MASTER THESIS

Titel der Master Thesis / Title of the Master's Thesis

"Between Legitimacy and Hypocrisy: Analysing the Relationship of the United States and the International Criminal Court"

verfasst von / submitted by

Larissa Buranich

angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of

Master of Advanced International Studies (M.A.I.S.)

Wien 2023 / Vienna 2023

Studienkennzahl lt. Studienblatt Postgraduate programme code as it appears on the student record sheet:	A 992 940
Universitätslehrgang lt. Studienblatt Postgraduate programme as it appears on the student record sheet:	Internationale Studien / International Studies
Betreut von / Supervisor:	Professor Stephan Wittich

diplomatische akademie wien
Vienna School of International Studies
École des Hautes Études Internationales de Vienne

Pledge of Honesty

"On my honour as a student of the Diplomatic Academy of Vienna, I submit this work in good faith and pledge that I have neither given nor received unauthorized assistance on it."

Larissa Buranich

Table of Contents

1 Introduction

1.1 Introduction to the topic and the research questions

The International Criminal Court (ICC) has often been described as an independent and permanent "court of last resort" of the international system in the event that a State fails to or is unable or unwilling to genuinely discharge its duty to prosecute international crimes[1]. In some cases, it is thus the last chance for any kind of justice after the most serious crimes that affect the international community as a whole.

Despite this important role in the international criminal justice system, the Court does not have universal jurisdiction, a fact which has been criticised by a number of scholars and advocates of international criminal justice on the basis that it may leave some of the most serious offences beyond its power to prosecute.[2] Instead, the Rome Statute[3] limits the jurisdiction of the ICC over the crimes outlined in Article 5 of the Statute to only those situations in which the alleged crimes either took place on the territory of a State Party or were committed by the national of a State Party, unless the State concerned has accepted by declaration the exercise of jurisdiction by the Court with respect to the crime in question.[4] Furthermore, the jurisdiction of the ICC is also limited to only those crimes that took place after the Rome Statute entered into force.[5] The only exceptions to the personal and territorial jurisdiction condition set out in Article 12 are situations which are referred to the Prosecutor by the UN Security Council (UNSC) acting under Chapter VII of the Charter of the United Nations[6]. The UNSC is composed of 15 members, 10 of which are non-permanent members elected for two-year terms by the General Assembly and 5 of which are permanent members that are not subject to elections[7].

---

[1] Caroline Fehl, "Growing Up Rough: The Changing Politics of Justice at the International Criminal Court" (Frankfurt: Peace Research Institute Frankfurt, 2014).
[2] Olympia Bekou and Robert Cryer, "The International Criminal Court and Universal Jurisdiction: A Close Encounter?," *International and Comparative Law Quarterly* 56, no. 1 (2007): 49–68.
[3] Rome Statute of the International Criminal Court*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF. 183/9* (2002) [*Rome Statute* hereinafter*].*
[4] Rome Statute, Art. 12.
[5] Rome Statute, Art. 11(1). The Rome Statute entered into force on July 1st, 2002.
[6] Rome Statute, Art. 13 (b).
[7] United Nations Security Council, "Current Members: Permanent and Non-Permanent Members," accessed January 11, 2023, https://www.un.org/securitycouncil/content/current-members.

These five permanent members are China, France, the Russian Federation, the United Kingdom, and the United States.

Article 27 of the United Nation Charter, then, stipulates that for all substantive decisions, such as resolutions and referrals to the ICC Prosecutor, require the affirming votes of the five permanent members of the UNSC. Consequently, any one of the permanent five may prevent a given situation from being referred to the Prosecutor of the ICC for further investigation.

The implication of these conditions is that those countries which are not parties to the Rome Statute and are also permanent members of the UNSC are the only states in the international system which can unilaterally prevent the ICC from exercising its jurisdiction over their territories. This is the case for three of the permanent members of the UN Security Council: China, the Russian Federation, and the United States.[8] This result should strike us as worrisome since nationals of these three states have previously been accused of having committed one or more of the international crimes set out in Article 5 of the Rome Statute in the last two decades since the establishment of the ICC.[9]

The case of the US is particularly odd, given that the US delegation and its negotiators had made significant contributions to the treaty and had been largely optimistic of the outcomes of the Rome Statute during the negotiation process.[10] Nevertheless, at the end of the six-week Rome Conference convened by the General Assembly, 120 countries voted in favour of the Rome Statute while the US and six other countries voted against it.[11] Despite the initial enthusiastic US involvement in negotiations and the repeatedly stated intention to support the development for a much needed international criminal court, the US has become one of the harshest critics of the ICC since its establishment in 2002.

[8] As of April 2023.
[9] Kenneth Roth, “Beyond Russia: The Real Threat to Human Rights Is from China,” *Human Rights Watch*, June 20, 2022, https://www.hrw.org/news/2022/06/20/beyond-russia-real-threat-human-rights-china.
[10] David J. Scheffer, “The United States and the International Criminal Court,” *American Journal of International Law* 93, no. 1 (1999): 12–22.
[11] Michael P Scharf, “Results of the Rome Conference for an International Criminal Court,” *American Society of International Law Insights* 3, no. 10 (1998).

The most worrisome aspect of the relationship between the US and the ICC does, however, not arise from the fact that the US is able to prevent the ICC from exercising its jurisdiction over international crimes perpetrated on US territory. The real issue that has characterised the difficult relationship between the US and the ICC over the past twenty years has been the continuous efforts of the US to not only undermine the ICC as an institution but also to block the Court from exercising its jurisdiction as set out in the Rome Statute over territories of states that *are* parties to the Rome Statute or that have accepted the jurisdiction of the Court.

In the past two decades, the US has used domestic legislation and international political pressure repeatedly to compel the ICC to refrain from certain courses of action that may affect is nationals, both domestically and abroad. This creates a very concerning problem of a *de facto* impunity of US nationals from prosecution and punishment of international crimes, especially given the unparalleled involvement of US armed forces and other law enforcement agencies in conflicts across the globe.[12]

While the US concerns over the potential jurisdictional overreach and a lack of procedural rights of individuals before the ICC may be reasonable, there is nevertheless a strong reason why one ought to question whether the hostile behaviour displayed by the US towards the ICC genuinely arises from such concerns. According to Art. 17 of the Rome Statute, any case that is being or has already been investigated and/or prosecuted by a State must be determined inadmissible by the ICC. Consequently, in order to prevent the ICC from exercising its jurisdiction over its nationals, all that is required from the US is to investigate and/or prosecute the alleged crimes of its nationals itself, even if the US was party to the Rome Statute. However, Art. 17 also states that this limitation on the jurisdiction of the ICC is not applicable if the State having jurisdiction has been "*unwilling or unable*" to "*genuinely carry out the investigation or prosecution*". Therefore, the ICC could, in fact, claim jurisdiction over cases the US has already investigated and even prosecuted, if the proceedings had not been carried out in a genuine manner.

[12] Alice Speri, "How the U.S. Derailed an Effort to Prosecute Its Crimes in Afghanistan," The Intercept, October 5, 2021, accessed January 22, 2023, https://theintercept.com/2021/10/05/afghanistan-icc-war-crimes/.

The question must then be raised, given that the US continues to criticise the ICC and to use domestic legislations as well as international political pressure to undermine the ICC as an institution, despite having the ability to prevent the ICC from exercising jurisdiction over its nationals, whether the US is truly concerned only about jurisdictional overreach of the Court and the possible implication for US nationals. This is, of course, only the case if the US has shown genuine willingness to investigate and prosecute alleged international crimes committed by its nationals.

Therefore, it shall be the aim of this thesis to establish how the negative attitudes of the US towards the ICC have manifested in terms of legislation and policy and to investigate why the US has continued its efforts to undermine and block the ICC, given that the principle of complementarity renders any case involving US nationals inadmissible before the ICC, if the US (or any other State with jurisdiction over such case) has shown willingness to genuinely investigate and prosecute international crimes committed by its nationals.

For this purpose, this thesis will address the following two research questions:

1. *What political actions, policies and legislation have the US used to undermine and block the ICC from exercising its jurisdiction?*
2. *Has the US shown willingness to genuinely carry out the investigation or prosecution of international crimes committed by its nationals, as envisaged in Article 17 of the Rome Statute?*

1.2 Methodology

As the introduction has demonstrated, this thesis is embedded in the wider disciplines of international law and international criminal law, while drawing also from the discipline of international relations in order to elaborate on the political power processes behind the actions of the key actors of the discussion. For this, the thesis will largely rely on a descriptive analysis of primary and secondary sources.

Central to this paper are, of course, the Rome Statute of the International Criminal Court, as well as its Rules of Procedure and Evidence[13].

For the analysis of US attitudes and actions towards the ICC, three types of primary sources will be consulted and analysed:

1. Legal sources, such as Congressional statutes/acts and their amendments, treaties, and presidential executive orders;
2. political statements and declarations by US representatives, e.g. the Political Declaration of the Ministerial Ukraine Accountability Conference, White House press statements, and statements by the Secretary of State;
3. first-hand expert accounts on the decision-making process of US legislators and policymakers, such as testimony before congress and recommendations of the American Bar Association (ABA).

Furthermore primary sources to be consulted are resolutions of the UN General Assembly and the UN Security Council, as well as decisions and press statements by the Trial Chamber and the Appeals Chamber of the ICC. In addition to the primary sources above, a number of secondary sources will also be used for the analysis and discussion of this thesis. These will include literature from both law journals and secondary legal sources, as well as literature from the fields of political and international relations. Discussions may also draw upon expert opinions and summaries from non-governmental organisations and research centres which conduct research and advocacy in international criminal justice, such as the Coalition for the International Criminal Court.

[13] International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3 (Part II-A), 9 September 2002. [*ICC Rules of Procedure and Evidence* hereinafter*].*

The second part of the thesis will focus on a case study of US investigations into international crimes allegedly committed by US nationals over the past two decades. As was already mentioned in the previous section, the aim of this case study is not to provide an exhaustive analysis of all instances of potential war crimes committed by US citizens, but rather to provide an analysis of a representative selection of cases to yield insights into the general willingness of US officials to genuinely investigate and prosecute the crimes in question. Due to the limitations of the thesis, the case study will be limited to alleged international crimes committed within the context of the US "War on Terror", that is, as a consequence of US military and other law enforcement personnel active in Afghanistan and Iraq since 2001.

Of course, for the analysis of investigations by US authorities into potential or alleged international crimes committed by US nationals, the pool of sources that are reliable and available to the public is much more limited. The analysis will rely mostly on secondary sources, given that the US military has only made a few brief statements about incidents that were not investigated and has strictly limited the access of the public to materials relating to internal investigations of the conduct of US military personnel. Such secondary sources will include news coverage of the incidents during which alleged war crimes have occurred, as well as coverage of the subsequent investigation and trials conducted by military and law enforcement officials into the alleged crimes.

More primary sources are available for the analysis of US attitudes towards the investigation of war crimes relating to the torture of alleged Taliban and al-Qaeda operatives in Afghanistan and Iraq. The thesis will consult memoranda by legal advisors, as well as those published by President Bush himself, regarding the application of the Geneva Conventions in the case of torture of Taliban and al-Qaeda operatives. These sources offer insights into the opinions of US officials about the need for an investigation into the acts of torture committed by US military and law enforcement personnel on foreign territories in the context of the War on Terror.

Finally, a key source for this part of the analysis will be the request filed by the Office of the Prosecutor for authorization of an investigation into the situation in the Islamic Republic of Afghanistan from the Pre-Trial Chamber III. Of course, the scope of the *proprio motu* investigation of the prosecutors was limited by both time constraints

and the substantive limitations of such an investigation. Nevertheless, the document offers valuable insights into alleged international crimes committed by the US military that have so far lacked a “genuine” investigation or prosecution.

