several factors underlie this perceived crisis: the lethargic pace of cases, the low tally of successful prosecutions, and the Court's thus-far exclusive prosecutorial focus on Africa.[117] These are serious critiques with major implications for the Court's ability to sustain itself as a viable

112. Blinken, *supra* note 4.

113. *Id.*

114. *Id.*

115. *Id.*

116. Caleb H. Wheeler, *In the Spotlight: The Legitimacy of the International Criminal Court*, INT'L L. BLOG (Oct. 22, 2018), https://internationallaw.blog/2018/10/22/in-the-spotlight-the-legitimacy-of-the-international-criminal-court/.

117. *See e.g.,* David Bosco, *Why is the International Criminal Court Picking Only on Africa?*, WASH. POST (Mar. 29, 2013), https://www.washingtonpost.com/opinions/why-is-the-international-criminal-court-picking-only-on-africa/2013/03/29/cb9bf5da-96f7-11e2-97cd-3d8c1afe4f0f_story.html.

arbiter of international justice. Many of them are also directly relevant to the dispute at hand between the Court and the United States. In particular, the Court's much-maligned focus on Africa points to a large existential question: can an international criminal court be empowered to succeed if it is not empowered to hold powerful States accountable alongside the weaker ones?

United States rhetoric against the Court is steeped in an unwillingness to confront its own harms. Bolton's 2018 speech attacking the Court stated, "[T]he largely unspoken, but always central, aim of its most vigorous supporters was to constrain the United States. The objective was not limited to targeting individual U.S. service members, but rather America's senior political leadership, and its relentless determination to keep our country secure."[118] When the Bush administration announced its decision to un-sign the Rome Statute, then-Secretary of Defense Donald Rumsfeld stated:

> By putting U.S. men and women in uniform at risk of politicized prosecutions, the ICC could well create a powerful disincentive for U.S. military engagement in the world. If so, it could be a recipe for isolationism—something that would be unfortunate for the world, given that our country is committed to engagement in the world and to contributing to a more peaceful and stable world.[119]

Even Secretary of State Blinken's statement announcing eased sanctions for ICC personnel reflected hypocrisy in the U.S. position. His statement reiterated opposition to investigations into the U.S. while expressing support for investigations into other countries with less power and military influence such as Syria, Iraq, and Burma.

It is difficult not to conclude from this pattern of behavior that the U.S. is indeed a champion of accountability and the rule of law, but only so long as such efforts do not threaten its own power or alliances. If that is not the case, the current breakdown in the ICC investigation offers a ready-made opportunity for the U.S. to demonstrate otherwise by working to secure rather than evade justice. A Court that is functionally barred from the ability to assess the crimes of global

118. Bolton, *supra* note 5.

119. Donald Rumsfeld, *Statement on the ICC Treaty*, SCOOP WORLD (May 7, 2002, 10:06 AM), https://www.scoop.co.nz/stories/WO0205/S00010/secretary-rumsfeld-statement-on-the-icc-treaty.htm?from-mobile=bottom-link-01.

superpowers will continue to be definitionally limited to focusing its prosecutorial pressure on everyone else. Most of the world's resources, people, and power belong to states that are not members of the ICC.[120] Thus, the practical effect is a two-tiered system of international accountability that results in justice for some but impunity for the rest. Accordingly, the outcome is determined by the relative power of the states perpetrating the crimes.[121] Such a system in turn reinforces global injustices of race, wealth, resources, and power, and renders the system itself unjust.

V. HOW SHOULD THE UNITED STATES PROCEED?

The stakes are clearly far too high to maintain the status quo. How, then, should the U.S. government proceed amidst its ongoing tensions with the ICC and the Court's failure to ensure accountability for U.S. torture in Afghanistan and beyond? Two main paths exist moving forward.

A. Pathway One: Submit to Standards of Accountability Expected From Other Governments

The Rome Statute's complementarity standard prohibits the Court from moving forward with investigations and prosecutions when the state in question is in the process of conducting its own genuine processes. This is a process that the United States has supported and even pushed for, including in Darfur, Uganda, and Libya.[122]

120. David Bosco, *How to Respond When the International Criminal Court Goes After America,* LAWFARE (Dec. 3, 2017, 10:00 AM), www.lawfareblog.com/how-respond-when-international-criminal-court-goes-after-america.