2 The US and the International Criminal Court

2.1 Historical Background of the ICC

2.1.1 Origin and purpose of the ICC

The idea that political and military leaders bear responsibility for their actions and should be held accountable for their misdeeds is hardly a new one. The first accounts of trials and convictions of those who were accused of having committed the most severe atrocities against other human beings can already be traced back to medieval times. For example, King Conradin of Jerusalem was put before a panel of knights akin to a modern-day military tribunal for being “a disturber of public peace” in 1268, William Wallace’s indictment for treason in 1305 also highlighted the atrocities committed against the civilian population during the First War of Scottish Independence (“sparing neither age nor sex, monk nor nun”), and German military commander Peter von Hagenbach was tried by an *ad hoc* tribunal of the Holy Roman Empire in 1474 for violating the "laws of God and man”.[14]

However, it was only after First World War that when the Allied powers came together to deal with the war’s aftermath, that the international community as a whole acknowledged the need for the establishment of a judicial body of international nature to decide on the punishment of a Head of State whose actions not only had had devastating consequence but had also threatened the peace and wellbeing of the world as a whole. The Treaty of Versailles included a number of provisions on the punishment of those individuals that had violated the laws and customs of war.[15] Article 227, provided that Kaiser Wilhelm II was to be arraigned for a “*supreme offence against international morality*” by Allied and Associated Powers. In what was perhaps the first concrete proposal of a truly *international* criminal tribunal, Kaiser Wilhelm II was to be tried before a tribunal comprised of 6 judges, one appointed by each the US, Great Britain, France, Italy, and Japan, and “guided by the highest motives of international policy”. While this tribunal never came to fruition, it was the first genuine attempt at holding an individual accountable for the crimes committed in his function as head of state by the means of a judicial body of international nature.

[14] Ziv Bohrer, “International Criminal Law’s Millennium of Forgotten History,” *Law And History Review* 34, no. 2 (2016): 394-398.
[15] The Treaty of Versailles Treaty of Versailles between the Allied and Associated Powers and Germany, Part VII, Articles 227-231.

After World War II, the international community once again had to find a way to deal with the atrocities committed over the course of the violent international conflict. When the Allied powers established the two *ad hoc* tribunals, the International Military Tribunal (IMT) in Nuremberg and the International Military Tribunal for the Far East (IMFT) in Tokyo, the international community created one of the most important milestones in the development of international criminal law.[16] For the first time, a truly international tribunal was created to hold individuals responsible for their crimes committed during an international armed conflict. However, with the renewed need for an international criminal tribunal, the recognition dawned upon several international policy makers that there would most likely be a continuous need for international criminal tribunals in the future. Thus, the idea of a permanent international criminal court was born.

The Nuremberg trials had brought awareness to the lack of international treaties and codified legislation of what would become international criminal law. The International Military Tribunals were criticised particularly for their disregard of the *nulla poena sine lege* principle which states that an individual may not be punished for acts not prohibited by law at the time of their commission, as well as their controversial use of *ex post facto* laws, that is, the use of laws that retroactively prohibited acts that were considered legal at the time they had been committed.[17] To avoid such problems in the future, the international community, particularly within the framework of the newly formed United Nations, was swift in filling the gaps in existing legislation and moved to codify and introduce new laws of international criminal law and international humanitarian law, such as the Convention on the Prevention and Punishment of the Crime of Genocide and the Fourth Geneva Convention.

Against this background, the United Nations General Assembly (GA) first adopted a resolution on December 9, 1948, which acknowledged that the new developments of international criminal laws would need an international judicial body responsible for the trial of these crimes, and that such a body should be different from the recently conceived International Court of Justice.[18] Furthermore, the GA established a

[16] Christian Tomuschat, “The Legacy of Nuremberg,” *Journal of International Criminal Justice* 4, no. 4 (2006): 830–31.
[17] Ibid.
[18] UN Doc A/RES/3/260 B.

Committee on International Criminal Jurisdiction[19] in 1950, which submitted a Draft Statute[20] in late 1951 and a Revised Draft Statute[21] for an international criminal court in 1953.

However, soon political challenges emerged and the progress that had been made towards the establishment of the ICC slowed down. One main point of contention was the lack of consensus for a definition of the criminal offense that would become the crime of aggression ("offences against the Peace and Security of Mankind"), and it was decided in the General Assembly that the work on the draft statute should be halted until the issue was settled.[22] Furthermore, by the 1950s, the international stage had been drastically changed by the Cold War, which was not only accompanied by a decline in international cooperation but also a decrease in political will to establish an international criminal court as individual states became increasingly involved in violent international conflicts.

It was not until the 1970s that the issue of a permanent international criminal court re-gained prominence after a number of legal scholars publicly expressed their opinions about the urgent need for such a court. One of the most vocal advocates of the ICC at the time was Benjamin Berell Ferencz[23], investigator of Nazi war crimes and Chief Prosecutor at the Einsatzgruppen trial, one of the subsequent Nuremberg tribunals held by US military courts. This renewed interest in the establishment of the ICC coincided with the settlement of the definition of the crime of aggression[24] and finally, in November 1990, the General Assembly once again invited the International Law Commission (ILC) to consider further the question of establishing an international criminal court.[25]

At the same time, the tragic events of the 1990s in Yugoslavia and Rwanda served as a powerful reminder for the necessity of a permanent international criminal tribunal that was equipped to investigate and prosecute those responsible for the

[19] UN Doc A/RES/489 (V).
[20] UN Doc. A/2136.
[21] UN Doc. A/2645.
[22] UN Doc A/RES/897 (IX).
[23] Benjamin B. Ferencz and Louis B. Sohn, *Defining International Aggression: The Search for World Peace*, 1975.
[24] *See* UN Doc A/RES/3314(XXIX) for the non-binding recommendation by the UN GA in 1974 and the 1991 ILC draft of the "Code of Crimes against the Peace and Security of Mankind" in UN Doc. A/46/10.
[25] UN Doc A/RES/45/41(3).

most serious crimes of concern to the international community as a whole. In the absence of such a permanent international criminal court, the UN Security Council had to establish not one but two *ad hoc* international criminal tribunals in the 1990s, one for the former Yugoslavia[26] in 1993 and one for Rwanda[27] in 1994, to deal with the perpetrators of atrocities committed during the two conflicts.

After these conflicts, political will once again favoured the establishment of a permanent international criminal court, and a resolution to establish an *Ad Hoc Committee on the Establishment of an International Criminal Court*[28] was adopted in December 1994, after the ILC had submitted its Draft Statute for an International Court[29]. The ad hoc Committee met in April and August 1995 and presented its report[30] in September 1995. From 1995 to 1998, a *Preparatory Committee Establishment of an* International Criminal Court (PrepCom)[31] met several times under the chairmanship of Adriaan Bos of the Netherlands to prepare a consolidated draft text.[32] Finally, after many years of negotiations and debates, the United Nations convened a diplomatic conference in Rome from 15 June to 17 July 1998 to finalise and adopt the Statute for the ICC.

[26] UN Doc S/RES/955.
[27] UN Doc S/RES/827.
[28] UN Doc A/RES/49/53.
[29] UN Doc A/CN.4/L.491/Rev.2 (B), adopted at its forty-sixth session in July 1994.
[30] UN Doc. A/50/22.
[31] Established by A/RES/50/46.
[32] Philippe Kirsch and John Holmes, "The Birth of the International Criminal Court: The 1998 Rome Conference," *The Canadian Yearbook of International Law* 36 (1999): 3.

2.1.2 Establishing the ICC: The Rome Conference and US Involvement in Negotiations

Despite the considerable work of the PrepCom to resolve as many disagreements as possible and to prepare a consolidated text, the work was far from done when the Rome Conference commenced in June 1998. The Draft Statute[33] that had emerged from the PrepCom in April 1998 was still riddled with hundreds of points of disagreement, including both partial and entire provisions, as well as numerous alternative texts.[34] The Rome Conference was, thus, faced with a daunting task which would take only five weeks to overcome.

In addition to the work done by the main organs of the Conference the Committee of the Whole, the Drafting Committee, and the Plenary, numerous other informal working groups, meetings, and consultations took place in parallel to official meetings. Contentious issues were, for example, the definition of certain crimes, the inclusion of some crimes such as the crime of aggression, illicit drug trafficking and terrorism, the possible inclusion of the death penalty, and, most crucially, the issues of jurisdiction and application of the Statute. The main issues linked to the definition of crimes and the jurisdiction of the Court were not only politically sensitive and legally complex, but they were also perceived as intertwined and almost unsolvable on their own.[35] For example, many states were willing to accept the inclusion of a broader range of crimes or broader definitions of certain crimes if the jurisdiction was limited – and vice versa.

In the US, the Clinton administration had not only voiced great interest in the realisation of the project of an international criminal court but had also contributed greatly to its development and the negotiation process. David J. Scheffer, the US Ambassador-at-Large for War Crimes Issues during President Clinton's second presidential term and lead negotiator of the US team during the negotiations of the ICC Statute, has offered import insights into the US aims during negotiations around the Rome Statute.

[33] UN Doc. A/CONF/183/2/Add.1.
[34] Kirsch and Holmes, *supra* note 32, 16.
[35] Kirsch and Holmes, *supra* note 32, 18.

One of the key points Scheffer highlighted in his reports of the process was that, since 1995, the Clinton administration had never question whether there *ought* to be an international criminal court but had instead always been steadfast in its belief that *there was a clear need for such a court*. The only problem they concerned themselves with both internally and externally was *what kind* of court this should be and how it should be regulated to ensure "efficient, effective, and appropriate" operation within an international system which also required *"*constant vigilance to protect peace and security*"*.[36] As a consequence, the US was strongly involved in the negotiations of the draft statute during the long process. Three days before the Rome Conference began, Deputy Spokesman for the U.S. Department of Justice, James Foley, reaffirmed the support of the US for a "strong, effective, and properly constituted Court"[37] to promote international criminal justice.

According to Scheffer, the US negotiation team had three main objectives during the negotiation process of the Rome Conference: work towards a successful conference resulting in a treaty, ensure that the international peace and security concerns of the US were factored into the functioning of the ICC, and prevent a Statute that would allow for a prosecutor with unduly excessive powers to initiate investigations and prosecutions of crimes within the jurisdiction of the Court.[38] Instead of forming or joining some regional or functional grouping at the Rome Conference, the US relied instead on its traditional strategy of intensive and numerous bilateral consultations with other delegations. During the conference, the US team made contributions to a number of provisions that would remain in the final Rome Statute, such as the inclusion of internal armed conflicts and acts in the absence of armed conflict into the definition of the crimes against humanity in Art. 8.[39] However, the US team struggled during the negotiation process to convince the other negotiating parties of its concerns, including concerns over the proposes (almost) universal jurisdiction and a powerful, the independent prosecutor, and the implications for sovereign decision-making and foreign policy concerns of the US.

[36] Scheffer, *supra* note 10, 12.
[37] U.S. Department of State, "U.S. Participation in Rome Conference on the Establishment of an International Criminal Court," Press release, June 12, 1998, https://1997-2001.state.gov/briefings/statements/1998/ps980612a.htm.
[38] For the full discussion of US participation see Scheffer, *supra* note 10, 15-18.
[39] Scheffer, *supra* note 10, 16.

In the end, when the negotiations finally concluded with a final Draft Statute on July 17th, 1998, the Rome Statute establishing the ICC was adopted[40] by a non-recorded vote of 120-7, with 21 abstentions[41]. Despite the initial enthusiasm for a permanent international criminal court and the continued efforts the US had shown to develop a treaty that would balance the need for a powerful international institution and US security concerns, the United States was among the seven UN members that had voted against the Statute.[42] Nevertheless the Rome Statute entered into force on July 1st, 2002, and the ICC took up its activity when the first elected judges of the Court were sworn in in The Hague on March 11, 2003.[43]

[40] UN Doc. A/CONF.183/9.
[41] UN Press. "UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court. Press Release L/2889," July 20, 1998. Accessed March 22, 2023. https://press.un.org/en/1998/19980720.l2889.html.
[42] Ibid.
[43] International Criminal Court, "ICC - The Court Is Ready to Receive the Senior Authorities," Press release, February 3, 2003, https://www.icc-cpi.int/news/icc-court-ready-receive-senior-authorities.

2.2 Legal Background: Jurisdiction and Admissibility

2.2.1 Jurisdiction

The Rome Statute sets out three conditions, all of which need to be met in order for the Court to be able to exercise its jurisdiction over any given situation. Firstly, Article 5 establishes the subject-matter condition, that is, it limits the jurisdiction of the ICC to the "most serious crimes of concern to the international community as a whole", i.e. the crime of genocide[44], crimes against humanity[45], war crimes[46], and the crime of aggression[47]. Secondly, Article 11(1) further restricts the jurisdiction of the Court to crimes committed after the entry into force of the Statute for the relevant State party, unless that State has made a declaration which states otherwise.

Finally, Articles 12 limits the exercise of the Court's jurisdiction to those situations in which the crimes have taken place in the territory of a State Party of the Rome Statute or the alleged perpetrator is a national of a State Party, as well as situations in which a State which is not a Party to the Rome Statute accept the exercise of jurisdiction by the Court with respect to the crime in question by declaration.[48] This last condition of subject and territorial jurisdiction has been particularly controversial, since it may be impossible that even the most serious crimes that affect the international community are investigated or tried before the ICC, unless they are committed on the territory of a state which has not accepted the jurisdiction of the ICC *or* the perpetrator of is a national of such a state.

The only exceptions to the personal and territorial jurisdiction condition set out in Article 12 are, as previously mentioned, those situations which are referred to the Prosecutor by the UN Security Council (UNSC) acting under Chapter VII of the Charter of the United Nations[49] and the exception set out in Art. 12 (3) of the Rome Statute.

[44] Rome Statute, Art. 6.
[45] Rome Statute, Art. 7.
[46] Rome Statute, Art. 8.
[47] Rome Statute, Art. 8 *bis.*
[48] Rome Statute, Art. 12(3).
[49] Rome Statute, Art. 13(b).

2.2.2 Admissibility

The distinction between issues of jurisdiction and admissibility is not always straightforward. While both legal concepts are used to determine whether a particular case may be heard before a certain court, they differ in their reasoning of why that may or may not be the case.

In general, most international courts and tribunals define jurisdiction *of a court* as the power or the authority granted to the court to hear and render judgments about certain types of cases. As the previous section has shown, the jurisdiction of the ICC is limited in its authority by subject-matter, temporal, and territorial conditions. The admissibility *of a case*, however, pertains to the characteristics of a particular case which may render it inadmissible before the court. In other words, while a court may have, in principle, the authority to hear a case given its general subject matter and territorial characteristics, other factors particular to that case may render it inadmissible before the court. Usually, jurisdiction is a matter that must be settled before questions of admissibility are considered. For example, in matters before the ICC, the Court must first rule on issues regarding jurisdiction, and only then any challenges to the admissibility of a case are to be considered.[50]

This distinction between jurisdiction and admissibility may appear minor or even insignificant at first glance. However, in most courts, decisions on the ability of a court to hear a case come with different legal consequences, based on whether it was the jurisdiction or admissibility that was challenged. For example, at the ICC, the Prosecutor may request a review of the decision of the Court on the admissibility of a particular case when the Prosecutor believes that new facts have come to light which would change the outcome of the previous decision on that matter.[51] The same article does, however, not provide the prosecutor to pursue the same course of action in the case of a decision on the jurisdiction over a certain case. In other words, notwithstanding any appeals, decisions of the ICC on jurisdictional questions may be final, whereas decisions on admissibility can be reviewed and reversed, if the newly arisen facts are sufficient to change the characteristics of the case enough for it to be found admissible.

[50] ICC Rules of Procedure and Evidence, Rule 58(4).
[51] Rome Statute, Art. 19(10).

The Rome Statute sets forth three distinct criteria of admissibility: gravity, complementarity, and *ne bis in idem.*[52] The next subsections will discuss each of these criteria in brief.

2.2.2.1 Gravity

The first criterion to determine the admissibility of a given case, provided by Article 17(1)(d) of the Rome Statute, is the condition of "sufficient gravity". If a case is found to be "insufficiently grave" to justify further action by the Court, that case must be deemed inadmissible, even if the situation falls within the jurisdiction of the Court.

At first glance, this criterion may appear counter-intuitive, given that by its very nature, the ICC deals with only the most serious international crimes. Of course, all cases under the jurisdiction of the Court are "grave", in that they constitute atrocities committed by humans against other humans. However, the aim of Article 17(1)(d) must be understood not as a judgemental statement of the general nature of the crimes that fall under the jurisdiction of the ICC, but rather as a tool to narrow the scope of cases before the ICC to only those that are of the most horrendous nature[53].

Given that the Prosecutor of the ICC has the unique mandate as an international prosecutor to independently and impartially select situations for preliminary examination and further investigation, it is in most cases for the Prosecutor to determine whether the gravity of any given situation justifies an investigation or further action from the Court. Nevertheless, the admissibility of several cases has been challenged before the Court in the past two decades[54] and the resulting rulings have provided future Pre-Trial Chambers as well as the Prosecution with detailed and more robust basis for gravity assessments in future cases of the Court, for both the Prosecutor and the Pre-Trial Chambers.[55]

---

[52] Rome Statute, Art. 17 and 20.
[53] Ingrid Mitgutsch "(In-)Sufficient Gravity of Cases before the International Criminal Court: Developing a Gravity Test through Case Law," July 12, 2022, accessed March 10, 2023, https://voelkerrechtsblog.org/in-sufficient-gravity-of-cases-before-the-international-criminal-court/.
[54] For example, in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* and in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*.
[55] Mitgutsch, *supra* note 53.

2.2.2.2 Complementarity

It is first and foremost the primary responsibility of *states* to prosecute international crimes within their jurisdiction. The establishment of the ICC arose from the realisation that in some situations, individual states were unable or unwilling to exercise their jurisdiction of these most severe crimes.

As a consequence, the ICC has often been accurately characterised as an international criminal "*court of last resort*". The use of that term refers to the fact that cases are brought before the ICC only as a final course of action, if all other means of bringing about justice for the victims of international crimes within the jurisdiction of the ICC have failed. In other words, the jurisdiction of the ICC is only meant to *compliment* the jurisdiction of national courts, *not to replace* it.

This notion that the ICC should only act if all other courts with primary jurisdiction are unable or unwilling to do so, is reflected by the principle of complementarity, defined as a functional principle which "*grants authority to a subsidiary body when the main body fails to exercise its primacy jurisdiction*".[56] According to this principle, then, national criminal courts have primacy jurisdiction in that it is both their right and duty to prosecute any of the crimes within the jurisdiction of the ICC. Only if they fail to exercise their jurisdiction, may the ICC intervene by considering the cases in question in their stead. This might be the case if, for example, the judicial system of a country is not equipped to deal the scope or severity of the case in question or if state authorities refuse to hold the individuals concerned accountable for their crimes.

The principle of complementarity of ICC jurisdiction is emphasised several times within text of the Rome Statute. Both paragraph 10 of the Preamble to the Statute and Article 10 clearly state that the jurisdiction of ICC "*shall to be complementary to national criminal jurisdiction"*.[57] Furthermore, there are a number of provisions in the Rome Statute which establish substantive restrictions on the jurisdiction of the ICC in order to protect states from potential infringements of the Court on the principle of complementarity.

---

[56] Xavier Philippe, "The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?," *International Review of the Red Cross* 88, no. 862 (2006): 380.
[57] Rome Statute, paragraph 10 of the Preamble and Art. 1.

In fact, the main criterion to determine the admissibility of a case is to answer the question whether the ICC would violate the principle of complementarity by exercising its jurisdiction of the case in question. Article 17(1) of the Rome Statute sets out that the ICC must find any case inadmissible if:

(a) the case is currently being investigated or prosecuted by a State which has jurisdiction over it,
(b) the case has already been investigated by a State which has jurisdiction over it and that decided not to prosecute the person concerned, or
(c) the person concerned has already been tried for the conduct which is the subject of the complaint.

It is clear how the above conditions are protecting the principle of complementarity. Each of the conditions prevents the ICC from exercising its jurisdiction in situations in which individual states have already exercised their primacy to investigate and/or prosecuted the matter concerned. However, not every matter which has been investigated and/or prosecuted by national criminal courts is necessarily inadmissible, as Rome Statute provides for several exceptions that render the investigation or prosecution of national courts insufficient for inadmissibility.

The Rome Statute has protections in place with the objective of preventing states from abusing the principle of complementarity in order to prevent perpetrators of international crimes from being brought to justice. If there were no such restrictions on the principle of complementarity available, then one could think of many ways a state may shield its nationals from prosecution and punishment, such as the use of sham trials and the application of unduly lenient sentencing to its own nationals.

For this reason, Article 17 not only sets out conditions for inadmissibility of cases but also introduces a qualifying statement about *the way* in which the investigation and prosecution of international crimes must be carried out, in order for the principle of complementarity to apply. According to Art. 17, then, any given case is only inadmissible if the State investigating and/or prosecuting the matter was "*willing* and *able* to *genuinely* carry out the investigation and/or prosecution".[58]

[58] Rome Statute, Art. 17(1)(a) and (b).

Further discussion around the criteria according to which this "ability" and "willingness" to "genuinely investigate and prosecute" alleged criminals will follow at a later point in this thesis.[59]

2.2.2.3 Ne bis in idem

The principle of "ne bis in idem", also known as the prohibition of "double jeopardy", is a legal doctrine common to most national legal systems and international criminal tribunals, which generally prohibits multiple prosecutions or multiple punishments for the same offense.[60] This principle also applies to the ICC as Art. 20 of the Rome Statute establishes that no person shall be tried again "with respect to conduct which formed the basis of crimes" for which the individual has already been convicted or acquitted.

Here, it should be noted that given the complimentary nature of the ICC, the *ne bis in idem* restriction applies both "horizontally" and "vertically" to the ICC, with respect to the prosecution and trials of national criminal courts.[61] This means that while, horizontally, the ICC is prohibited from trying an individual for the same conduct for which the individual has already been convicted or acquitted *by the ICC*[62], the same principle must also be applied when considering the actions of national courts with regards to trials covering the same conduct. Vertically, the ne bis in idem principle applies both "downwards", i.e. from domestic courts to the ICC, as well as "upwards", i.e. from the ICC to domestic courts. To explain this in more concrete terms, while the ICC is not permitted to try any case after a previous state prosecution of the same conduct[63], national criminal courts are also prohibited from prosecuting an accused individual after the ICC has already prosecuted on the alleged acts of the case[64].