121. *Id.*

122. Examples of the United States supporting ICC prosecution of officials who have not been held accountable by their own governments include pushing for the indictment and celebrating the convictions of Lord's Resistance Army leader Dominic Ongwen from Uganda, voting in favor of a U.N. Security Council resolution authorizing the ICC to investigate human rights abuses in Libya under Muammar Gaddafi's government, and not vetoing a Security Council resolution authorizing investigation and prosecution of abuses in Darfur, Sudan. *See U.N. Security Council Refers Darfur to the ICC*, HUM. RTS. WATCH (March 31, 2005), https://www.hrw.org/news/2005/03/31/un-security-council-refers-darfur-icc; *Libya: What the Security Council Has Done For Justice,* HUM. RTS. WATCH (March 1, 2011), https://www.hrw.org/news/2011/03/01/libya-what-security-council-has-done-justice#; Ned Price, *Welcoming the Verdict in the Case Against Dominic Ongwen*

Furthermore, this is a requirement for the U.S. through its other international legal commitments such as the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment ("CAT").[123] When the Court entertained the idea of an investigation of U.S. actions in Afghanistan, the pushback to the Court's assertion of jurisdiction merely centered on the status of the United States as a non-member state. However, now that the Court seems to have ceased looking into U.S. behavior, the United States has three main options for salvaging the possibility of justice for its conduct in Afghanistan.

First, the U.S. government could publicly announce that it has already met the complementarity standard through its own investigations, which has led to a genuine decision not to prosecute those most responsible for the torture program. This option would require the U.S. government to disclose documents supporting this assertion, particularly from the closed Durham investigation.[124] Information currently public indicates that no senior official has ever been criminally investigated for any crimes of torture.[125]

Second, if unable to demonstrate that it has achieved complementarity in the form of a genuine investigation, another option would be for the United States to launch its own investigation. However, pursuing this option presents several obstacles. In the Military Commissions Act of 2006 ("MCA"), the U.S. Congress amended the War Crimes Act in a targeted effort to extend immunity to the perpetrators of post-9/11 torture.[126] Additionally, officials would likely point to the OLC "torture memos" and assert that they

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for War Crimes and Crimes Against Humanity, U.S. STATE DEP'T (Feb. 4, 2021), https://www.state.gov/welcoming-the-verdict-in-the-case-against-dominic-ongwen-for-war-crimes-and-crimes-against-humanity/.

123. The Convention Against Torture (CAT) not only prohibits the practice of torture but requires prosecution of offenders. G.A. Res. 39/46, art. 7.1., Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (June 26, 1987).

124. *See* Holder Press Release, *supra* note 79.

125. *Findings of the Detainee Abuse and Accountability Project*, HUM. RTS. WATCH (Apr. 26, 2006), https://www.hrw.org/report/2006/04/25/numbers/findings-detainee-abuse-and-accountability-project [hereinafter "DAA Project"].

126. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2633 (2006).

relied on them in good faith in the defense of their actions.[127] However, the provisions found in the MCA could be repealed, and even if they remained in place, a court would perhaps not uphold them as a lawful amnesty for such atrocities.

As to reliance on the OLC memos, it is far from certain that the Court would find them sufficient to excuse torturers from being held accountable for their actions. Their authors were found by the OPR to have committed malpractice in writing them, and they have long since been rescinded.[128] Even the authors of the memo were doubtful their analysis would be upheld by a court, writing, "we cannot predict with confidence whether a court would agree with [our] conclusion," but assuring readers that "the question is unlikely to be subject to judicial inquiry."[129] Regardless, the memo should not serve as a cover for those who wrote them, requested them, or acted outside their permissive scope. Fundamentally, the question is not whether prosecutions are certain to be successful, but instead the question rests on whether the United States is willing to pursue them at all. Moreover, complementarity does not necessarily require prosecutions. It may be acceptable for the United States to demonstrate a good faith criminal investigation that concludes with an official record of wrongdoing, even if no formal criminal charges are brought due to the legal obstacles at play.