The principle of *ne bis in idem* in its "upwards vertical" application is closely related to the principle of complementarity in that it underpins the same notion that the

[59] *See sections 3.1 and 3.2.1.*
[60] Linda E. Carter, "The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem," *The Santa Clara Journal of International Law* 8, no. 165 (2010): 170.
[61] Ibid, 172.
[62] Rome Statute, Art. 20(1).
[63] Rome Statute, Art. 20(3).
[64] Rome Statute, Art. 20(2).

jurisdiction of the ICC is restricted to those cases, in which national criminal courts have not (yet) exercised their jurisdiction over a certain situation. In fact, the *ne bis in idem* restriction can also be found in Article 17(1)(c) of the Statute, which states that the ICC must determine that a case is inadmissible, "*if the individual concerned has already been tried for conduct which is subject of the complaint*".

There are limitations to the *ne bis in idem* restriction outlined in the Rome Statute, which would grant the ICC the right to try a case concerning the conduct for which an individual has already been convicted or acquitted by national criminal courts. The only reasons provided by the Rome Statute that may negate the *ne bis in idem* restriction on the ICC is if the proceedings of the domestic court were either conducted with the purpose of shielding the individual concerned from criminal responsibility or lacked the necessary independence or impartiality required by international law.[65]

[65] Rome Statute, Art. 20(3)(a) and (b).

2.3 US Criticism of the Rome Statute

Over the years since the establishment of the ICC, the US has cited several reasons for its rejection of the Rome Statute, including procedural and structural concerns. The following sections will explain the most important US objections in brief.[66]

2.3.1 Jurisdiction

The United States' principal objection to the Rome Statute, which US officials have brought against the ICC many times, arises from the fact that the Rome Statute grants the ICC the right to exercise jurisdiction in an almost universal manner. What has been particularly criticised is that this jurisdiction extends not only to the nationals of those States that have ratified the Rome Statute but, in certain instances, also to nationals of States who have not done so.

As David Scheffer explained, it was the US firm position during negotiations that since the ICC was designed as a treaty-based court, its Statute should consequently bind only those states (and their nationals) that ratified the Rome Statute.[67] The ICC should not be authorized to unilaterally enact laws that would empower the Court to prosecute any individuals, including nationals of non-party states, who had committed one or more of the crimes set out in the Statute. In his recounting of the negotiation process, Scheffer asserted that this extent of ICC jurisdiction may still have been acceptable to the US team if the only way in which such jurisdiction could be exercised was with a referral from the UN Security Council.[68]

However, under Article 12 of the Rome Statute the ICC may also exercise its jurisdiction over any individual if either the state of the territory where the alleged crime was committed[69] or the state of nationality of the accused[70] "consents", even without a Security Council referral. It was this way in which Article 12 of the Statute exposed non-party states to the jurisdiction of the ICC without their consent that ultimately rendered the treaty unacceptable to the United States. As the US

[66] For a comprehensive discussion of the main objections and counterarguments, see Jennifer Trahan and Andrew Egan, "U.S. Opposition to the International Criminal Court," *Human Rights (ABA)* 30, no. 1 (2003).
[67] Scheffer, *supra* note 10, 18.
[68] See Rome Statute, Art. 13(b).
[69] Rome Statute, Art. 12(2)(a).
[70] Rome Statute, Art. 12(2)(b)

representatives clearly stated in their explanation of the US vote against the Rome Statute in 1998, the US would not accept the concept of jurisdiction in the finalised Statute and certainly not its application over non-States parties.

US President Bill Clinton eventually signed the Rome Statute as the US Head of State, despite the fact that the US had voted against the Statute in Rome.[71] In his statement, President Clinton once again highlighted the possibility of jurisdiction over the military personnel of non-party states as the major concern of US policymakers. In his Statement on December 31, 2000, President Clinton said that:

> *"In signing, however, we are not abandoning our concerns about significant flaws in the treaty. In particular, we are concerned that when the court comes into existence, it will not only exercise authority over personnel of states that have ratified the treaty but also claim jurisdiction over personnel of states that have not. […] Court jurisdiction over US personnel should come only with US ratification of the treaty."*

However, in the same speech President Clinton also emphasised that he did not believe that the Rome Statute in its current form should be ratified at all by the United States, unless significant changes were made to limit the jurisdiction of the ICC:

> *"Given these concerns, I will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied."* [72]

Neither President Clinton nor his successors did ever submit the Rome Statute to the Senate for approval. In fact, less than two years after the Rome Statute had been signed by President Clinton, his Republican successor George W. Bush authorized then-Under Secretary of State John R. Bolton to "unsign" the Rome Statute at the United Nations.[73]

---

[71] In signing the Rome Statute despite his intentions not to submit the treaty to the Senate and for ratification, Clinton was hoping to allow for US participation in secondary legislation under the Statute, while at the same time avoiding being legally bound by the treaty.

[72] Bill Clinton, "Statement on Signature of the International Criminal Court Treaty," December 31, 2000, https://1997-2001.state.gov/global/swci/001231_clinton_icc.html.

[73] The White House, "Protecting American Constitutionalism and Sovereignty from the International Criminal Court," Press release, September 10, 2018.

In the following two decades, concerns over the potential jurisdiction of the ICC over US nationals have been repeated numerous times by US officials of both major parties, as well as US military leadership, particularly in relation to US military personnel stationed outside of US territory.

2.3.2 "Politicised" Prosecution

Another major point of criticism that has been levelled against the ICC is that structural weaknesses in the Rome Statute may allow for the possibility of "politicised" prosecution of US nationals. That is, structural flaws may allow for countries to bring false or inflated charges against US nationals for political reasons, rather than in pursuit of justice. Such concerns have been highlighted especially strong by US national security officials, such as John R. Bolton[74], Under Secretary of State for Arms Control and International Security Affairs from 2001 to 2005, who later served as US Ambassador to the UN and as US National Security Advisor during the Trump presidency.

Even before the Rome conference, the US Department of State had warned that US negotiators would be careful to guard the US from the creation of a court which could be "*used and manipulated by politically motivated states*" to challenge the foreign policy of individual states by targeting their military and civilian personnel for criminal investigation and prosecution.[75] It has also been suggested by US critics that the US would be particularly vulnerable to such politicised prosecution, more so than other state parties to the Rome Statute critical of the US' reluctance cooperate with the Court, given the prominent role the US and its military play in international affairs.

The structural weaknesses that critics highlight as enablers of such politicised prosecution are both the independence and the alleged lack of oversight over the Prosecutor of the ICC. President George W. Bush himself has described the ICC as "*a body based in The Hague where unaccountable judges and prosecutors could pull our troops*"[76]. John Bolton has also argued that the independence of the Prosecutor

[74] John R Bolton, "The Risks and Weaknesses of the International Criminal Court from America's Perspectives," *Law And Contemporary Problems* 64 (2001): 167–80.
[75] U.S. Department of State, *supra* note 37.
[76] Comments made by President George W. Bush in his first presidential debate against Senator Kerry in the first 2004. Transcript available at:

is "*more of a source of concern than an element of protection*", given that the structure of the ICC allegedly fails to provide sufficient political accountability or other checks on the OTP to warrant vesting the Prosecutor with the extensive power of law enforcement, particularly over those States that are not parties to the Rome Statute in the first place.[77]

This worry arises from the fact that the Prosecutor, an organ of the ICC that is not controlled by any separate authority[78], has the power to start legal proceedings at its own discretion (*proprio motu*), i.e. without prior authorization from the Court or referral by the UN Security Council. US critics have argued that such extensive powers in the hands of an "unsupervised" prosecutor could result in the initiation of investigations that are driven by political motivations and, consequently, the US should not be willing to place such powers completely outside the control of the US government by ratifying the Rome Statute.[79] Furthermore, the Trump administration has been particularly vocal in emphasising that the unaccountable powers[80] granted to the ICC and its Chief Prosecutor "*pose a significant threat to United States sovereignty and its constitutional protections*".[81] It has been suggested that, as a solution to the lack of accountability of the ICC and its Prosecutor, the ability of the UN Security Council to exercise political oversight and control over the ICC should be increased in order to protect both party and non-party states from politicised investigations and prosecutions.

It should come as no surprise that US concerns about the independence of the Prosecutor often align with the calls for increased political oversight over the ICC by the UN Security Council in particular. Bolton, for example, has said that undercutting the role of the five permanent members of the Security Council, effectively "marginalising" it in its role as protector of international peace and security, is a

---

https://georgewbush-whitehouse.archives.gov/news/releases/2004/10/text/20041001.html

[77] Bolton, *supra* note 74, 174-178.

[78] It should be noted that the Prosecutor of the ICC is democratically elected by secret ballot by an absolute majority of the members of the Assembly of States Parties (Art. 42(24)). Of course, the US, as a non-party to the Rome Statute, is not eligible to vote in this election.

[79] Bolton, *supra* note 74, 173.

[80] Note that the UN Security Council does, by a resolution adopted under Chapter VII of the UN Charter, have the power to suspend an ICC investigation or prosecution for a period 12 months, renewable under the same conditions, pursuant to Art. 16 of the Rome Statute. The US has, however, criticised that this resolution must be adopted unanimously, rendering it more difficult for the US to exert control over the ICC through the UN Security Council.

[81] The White House, *supra* note 73.

fundamental problem for the US that would detrimentally impact the conduct of its foreign policy.[82]

Given the US position as a permanent member of the UN Security Council, it would consequently be well served if additional powers to control the ICC were granted to the Security Council, effectively giving the US oversight not only about matters concerning the prosecution of its own nationals but also about other investigations and prosecutions of the ICC.

2.3.3 Lack of Due Process Rights

Finally, the last key criticism US officials have voiced about the ICC is that the Rome Statute lacks some of the fundamental procedural rights that ought to be guaranteed to individuals investigated, charged, or prosecuted by the Court. More specifically, US critics of the ICC have argued that the Rome Statute is fundamentally incompatible with the Constitution of the United States since some of the "due process" rights guaranteed under the Constitution are absent from the Statute of the Court, most notably, the right to a jury trial.[83]

However, it must be said that this line of argument has been refuted by numerous legal experts, even including some who have spoken out against the US joining the ICC, such as David Scheffer.[84] Multiple legal scholars have compiled lists of articles of the Rome Statute that guarantee the same due process rights that are also guaranteed to US citizens under the US constitution[85], including, inter alia, the right to have timely notice of charges filed[86], to the assistance of counsel[87], to be present at the trial[88], to a speedy trial[89], to the privilege against self-incrimination[90], to the

[82] Bolton, *supra* note 74, 177.
[83] Ruth Wedgwood, "The Irresolution of Rome," *Law And Contemporary Problems* 64, no. 1 (2001): 193–214.
[84] David J. Scheffer and Ashley Cox, "The Constitutionality of the Rome Statute of the International Criminal Court," *Journal of Criminal Law & Criminology* 98, no. 3 (March 1, 2008): 983–1068.
[85] See Teresa Young Reeves, "A Global Court? U.S. Objections to the International Criminal Court and Obstacles to Ratification," *Human Rights Brief (American University)* 8, no. 1 (2000): 15–30.
[86] Rome Statute, Art. 61(1).
[87] Rome Statute, Art. 55(2)(c), 67(1)(b) and(d).
[88] Rome Statute, Art. 63.
[89] Rome Statute, Art. 67(1)(c).
[90] Rome Statute, Art. 55(1)(a) and (1)(b), as well as Art. 67(1)(g).

presumption of innocence[91], and that the prosecutor has proved guilt "beyond reasonable doubt"[92].

Nevertheless, it is important to mention the above concerns in the context of the US hostility towards the ICC, particularly in reference to the legislative acts passed by Congress to prevent the ICC from exercising its jurisdiction over US nationals. While the alleged lack of due process rights is not usually, it is often cited as one of the key reasons why US personnel abroad must be protected from the jurisdiction of the ICC in the first place.

[91] Rome Statute, Art. 66(1) and (2)
[92] Rome Statute, Art. 66(3).

2.4 US efforts to block and undermine the ICC

For the past two decades, the US have attempted to use their political power and position in the international system to influence the actions of the ICC and pressure the Court and its prosecutor to yield to US demands.

The follow section shall address four methods, both political and legislative in nature, the US has used to undercut, undermine, and block the ICC in the past two decades since its establishment. I will address the bilateral non-surrender agreements under Art. 98(2) of the Rome Statute, the American Service-Members' Protection Act (2002), the US threats to block the UNSC from referring the Darfur conflict to the ICC, and Executive Order 13928 which imposed economic sanctions and visa restrictions on persons related to the ICC. The aim is not only to develop an understanding of the tools and methods the US has used to potentially prevent the ICC from exercising its jurisdiction but also to elaborate on how they have each impacted the overall relationship between the US and the ICC and how the international community has reacted and responded to these measures.

2.4.1 Bilateral Agreements under Art. 98

As soon as the negotiations of the Rome Statute concluded and as it had become clear that the US would not ratify the statute any time soon, US policy- and lawmakers began considering different methods through which the reach of the Court over US citizens could be limited. The first method the US came up with takes advantage of a legal “loophole” that the US alleges would allow them to conclude bilateral agreements that could prevent other states from surrendering US citizens to the ICC.

To make sense of these agreements, it is important to note that given the limited resources available to the ICC, the Court depends on its State Parties to cooperate and assist in functions traditionally carried out by law enforcement bodies. Part 9 of the Rome Statute (International Cooperation and Judicial Assistance) outlines the obligations of State Parties to cooperate with the ICC and assist the ICC in its functions. In addition to a general obligation to cooperate, the Court may also

request other specific forms of cooperation.[93] Importantly, pursuant to Art. 89 of the Rome Statute, the ICC may transmit a request for the arrest and surrender of a person "to any State on the territory of which that person may be found", with which State Parties are obligated to comply in accordance with the procedures under their national law.[94] It follows from this that State Parties to the Rome Statute are obligated to arrest and surrender any US citizen, should the ICC request it. Clearly, this poses a great threat to the US objective to prevent its citizens from being prosecuted by the ICC.

However, according to Art. 98 of the Rome Statute, the ICC may not proceed with a request for surrender,

(1) "*which would require the requested State to act inconsistently with its obligations under international law […]*", or
(2) "*which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court […]"*

It is obvious how this exception provided for by Article 98(2) has been used by the US to limit the Court's reach over its citizens. The US concluded its first Article 98 agreement with Romania on August 1st, 2002, only one month after the Rome Statute had entered into force. After John R. Bolton, then-US. Under Secretary of State for Arms Control and International Security John R. Bolton and Romanian Acting Foreign Minister Cristian Diaconescu had signed the agreement, a press statement by the US Department of State remarked that they expected this agreement to be the first of many.[95] As a matter of fact, in the four years since the agreement with Romania was signed, the US would conclude more than 100 bilateral Article 98 agreements.[96]

---

[93] Attila Bogdan, "The United States and the International Criminal Court: Avoiding Jurisdiction Through Bilateral Agreements in Reliance on Article 98," *International Criminal Law Review* 8 (2008): 8.
[94] Rome Statute, Art. 89(1).
[95] Philip T Reeker, "U.S. and Romania Sign Article 98 Agreement," Press release, August 1, 2002, https://2001-2009.state.gov/r/pa/prs/ps/2002/12393.htm.
[96] Bogdan, *supra* note 93, 27. A list of countries which have signed Article 98 Agreements with the US is available at https://guides.ll.georgetown.edu/c.php?g=363527&p=2456099.

Several legal experts have already analysed the controversial bilateral "immunity" agreements the US has concluded pursuant to Article 98(2) of the Rome Statute in detail and have offered legal commentary on whether the language of the Art. 98(2) does, in fact, explicitly authorize the type of indiscriminate, nationality-based immunity that such bilateral agreements claim to provide. There seems to be some consensus that Art. 98(2) was intended to provide only a very limited exception to a narrowly defined category of persons, while the US have chosen to take a position that this is "t*oo narrow of a reading*"[97]. Legal experts are also in agreement that as long as the ICC does not make a definitive determination of the validity of the bilateral Article 98(2) agreements, their validity remains questionable.[98]

Many states and international organisations have been critical of the bilateral Article 98 agreements of the US. The EU Council, for example, noted in a resolution in 2002 that *"entering into US agreements [..] would be inconsistent with ICC States Parties' obligations with regard to the ICC Statute*". However, the EU nevertheless expressed its hope for continued work with the US to ensure effective and impartial criminal justice at that time.

2.4.2 The American Service-Members' Protection Act of 2002

In the early years after the Rome Statute was adopted, US policymakers began considering ways to prevent both international and domestic cooperation with the ICC. As legislative responses directly aimed at the ICC were considered, US officials also began to think of other ways to influence countries considering the ratification of the Rome Statute.[99] Out of these concerns, the American Service-Members' Protection Act of 2002 (ASPA)[100] emerged.

---

[97] Bogdan, *supra* note 93, 40.
[98] Robert P. Barnidge, "The American Servicemembers' Protection Act and Article 98 Agreements: A Legal Analysis and Case for Constructive Engagement with the International Criminal Court," *Tilburg Law Review* 11, no. 4 (2003): 738–55.
[99] Lilian V. Faulhaber, "American Servicemembers' Protection Act of 2002," *Harvard Journal on Legislation* 40, no. 2 (2003): 544.
[100] 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Public Law 107-206, Title II, §§ 2001-2015, 116 Stat. 899-909 [ASPA hereinafter]

The ASPA was passed by the Senate on June 6th, 2002, with 75-19 votes, and was subsequently signed into law by President Bush. As its name suggests, the intention of the ASPA was to protect US servicemembers and other government agents from the kinds of "politicised prosecution" opponents of the ICC such as John R. Bolton had warned about through imposing prohibitions on the cooperation with the ICC and other means. According to the ASPA, no agency or government entity may cooperate with the ICC, extradite any person located on the territory of the US to the ICC, support the transfer of a US citizen to the ICC, or provide support to the ICC, and no funds may be used for the purpose of assisting the investigation, arrest, detention, extradition, or prosecution of any US citizen.[101] The ASPA also put restrictions on US participation in certain UN peacekeeping operations and prohibited the transfer of classified national security information to the ICC.[102]

It should be noted that the broad application and extensive restrictions of the ASPA are, however, not absolute in nature. For example, an important provision introduced by Democratic Senator Chris Dodd, the so-called "Dodd Amendment", permit significant forms of cooperation with the ICC under certain circumstances:

> *"Nothing in this title shall prohibit the US from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Queda, […] and other foreign nationals accused of genocide, war crimes or crimes against humanity."*[103]

Section 2008 of the ASPA was the provision which gained the most medial attention and caused outrage throughout the international community as the provision authorized the US President to "*use all means necessary and appropriate to bring about the release of any person being detained or imprisoned by, on behalf of, or at the request of the ICC*".[104] This, it has been noted, allows the US president to authorize the use of military force to liberate any US citizen or citizen of an allied country being held by the ICC, which is located in The Hague.[105] As a consequence

[101] ASPA, Sec. 2004 (b – f), 116 Stat 903-904.
[102] ASPA, Sec. 2005-6, 116 Stat 905-905.
[103] ASPA, Sec. 2015, 116 Stat 909.
[104] ASPA, Sec. 2008 (a), 116 Stat 905.
[105] "U.S.: 'Hague Invasion Act' Becomes Law," *Human Rights Watch*, August 3, 2002, https://www.hrw.org/news/2002/08/03/us-hague-invasion-act-becomes-law.

of this controversial provision, the ASPA has become commonly known as the "Hague Invasion Act".

However, despite media's focus on provision 2008, other provisions of the ASPA had much greater impact on the US' objective to prevent other states from cooperating with the ICC. As a matter of fact, one of the most important components of the ASPA is section 2007, which holds that no US military assistance may be provided to countries which are State Parties to the ICC unless the President decides to waive this prohibition if such country has entered into an Article 98 agreement or it is determined to be "in the national interest" to do so.[106] Essentially, section 2007 allows the US to withhold military assistance from any ICC State Parties, providing US officials with statutory tool to pressure or coerce other countries into signing Article 98 agreements, further helping their efforts to exempt their country from the ICC's jurisdiction.[107] Given the fact that US miliary aid provides support in the field of education, training, and monetary aid to many countries over the world which depend on the continued support of US aid, the ASPA has without question contributed to the numerous Article 98 agreements that have been concluded since it was passed.

The international community was quick to respond with strong criticism of the ASPA. For example, an EU Parliament resolution on the draft of the ASPA criticised that the ASPA not only went beyond the exercise of the US' right not to participate in the ICC and has also noted that it would also have negative consequences to the US by obstructing global military and intelligence cooperation.[108] More recently, the ASPA has received renewed criticism as it has been reported that the efforts to support the ICC in its investigations and proceedings in the matter of the Russian war against Ukraine have been impeded by its restrictions on cooperation with the Court.[109]

---

[106] This prohibition does of course not apply to NATO member countries. The ASPA also exempts Taiwan and major non-NATO allies including, *inter alia*, Australia, Egypt, Israel, Japan, and the Republic of Korea.

[107] Faulhaber, *supra* note 99, 547.

[108] "European Parliament Resolution on the Draft American Servicemembers' Protection Act (ASPA)," European Parliament, July 4, 2002, https://www.europarl.europa.eu/doceo/document/RC-5-2002-0386_EN.html.

[109] "Supporting International Accountability for Ukraine," *Brookings*, December 29, 2022, https://www.brookings.edu/research/supporting-international-accountability-for-ukraine/.

2.4.3 The Darfur Dilemma

Not only did the US conclude international treaties and take domestic legislatives steps to undermine the ICC but it also used its position as permanent member of the UN Security Council to express its criticism over the Court and block the ICC from being allowed to exercise jurisdiction over certain situations. The clearest example of this approach is the conduct of the US during the discussions over a possible UN Security Council (UNSC) referral of the matter to the ICC.

The civil war in Darfur began in February 2003 and consisted of multiple overlapping armed conflicts and large-scale offensives by both the army of the Sudanese government as well as its proxies, such as the Sudanese Arab Janjaweed militia.[110] The Janjaweed militia was responsible for the violent suppression the rebellion against the Sudanese government during the conflict. In return, the militia could pursue its own agenda, namely the "Arabization" of their region, with *de facto* impunity, as long as they continued to supress the government opponents. Soon evidence began to arise that the Janjaweed militia was committing atrocities against the people in the region amounting to international crimes, including genocide, crimes against humanity and war crimes during the armed conflict.[111]

At the time of the conflict, Sudan was not party to the Rome Statute and the Sudanese government was not interested in accepting the jurisdiction of the Court by declaration for reasons that are obvious. The crimes committed in Darfur were, thus, not within the jurisdiction of the ICC and could not be investigated or prosecuted unless the matter was referred to the Court by the UNSC, pursuant to Art. 13 (b) of the Rome Statute and in accordance with Chapter VII of the Charter of the UN. As a permanent member of the UNSC, the US was at that time able to veto any resolution, including a referral of the Darfur situation to the ICC and given its vocal opposition to the ICC, the international community expected the US would do so.

However, it is crucial to note that such a move would have been entirely contradictory to the previously expressed US position, which not only expressed its strong conviction to support and bring about justice for the victims of the War in

[110] Alex De Waal, "Darfur and the Failure of the Responsibility to Protect," *International Affairs* 83, no. 6 (2007): 1039.
[111] "Sudan: ICC Holds First Darfur Trial," *Human Rights Watch*, March 29, 2022, https://www.hrw.org/news/2022/03/29/sudan-icc-holds-first-darfur-trial.