The true limitation on this particular avenue is the total lack of political will. Reflecting on how the so-called "justice cascade" of international accountability has seemingly failed to affect the U.S., Kathryn Sikkink noted the continued power dynamics:

> The United States has now entered into the debate that has been going on throughout the world for the last thirty years about the desirability of accountability. But because U.S. actions involved citizens from many countries, and took place on a global scale, the debate about accountability is a global debate. In the U.S. case, not

127. *United States: Investigate Bush, Other Top Officials for Torture*, HUM. RTS. WATCH (July 11, 2011), https://www.hrw.org/news/2011/07/11/united-states-investigate-bush-other-top-officials-torture.

128. Memorandum from Acting Assistant Att'y Gen. David J. Barron to the Att'y Gen., Withdrawal of Office of Legal Counsel CIA Interrogation Opinions (Apr. 15, 2009), https://fas.org/irp/agency/doj/olc/withdraw-0409.pdf.

129. DAVID COLE, THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE 272 (2009).

> only was there no 'ruptured' transition that undermined the power of the leaders of the previous regime, but the officials from the Bush administration . . . continue to be powerful actors in politics and the media. Human rights prosecutions have had greatest support where there are large numbers of national victims, willing to march in the streets demanding accountability for violations. In the United States, no one was marching in the streets. The victims of the human rights violations of the Bush administration were for the most part foreigners, with foreign names, and without large or active constituencies in the United States.[130]

She nonetheless points out that the "the real test of international law and new norms will be their ability to influence the actions of even the most powerful States."[131]

Third, the United States could fulfill its obligations by admitting it is "unable and unwilling" to hold its own citizens accountable for such atrocities pursuant to Article 17 of the Rome Statute, but would invite and cooperate with a renewed investigation by the International Criminal Court. However, this pathway comes with its own steep obstacles. One significant hurdle is the previously discussed American Servicemembers Protection Act, dubbed the "Hague Invasion Act."[132] This statute remains in effect to this day and was enacted as part of the George W. Bush administration's multi-pronged campaign against the ICC to prohibit U.S. participation in the Court's efforts to investigate U.S. personnel.[133] But, of course, this statute like any other can still be amended or repealed.

The true obstacle to submitting to the Court's jurisdiction is the massive amount of political capital that doing so would require. After decades of consistent anti-Court rhetoric by U.S. government officials, the American public and many political actors instinctively view the Court as a rogue actor that has long been conspiring to launch "politicized" prosecutions against U.S. forces for simply fulfilling what is framed as their proper role as a global military superpower.[134] A decision to acquiesce to the Court's review would unquestionably spark intense backlash, heated debate, and possibly even panic. But as

130. KATHRYN SIKKINK, THE JUSTICE CASCADE 220 (2011).
131. *Id.* at 189.
132. ASPA, *supra* note 9.
133. *See* HUM. RTS. WATCH, *supra* note 10.
134. *See, e.g.,* Bolton, *supra* note 5.

Gen. Wes Clark, former supreme allied commander of NATO has insisted, the U.S. should welcome rather than fear the Court's scrutiny.[135] Drawing on personal experience in having his actions reviewed by the International Criminal Tribunal for the former Yugoslavia when the tribunal assessed potential war crimes by NATO under his command in Kosovo, Gen. Wes Clark acknowledged that while it is indeed "uncomfortable," the "[g]reat nations are willing to face the truth, accept accountability, and admit their mistakes."[136]

The U.S. could set a precedent that no one is above the law, by acknowledging that it is unable or unwilling to hold its own officials accountable and by inviting the International Criminal Court's investigation accordingly. Conversely, any failure by the United States to administer truth or accountability through its own domestic channels or to cooperate in good faith with a Court investigation effectively serves as a final nail in the coffin for any remaining plausible deniability of the reality that international criminal justice selectively applies to some but not to all.

B. Pathway Two: Create an Equitable International Justice Mechanism

There may be another pathway, but it would also require honesty and integrity in acknowledging the unjust present reality and spending the political capital that is necessary for change. If the U.S. is unwilling to hold itself to the same standards of accountability that are expected of other nations, the U.S. should endeavor towards setting a standard that it is willing to meet.