Darfur but also underscored the US role as international peacekeeper.[112] In the first half of 2004, the US State department had conducted its own preliminary investigation into the Darfur situation, deploying 24 independent experts to affected border regions of Sudan.[113] At the time, it was alleged that Clinton administration had banned the use of the term ”genocide”, due to legal concerns that by using such a term, the US would be obligated to “undertake to prevent and punish” genocide as bound to by Article 1 of the 1948 Convention on the Prevention and Punishment of Genocide.[114] It was therefore even more remarkable that when Secretary of State Colin L. Powell testified before the Senate Foreign Relations Committee about the findings of the US investigation into Darfur on September 9, 2004, he stated that “*genocide has been committed in Darfur, that the Government of Sudan and the [*Janjaweed*] bear responsibility, […] and that genocide may still be occurring*” in Sudan.[115] It was the first time that the US executive branch had used the term “genocide”.[116]

Nevertheless, as the UN Security Council was preparing the consideration of referring the Darfur situation to the ICC, the Bush administration continued to oppose such a move by advocating and lobbying internationally for alternative solutions and by threatening to veto such a referral. Pierre-Richard Prosper, the US Ambassador-at-Large for War Crimes succeeding Ambassador David Scheffer, began lobbying the representatives of key UN members regarding the US position on referral of Darfur to the ICC, emphasising that the US would not be take part in legitimising the ICC.[117]

Instead, the administration decided in November 2004 to return to its earlier policy of using positive incentives in its attempts to convince the Sudanese government to sign the Naivasha Peace Agreement instead of pursuing a strategy to bring about

[112] Corrina Heyder, “The U.N. Security Council’s Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court’s Functions and Status,” *Berkeley Journal of International Law* 24, no. 2 (2006): 650–71.
[113] Rebecca Hamilton, “Inside Colin Powell's Decision to Declare Genocide in Darfur,” *The Atlantic*, August 17, 2011, https://www.theatlantic.com/international/archive/2011/08/inside-colin-powells-decision-to-declare-genocide-in-darfur/243560/.
[114] Ibid.
[115] A transcript of Powell’s testimony before the Senate Foreign Relations Committee is available at: https://2001-2009.state.gov/secretary/former/powell/remarks/36042.htm.
[116] Hamilton, *supra* note 113.
[117] John Stomper, “The Darfur Dilemma: U.S. Policy Toward the ICC,” *Georgetown Journal of International Affairs* 7, no. 1 (2006): 114.

justice.[118] The US also offered an alternative solution to a referral to the ICC, proposing that the UN Security Council should establish another ad hoc international criminal tribunal, as it had done before for the situations in the former Yugoslavia and in Rwanda.

However, the US proposal for an independent tribunal encountered both practical and political problems, which created a serious policy dilemma for US decisionmakers.[119] Practical difficulties included the immense resources necessary to set up an *ad hoc* tribunal, which would be costly and take much time to set up, as opposed to the already operational ICC. This was an unacceptable solution to many in the international community, especially given that the conflict was still ongoing, and victims were still being affected. Furthermore, the US also failed to gain domestic support for its proposals. Polling data by the Chicago Council on Foreign Relations indicated that a majority of Americans (60%) supported a referral of the situation in Darfur to the ICC and only 29% favoured the solution of an *ad hoc* tribunal, despite being the proposed solution by their own government.[120] While Democrats were more likely to support a referral to the ICC, this solution was nevertheless also favoured by a majority (56%) of Republicans.

Finally, on March 31, 2005, the resolution to refer the situation in Darfur to the Prosecutor of the International Criminal Court[121], was adopted by the UNSC by 11 votes to none, with four abstentions, including that of the US.[122] Given the absence of any viable alternatives and the immense international public backlash the US would have faced if it had vetoed the resolution, the US chose not to do so. Of course, the US State Department did much to emphasises at every opportunity following the UNSC referral that its abstention did not mark a deviation from the previous US position on the ICC.[123] Nevertheless, the fact that the US allowed the

[118] "Darfur: Whose Responsibility to Protect: The United States and Darfur," Human Rights Watch, January 2005, https://www.hrw.org/legacy/wr2k5/darfur/4.htm.
[119] Stomper, *supra* note 117, 114.
[120] "Majority of Americans Favors Referring Darfur War Crime Cases to ICC," *The Sudan Tribune*, accessed May 25, 2023, https://sudantribune.com/article9010/.
[121] S/RES/1593.
[122] The other abstentions were Algeria, Brazil, and China. The UN Security Council voting data on this resolution is available at https://digitallibrary.un.org/record/544831?ln=en
[123] Heyder, *supra* note 112, 650.

referral of the Darfur situation to go forward was an important step in legitimising the ICC's important role as court of last resort in the international criminal justice system.

2.4.4 Executive Order 13928

Another notable attempt of the US to put pressure on the ICC and coerce its prosecutors to discontinue investigations contrary to US interests came after the Court's Appeals Chamber delivered a judgment authorizing the Prosecutor to begin an investigation in relation to all crimes committed in Afghanistan since May 1st, 2003.[124] Since this investigation would inevitably include and possibly affect US nationals involved in the US war in Afghanistan, the US took swift action against the ICC and its prosecutor.

On June 11th, 2020, then-President Donal Trump issued Executive Order 13928 on the "Blocking Property of Certain Persons Associated With the International Criminal Court".[125] In the presidential order, Trump made the following declaration:

> "*[The] situation with respect to the International Criminal Court (ICC) and its illegitimate assertions of jurisdiction over personnel of the United States […] threatens to subject current and former United States Government and allied officials to harassment, abuse, and possible arrest. […] I therefore determine that any attempt by the ICC to investigate, arrest, detain, or prosecute any United States personnel without the consent of the United States […] constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States, and I hereby declare a national emergency to deal with that threat.*"

With this executive order, Donald Trump used the authority vested in the US president by federal statutes such as the International Emergency Economic Powers Act (IEEPA) and the National Emergencies Act, to impose sweeping economic sanctions and visa restrictions on ICC Prosecutor Fatou Bensouda, Phakiso

[124] ICC Appeals Chamber, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, 5 March 2020.
[125] "Executive Order 13928: Blocking Property of Certain Persons Associated With the International Criminal Court," Executive Office of the President, June 11, 2020, https://www.federalregister.gov/documents/2020/06/15/2020-12953/blocking-property-of-certain-persons-associated-with-the-international-criminal-court.

Mochochoko, the Head of the Jurisdiction, Complementarity and Cooperation Division of the Office of the Prosecutor, and many other individuals which were determined by the Secretary of State to have "*directly engaged in efforts of the ICC to investigate, detain, or prosecute any US personnel without the consent of the US*".[126] The sanctions in the executive order include the very broad prohibitions, including transferring, paying for, exporting, withdrawing, or otherwise dealing with the property and interests in property of a designated persons, and making or receiving contributions or provision of funds, goods, or services to the benefit of or from a designated person.

These extensive prohibitions, and the severe penalties in case of a violation of the executive order, aimed at deterring any US citizens, organisations, or companies from interacting with the designated individuals.[127] In response to the executive order and the revocation of Prosecutor Fatou Bensouda's visa to the US, the Office of the Prosecutor released a statement which stressed that the prosecutor had an "independent and impartial mandate" under the Rome Statute, and that she would continue to do her duty under this mandate with "utmost commitment and professionalism, without fear or favour", with the help of her office.[128]

Executive Order 13928 drew very strong and vocal criticism through the international community. NGOs such as the Human Rights Watch described the sanctions and visa restrictions as "an outrageous effort to bully the court and deter scrutiny of US conduct", while calling on states to publicly affirm their support of the ICC and denounce the US attempts to coerce the Court.[129] The international community did exactly that. In response to the executive order, 67 countries that are State Parties to the Rome Statute, including key US allies, issued a joint cross-regional statement expressing "unwavering support for the court as an independent and impartial judicial institution."[130] The EU issued a statement on June 16th, 2020, voicing grave

[126] Executive Order 13928, *supra* note 125, Section 1(a)
[127] "US Sanctions on the International Criminal Court," *Human Rights Watch*, December 14, 2020, https://www.hrw.org/news/2020/12/14/us-sanctions-international-criminal-court.
[128] Mike Corder, "US Revokes Visa for International Court Prosecutor Bensouda," *AP News*, April 5, 2019, https://apnews.com/article/north-america-the-hague-courts-rome-international-news-a5e0748b9b7443e683c6a0f4e0c7d509.
[129] "US Threatens International Criminal Court," Human Rights Watch, March 15, 2019, https://www.hrw.org/news/2019/03/15/us-threatens-international-criminal-court.
[130] Ibid.

concerns about the “unacceptable” sanctions “unprecedented in scope and content”.[131] The Union also re-affirmed its commitment to defending the ICC from outside interference and to advocating for the universality of the Rome Statute “to end impunity for the most serious crimes”.

On April 2nd, 2021, President Joseph R. Biden revoked Executive Order 13928, ending the threat and imposition of sanctions and visa restriction against the designated individuals. In a press statement, Secretary of State Antony J. Blinken clarified that the US continued to disagree strongly with the ICC’s actions relating to the Afghanistan and Palestinian situations, and that it maintained its objections regarding the jurisdictional claims of the ICC. However, the decision to revoke the executive order was made by the Biden administration, which assessed these measures to be both “inappropriate and ineffective” to address US concerns in a meaningful way.[132]

[131] “International Criminal Justice: Statement by the High Representative Following the US Decision on Possible Sanctions Related to the International Criminal Court,” European External Action Service, June 16, 2020, https://www.eeas.europa.eu/eeas/international-criminal-justice-statement-high-representative-following-us-decision-possible_en.

[132] US Department of State, “Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court,” Press release, April 2, 2021, https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/.

3 US willingness to "*genuinely investigate and prosecute*"

3.1 Complementarity as a solution to US concerns over the jurisdiction of the International Criminal Court

As the discussion of admissibility and the complementarity principle in the second section of this thesis has shown, both the preamble and Art. 17(1) of the Rome Statute clearly state that the jurisdiction of the ICC "shall be complementary to national criminal jurisdiction", that is, the ICC may only exercise its jurisdiction over a given case, if the individual State(s) concerned have not exercised their jurisdiction to investigate and prosecute the alleged international crimes. From this it follows that the US can prevent any of its nationals from being brought before the ICC, simply by taking national judicial action itself.[133] Given, then, that any case of alleged crimes under the jurisdiction of the Court would be inadmissible before the ICC if the US or any other State concerned had exercised their right to primary jurisdiction over a case concerning US nationals, *not even if the US was party to the Rome Statute,* the question arises why the US is still persistent in its negative behaviour towards the ICC.

If the US demonstrates *willingness* to *genuinely* carry out an investigation and/or prosecution in cases of alleged or suspected international crimes committed by its nationals, then any concern about jurisdictional overreach and procedural rights of US nationals before the ICC are effectively eliminated since such cases are no longer admissible. Given the fact that a relatively simple course of action is readily available to the US to prevent the ICC from investigating and prosecuting its nationals, the question arises why the US has continued to undermine the ICC as an institution and block its jurisdiction by both legal and political means *other than the genuine investigation and prosecution of its nationals in instances of alleged international crimes*.

[133] See the European Parliament Resolution, *supra* note 108, G: "Noting that, by already taking national judicial action itself, the US can prevent its citizens from being brought before the International Criminal Court".

The simplest and most obvious explanation for this behaviour is that the US has, in fact, not been willing (or will not be willing) to genuinely carry out an investigation or prosecute alleged international crimes committed by its nationals. In this case, the hostile attitude of the US towards the ICC does not arise from genuine concerns about the jurisdiction or procedures of the ICC. Instead, the reasons for the continued efforts of the US to block and undermine the ICC might be better explained by factors within the realm of power politics, either domestically or at the international level.

Of course, there are several additional factors that might play a role in the US stance towards the ICC which are entirely unrelated to US willingness to genuinely investigate and prosecute its nationals. For example, one might question the integrity or quality of complementarity assessments of the ICC and consider concerns about international prosecution despite genuine domestic investigations. David Scheffer, the US Ambassador-at-Large for War Crime Issues during the Clinton presidency, for example, has argued that while complementarity may resolve the immediate concern over the ICC exercising jurisdiction over individuals that are nationals of non-party states, it is a flawed solution that fails to overcome all US concerns. Scheffer's main criticism focuses on the fact that even if the United States did conduct an investigation, despite not being obligated to do so as a non-party to the Rome Statute, the ICC could nevertheless "*decide by a 2-to-1 vote*[134] *that the investigation was not genuine*" and begin its own investigation and/or prosecution of US nationals.[135]

Another explanation for the effort of the US to undermine and discredit the ICC as an institution is that the US might, as a matter of principle, stand up against any court and prosecutor which it judges to be unfair and illegitimate[136], even if US nationals were not affected by its jurisdiction. However, the legislative acts enacted by US lawmakers aimed primarily at the protection of US nationals and justifications offered

[134] See *Rome Statute*, Art. 18, 19, and 57(2)(b) if the challenge takes place prior to the confirmation of the charges (ruling by the Pre-Trial Chamber), or Art. 19 and 64 if it takes place after the confirmation of charges (ruling by the Trial Chamber). Of course, this decision by either the Pre-Trial Chamber or Trial Chamber may also be challenged before the Appeals Chamber in accordance with Art. 82 of the Statute. In such a case, the admissibility would have to be confirmed by another 2-to-1 majority of the Appeals Chamber.
[135] Scheffer, *supra* note 10, 19.
[136] Bolton, *supra* note 74, 169.

by US officials for the US behaviour towards the ICC have not been grounded in such explanations.

President George W. Bush, for example, has made the following comment about the ICC when discussing the possibility of joining the Court:

> "*I wouldn't join it. […] It is the right move, not to join a foreign court [where] our people could be prosecuted*." [137]

Note here that President Bush made no mention of reasons as to *why* he would not agree to the accession of the US to such a court. Instead, the simple fact that a 'foreign' court could potentially investigate and prosecute US nationals seemed to be unacceptable in itself and enough of a reason not to join any such 'foreign' court.

As a result of this discussion, then, the thesis shall form the hypothesis that reason for US hostilities towards the ICC is not found in concerns about jurisdiction and procedural rights but, at least in part, due to political concerns over the protection of the reputation of US military and its conduct, as well as the legitimacy of US military presence in Afghanistan and Iraq over the past two decades.

To test this hypothesis, the thesis will conduct a case study to analyse whether US attitudes towards and conduct during investigations and prosecutions of alleged war crimes committed by its nationals show a lack of "*willingness to genuinely carry out the investigation or prosecution*" of such crimes. The hypothesis must be rejected if the US has consistently carried out "*genuine*" investigations and prosecutions of alleged international crimes committed by its nationals abroad. This second part of the analysis shall therefore aim to address the research questions of whether the United States has shown *genuine willingness* to investigate and prosecute crimes under the jurisdiction of the ICC domestically.

[137] George W. Bush, *supra* note 76.

3.2 Methodology

3.2.1 Determining "willingness" and "genuineness"

For any analysis of the conduct of the United States with regards to the investigation and prosecution of its nationals, it is first necessary to establish what exactly is required from a State to satisfy the conditions of the complementarity principle set out by the Rome Statute.

From Art. 17(2) of the Statute, the following three general conditions for an "unwillingness to genuinely investigate or prosecute" can be identified:

i. No investigation has taken place;
ii. There was an *unjustified delay* in the proceedings which is *inconsistent with an intent to bring the person concerned to justice*;
iii. The proceedings were *not being conducted independently or impartially*, and they were being conducted in a manner which is *inconsistent with an intent to bring the person concerned to justice*;

During the subsequent analysis, then, these three general conditions shall be considered to determine whether the US has shown willingness to genuinely prosecute international crimes committed by its nationals.

To further assist in the analysis, this thesis will make use of the informal expert paper published by the ICC's Office of the Prosecutor (OTP) on the principle of complementarity in practice[138]. The paper is the result of an expert consultation process on complementarity, for the benefit of the OTP, by a group of legal experts[139] who presented their findings on "*the potential legal, policy and management challenges which are likely to confront the OTP as a consequence of the complementarity regime of the Statute*"[140]. The paper not only offers invaluable insights into the processes of fact-finding and analyses conducted by the OTP when assessing a case with regards to the admissibility criteria of the Rome Statute, it also provided an informal guideline on assessing national proceedings for, inter alia,

[138] "The Principle of Complementarity in Practice," *ICC Office of the Prosecutor*, 2003, https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2009_02250.PDF. [Informal Expert Paper hereinafter]
[139] Participants were (in alphabetical order): Xabier Agirre, Antonio Cassese, Rolf Einar Fife, Håkan Friman, Christopher K. Hall, John T. Holmes, Jann Kleffner, Hector Olasolo, Norul H. Rashid, Darryl Robinson, Elizabeth Wilmshurst, Andreas Zimmermann
[140] Informal Expert Paper, 2.

unwillingness, inability, and impartiality. Therefore, the subsequent analysis in this thesis will make use of the list of the specific indicia for “shielding”, “delay”, and for a lack of “independence”, “impartiality”, and “intent to bring about justice, as reflected by the three general conditions to assess national proceedings mentioned above, provided for by the informal expert paper.[141]

One important key aspect of the assessment of national proceedings, which ought to be mentioned at this point, is that any determination of “(un)willingness” may not be based on the *outcome* of the proceedings itself. This was confirmed by the informal expert paper, which argued the following:

> “*At first glance, it may seem attractive to suggest a test such as “no reasonable tribunal could acquit the person on the evidence”. However, such a test would create grave complications and is likely inconsistent with the Rome Statute. […] Therefore, the admissibility assessment should be based on procedural and institutional factors, not the substantive outcome*.”[142]

Consequently, the analysis conducted in this thesis will only focus on the procedural and institutional facts of the cases considered and will only take outcomes into account within their broader context.

3.2.2 Case selection

The following analysis will conduct a case study of several instances of alleged war crimes that have taken place in Afghanistan and Iraq in the context of the US “War on Terror”. For the purpose of the analysis, four types of cases of alleged war crimes will be distinguished: (1) “traditional” war crimes committed by individual actors, (2) airstrikes with civilian casualties (3) torture on foreign territory, and (4) presidential pardons of individuals convicted or accused of war crimes.

The cases chosen reflect investigations towards the beginning of the war, during troop surges, and towards the end of the two-decade long US military presence in Afghanistan and Iraq. Covering different periods of time during the War on Terror is important to account for possible changes in willingness to genuinely investigate and

[141] See Annex 1.
[142] Informal Expert Paper, 14.

prosecute, taking into account the dimension of domestic politics by including investigations during both Republican and Democratic administrations.

Of course, for the analysis of investigations by US authorities into potential or alleged international crimes committed by US nationals, the pool of sources that are reliable and available to the public is very limited. Thus, the analysis will rely mostly on secondary sources, given that the US military has only made a few brief statements about and has strictly limited the access of the public to materials relating to internal investigations of the conduct of US military personnel. Such secondary sources will include news coverage of both the situations of certain cases, as well as coverage of the subsequent investigation and trials conducted by military and law enforcement officials into the alleged crimes.

The thesis will analyse the conduct of the US with regards to investigations and prosecutions of alleged situations of war crimes committed in each of the four categories mentioned above. Importantly, the thesis will not analyse the question whether certain actions of US military and law enforcement personnel in Afghanistan and Iraq have, as a matter of fact, constituted war crimes. Instead, the aim of the analysis is to examine a small selection of representative cases that may offer valuable insights into US *attitudes towards* and *conduct during investigations* of alleged war crimes committed by US nationals.

3.3 Applicable US Laws

Before the case study can proceed with analysing the *willingness* to genuinely prosecute, it is first necessary to establish that the US has the *ability* to genuinely prosecute war crimes committed by its nationals, given that this ability is both in itself a condition of the principle of complementarity as laid out by the Rome Statute, as well as a necessary precondition to the demonstration of willingness. Therefore, the following section will be concerned with the question of how and through which mechanisms the US justice system is able to investigate and prosecute its nationals for war crimes.

The 2017 Office of the Prosecutor's request to open a formal investigation into the situation in Afghanistan[143] clearly states that the investigation would, if approved, include "*acts allegedly committed by members of the US armed forces and members of the CIA*". Therefore, the following section will include a discussion of the US war crimes legislation, the law applicable to members of the US military, and US federal criminal law applicable both to CIA personnel and, in some circumstances, to US military personnel.

3.3.1 Ordinary vs. international crimes

Domestic courts tasked with prosecuting the atrocities committed by the persons under their jurisdiction are often faced with the dilemma of having to decide whether to prosecute the crimes committed as "ordinary crimes", i.e., crimes as defined under domestic law, or as "international crimes", as defined by the Statute of the ICC.[144] This dilemma arises from the fact that international crimes are often constituted by individual criminal acts themselves. For example, the act of wilful killing of a person protected under the Geneva Conventions could either be classified as war crime as defined by Art. 8 of the Rome Statute or as a murder or voluntary manslaughter as defined by the relevant domestic legislation.

[143] ICC Office of the Prosecutor, Public redacted version of "Request for authorisation of an investigation pursuant to article 15", ICC-02/17-7-Red, 20 November 2017. [*OTP Afghanistan Request* hereinafter]

[144] Elena Maculan, "International Crimes or Ordinary Crimes? The 'Dual Classification of the Facts' as an Interpretive Method," *International Criminal Law Review* 21 (2021): 404.

However, a court cannot charge an individual with both an international crime and an ordinary crime at the same time without running into the problem of a potential violation of the *ne bis in idem* principle. In the US, prosecutions for ordinary crimes under either civil or military law are much more common in its proceedings against individuals accused of conduct which may constitute international crimes, such as war crimes. The relevance of the dilemma for admissibility crystalizes when one considers how courts may assess whether a matter has or is being prosecuted sufficiently in any given case. The question that arises is whether the ICC could, for instance, bring charges of war crimes against an individual that has already been prosecuted for the same conduct but for another ordinary crime.

This problem is not a purely theoretical one, given that the Draft Statute for an international criminal court presented by the ILC in 1994 included Article 42(2)(a), which stated that the *ne id bis idem* principle did not apply, and the Court could chose to investigate and re-try cases, if *"the acts in question were characterized by that court as an ordinary crime and not as a crime which is within the jurisdiction of the Court"* [145], using the same wording as both the ICTY and the ICTR Statute.