If the United States has a stated goal of serving as a world leader in the fight for human rights and against impunity for atrocities, the U.S. should lead an international diplomatic process to confront the reality that the current two-tiered system of international justice is inherently unjust. The U.S. should acknowledge its own role in creating that reality and commit to securing an equitable application of the law. Ideally, this would entail working with other global superpowers to advocate for and secure certain reforms to the ICC's

135. Wesley K. Clark, *The United States Has Nothing to Fear From the ICC,* FOREIGN POLICY (July 2, 2020, 4:45 PM), https://foreignpolicy.com/2020/07/02/the-united-states-has-nothing-to-fear-from-the-icc/.

136. *Id.*

procedures in exchange for ratification by those States of the amended Rome Statute. One key reform could include a codified expansion of the complementarity principle, in which multiple mechanisms for accountability could satisfy the requirement, including truth commissions, official apologies, restitution to victims, legal reforms to prevent future abuses, or a combination thereof. One concern that would likely arise from this proposal is whether an expanded complementarity principle would water down the standard of international justice and effectively diminish the Court's ability to secure high-level prosecutions. But in truth, this concern is already the present reality. So long as it operates without the cooperation of global superpowers, the Court is severely limited in its ability to prosecute and convict rogue actors. Thus, the Court is effectively barred from operating a system in which no one is above the law. It is under the status quo that powerful human rights abusers are shielded from any consequences at all, let alone criminal prosecution. Under an expanded complementarity system, perpetrators would at least be forced to reckon with their abuses in some manner that gainfully contributes to the cause of international justice.

Samuel Moyn predicted that "strong and wealthy nations are never going to legally mandate their own loss of superiority and money—and no court will dare call them enemies of mankind for not doing so."[137] This may perhaps be the case. If it is, and global superpowers led by the United States are unwilling to enter even into a reformed international criminal justice system, then it is difficult to imagine the sustainability of the core ICC model in the long term.

The Court will likely succumb to its many critiques, and will eventually be forced to recognize the impossibility of facilitating a permanent system for criminal justice that applies to some but not to all. Indeed, some critics believe this would be a just outcome, and that a model of individual criminal prosecutions is not the right mechanism with which to right the wrongs of global atrocities. Martti Koskenniemi is one such critic, who believes the trials of a few can never address the scale of the suffering, and that:

> [W]hen trials are conducted by a foreign prosecutor, and before foreign judges, no moral community is being affirmed beyond the elusive and self-congratulatory 'international community.' Every

137. SAMUEL MOYN, HUMAN RIGHTS AND THE USES OF HISTORY 68 (2014).

> failure to prosecute is a scandal, every judgment too little to restore the dignity of the victims, and no symbolism persuasive enough to justify the drawing of the thick line between the past and the future.[138]

Whether a permanent ICC can survive and achieve its stated goals remains to be seen. But regardless of which pathway is chosen, the fallout from the U.S.-ICC Afghanistan dispute is likely an inflection point that will help to determine both the fate of the Court and the role of the U.S. as a leading international advocate for accountability and human rights. With these high stakes, it is essential that the U.S. choose a path that leads to justice.

CONCLUSION

If the United States complied with requirements of accountability, it would have to exploit precious political capital to re-open wounds from abuses that took place nearly two decades ago. Additionally, this option would likely require repeal of statutes amidst seemingly insurmountable political polarization and dysfunction in the U.S. Congress. In the event of resulting domestic prosecutions, there would likely be lengthy litigation that may not actually lead to convictions. Thus, there is very little political incentive for the U.S. government to pursue this option.

Conversely, working multilaterally to expand the Court's membership is likewise no easy task. Many will likely push back against efforts to deviate from individual prosecutions as the official standard of complementarity. Further, the larger nations such as the United States whose cooperation would be essential for success have little appetite to take on an endeavor of this magnitude.

The alternative is possibly the slow death of the promise of international criminal justice. Any path the United States chooses to take moving forward will be difficult. These paths moving forward, though unappealing, are the inevitable consequences stemming from the U.S. government's choice to design, build, execute, and provide cover for a torture program. But accountability is never easy, and the rule of law is worth laboring to protect.

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138. STEPHEN HOPGOOD, THE ENDTIMES OF HUMAN RIGHTS, 128-29 (2013) (quoting Koskenniemi).