However, as the wording of Art. 20(3) of the Rome Statute suggests, the ICC is not authorized to investigate and re-try cases in which an individual had only been convicted of ordinary crimes as opposed to the international crimes which cover the same conduct:

> "*No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court* ***with respect to the same conduct*** *[…]"*

The ICC has further addressed the issue of ordinary crimes and international crimes with regards to the assessment of complementarity in the *Gaddafi* case. The Pre-Trial Chamber in this case also noted that the travaux préparatoires demonstrate a *deliberate* departure from the language of the ICTY and ICTR Statutes[146] and it determined that:

---

[145] International Law Commission, "Report of the International Law Commission on the Work of its 46th Session (2 May – 22 July 1994)," UN Doc A/49/10 (1994): 57.
[146] Prosecutor v Gaddafi and Al-Senussi (*Decision on the admissibility of the case against Saif Al-Islam Gaddafi),* ICC-01/11-01/11-344-Red, 31 May 2013

"[…] a domestic investigation or prosecution for "ordinary crimes", to the extent that the case covers the same conduct, shall be considered sufficient. It is the Chamber's view that Libya's current lack of legislation criminalising crimes against humanity does not per se render the case admissible before the Court."[147]

The test to determine whether a case is inadmissible under the *ne bis in idem* restriction has since then become known as the "same person – same conduct" test, as set out by the ICC in the *Lubanga* case[148]. It consists in the assessment of whether national proceedings of the case in question have encompassed both the *same person* and the *same conduct* which are subjects of the case concerned. If this is the case, then the ICC may not exercise its jurisdiction over the case and individual concerned.

Turning to the assessment of US national proceedings, then, it its thus necessary to clarify which conduct exactly is covered by the Rome Statute, applicable to the situations in Afghanistan and Iraq, and to identify the offenses covering the same conduct, i.e. the underlying criminal acts, as outlined by Art. 8 of the Rome Statute.

3.3.2 Classification of the armed conflict and its relevance for the application of Art. 8 of the Rome Statute

In the OTP's request to investigate the Situation in Afghanistan, the Prosecutor stated that while in the period between 7 October 2001 and 19 June 2002, there was an "international armed conflict" between Afghanistan under the Taliban and the US-led coalition, the situation in Afghanistan as of 19 June 2002, after which most alleged international crimes have taken place, has been accurately qualified as an "armed conflict not of an international character".[149] This determination is crucial in order to understand which provisions of the Statute, i.e. which provisions of International Humanitarian Law (IHL), are applicable to the conflict in Afghanistan,

[147] Ibid, 36.

[148] *Prosecutor v Thomas Lubanga Dyilo* (Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58), ICC-01/04-01/06-1-Corr-Red, 8 March 2006, para 31: "*[T]he Chamber considers that it is a* conditio sine qua non *for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court."*

[149] OTP Afghanistan Request, para 125-137.

since the Statute distinguishes the underlying acts constituting war crimes by the type of conflict.

In the case of armed conflicts of a non-international character, the underlying acts that constitute war crimes are found in Article 8(2)(c) and (e) of the Rome Statute. Articles of particular relevance to the conduct of US personnel in Afghanistan are:

- Art. 8(2)(c)(i): *Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture*
- Art. 8(2)(c)(ii): *Committing outrages upon personal dignity, in particular humiliating and degrading treatment*
- Art. 8(2)(e)(vi): *Committing rape, sexual slavery, enforced prostitution, forced pregnancy, […], enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions*

The characterization of the conflict in Iraq is complex and varies depending on the specific legal and factual context being analysed. The evolving nature of the conflict and the involvement of multiple parties have made it particularly challenging to classify the entire conflict under a single category of international or non-international armed conflict. There seems to be broad agreement that the conflict initially began as an international armed conflict with the invasion of the US-UK coalition in March of 2003, given that an international armed conflict may generally be defined as any differences between two or more States leading to the intervention of members of armed forces.[150] To such an international armed conflict, the four Geneva Conventions of 1949 are applicable, as reflected by Art. 8(2)(a) of the Rome Statute. Furthermore, while Additional Protocol I to the Geneva Conventions is not legally binding upon the US nor Iraq, since neither are State Parties to the treaty, both States were nevertheless bound by the rules of customary international humanitarian law, which now correspond largely to the provisions of Protocol I.[151]

[150] Knut Dörmann and Laurent Colassis, "International Humanitarian Law in the Iraq Conflict," in *German Yearbook of International Law*, vol. 47 (Berlin: Duncker & Humblot, 2004), 295, https://www.icrc.org/en/doc/assets/files/other/ihl_in_iraq_conflict.pdf.
[151] Ibid.

Following the initial phase of the conflict, after the US-led coalition had toppled the Baathist government under Saddam Hussein, the conflict continued as an insurgency, with various insurgent groups, local militias, and sectarian factions entering a prolonged period of internal armed conflict within the territory of Iraq. The characteristics of the period of the War in Iraq following the US invasion are consistent with Article 1 of Addition Protocol II to the Geneva Conventions, which defines a conflict not of an international character as follows:

> "*All armed conflicts [not covered by Article 1 of the Protocol I], and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol*."

Therefore, Article 8(2)(c) and (e) of the Rome Statute are applicable to this period of the War in Iraq.

The analysis will now move on to discussion laws and legal provisions in place in the US legal system that provide investigators and prosecutors with the ability to prosecute the crimes under the jurisdiction of the ICC before domestic courts. This section will primarily address the US military justice system, the War Crimes Act of 1996, and the Military Commissions Act of 2006.

3.3.3 The US Military Justice System: The Uniform Code of Military Justice (UCMJ) and the Manual for Courts Martial (MCM)

The US military justice system operates under the Uniform Code of Military Justice (UCMJ)[152], which was enacted by Congress in 1950 and has been in effect since 31 May 1951, when it replaced the Articles of War of 1920.[153] The UCMJ contains the substantive and procedural laws governing the military justice system and

[152] Uniform Code of Military Justice, 10 U.S.C. §§ 801–940 (2006) [*UCMJ* hereinafter]
[153] "Uniform Code of Military Justice (1946-1951)," The Library of Congress, accessed April 8, 2023, https://www.loc.gov/collections/military-legal-resources/articles-and-essays/military-law-and-legislative-histories/uniform-code-of-military-justice-1946-to-1951.

establishes personal jurisdiction over all members of the Uniformed Services of the US[154], without any territorial restrictions on jurisdiction.[155]

The Manual for Courts-Martial (MCM)[156] is a collection of the up-to-date rules governing criminal proceedings conducted by the US military, and it includes the Rules for Courts-Martial, the Military Rules of Evidence, the Punitive Articles of the UCMJ, and the Nonjudicial Punishment Procedures. The MCM is updated every few years to reflect the new amendments to the UMCJ and the additional executive orders applicable to courts-martial. Offenses under the MCM[157] which would most likely cover "the same conduct" as the underlying criminal acts constituting war crimes as outlined in Article 8 of the Rome Statute are, for example, *Murder* (Art. 118), *Manslaughter* (Art. 119), *Rape and sexual assault generally*[158] (Art. 120), *Maiming* (Art. 124), and *Assault* (Art. 128).

It must be noted that the military justice system in the United States operates quite differently from the civilian justice system. In stark contrast to the US civilian justice system, military commanders are granted the unique authority to exercise discretion in deciding whether an individual should be charged with an offence, how the guilt of the individual should be determined, and, in some cases, how the individual should be punished for the offence in question. In cases involving US military personnel, investigations of serious offences, such as rape, assault, manslaughter, and murder, are usually conducted by one of the military-specific criminal investigative agencies, such as the Naval Criminal Investigative Service (NCIS) and the US Army Criminal Investigation Command (CID).[159]

---

[154] The US Uniformed Services are the following: the US Army, the US Marine Corps, the US Navy, the US Air Force, the National Oceanic and Atmospheric Administration Commissioned Officer Corps, the United States Public Health Service Commissioned Corps, and the US Space Force.
Coast Guard, NOAA Commissioned Officer Corps, and Public Health Service Commissioned Corps.
[155] UCMJ, 10 U.S.C.§ 802, Art. 2.
[156] Manual for Courts-Martial, United States (2019 ed.) [*MCM* hereinafter].
[157] MCM, Part IV – Punitive Articles.
[158] This article in particular been changed numerous times with the amendments of the US MCM over the past two decades since the beginning of the "War on Terror". For example, additional supplementary articles such as Art. 120b (Rape and sexual assault of a child) and Art. 120c (Other sexual misconduct) have been introduced. However, article 120 has been in place, in some capacity, during the entire duration of the conflict.
[159] US Department of Defense, "Military Justice Overview," DoD Victim and Witness Assistance, accessed April 3, 2023, https://vwac.defense.gov/military.aspx.

In the initial stage, a military commander may choose to take no action, to initiate administrative action against the individual concerned, to dispose of the offense with nonjudicial punishment[160] in the case of handling "minor offences"[161], or to dispose of the offenses by court-martial.[162] One can distinguish between three levels of court-martial, summary, special, or general court-martial, each differing in the procedures, rights, and punishment that may be imposed.[163] Only a general court-martial deals with the most serious of crimes and given the gravity of the crimes discussed during the subsequent analysis, only the procedure of a general court-martial will be considered further. Before any charge may be brought before a general court-martial, the commander in charge of the investigation and/or prosecution must first initiate so-called *Article 32* proceeding, which is a preliminary procedure similar to a civilian grand jury to determine whether there is sufficient evidence to proceed with a general court-martial. Such proceeding consists in an investigation and a hearing, at the close of which the Article 32 officer is then authorized to make a non-binding recommendation to the convening authority as to whether the individual accused should stand trial in a general court-martial.[164]

A general court-martial, then, consists of a panel of a military judge and no less than five members.[165] The members of the panel are selected by the convening authority[166] and must be active-duty members who, in the opinion of the convening authority, are "*best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament*".[167] Furthermore, enlisted members accused may request that the panel be made up of at least one-third enlisted personnel.[168]

[160] According to the rules laid down in US MCM, PART V.
[161] MCM, PART V, 1e.
[162] MCM, Rule 306(c), p. II-26.
[163] US DoD Military Justice Overview, *supra* note 159.
[164] Ibid.
[165] MCM, Rule 501, p. II-42. An accused may also request a trial by military judge alone except in those cases referred as "capital" cases (Rule 501, 1, B).
[166] UCMJ, 10 U.S.C.§ 822, Article 22.
[167] MCM, Rule 501(1), p. II-42.
[168] MCM, Rule 503(2), p. II-47.

3.3.4 Federal Legislation: The US War Crime Legislation

The United States Congress implemented war crimes legislation with the War Crimes Act of 1996.[169] This initial legislation stated simply that any individual that commits a grave breach of the Geneva Conventions, anywhere in the world, […] "*shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death*"[170]. In 1997, the War Crimes Act was amended to expand the definition of war crimes under the legislation to also include a violation of Article 3 of the Geneva Convention of 1949 and violations of certain provisions of the Hague Convention IV.[171] This version of the War Crimes Act is the war crimes legislation that would have been applicable for all prosecutions by US authorities until the implementation of the Military Commissions Act of 2006.

It is important to note this, given that the OTP stated in its request for authorization for further investigation of the Situation in Afghanistan that the preliminary information available provided a reasonable basis to believe that a number of individuals had been subjected to war crimes by members of the US armed forces and of the CIA "*primarily in the period 2003-2004*".[172] Thus, the war crimes identified and investigated by the OTP fall within the timeframe during which the War Crimes Act of 1996 as amended in 1997 was applicable.

In 2006, in response to a ruling by the US Supreme Court[173] which, inter alia, held that the Combatant Status Review Tribunals dealing with detainees at the US detention camp at Guantanamo Bay violated Article 3 of the Geneva Conventions and that the Geneva Conventions are enforceable in the federal courts[174], the Military Commissions Act of 2006 (MCA) was passed by Congress and signed into law by President George W. Bush.

Among other controversial provisions, the MCA amends the definition of war crimes and establishes that a war crime is constituted only by "grave breaches" of Common

[169] 18 US Code §2441.
[170] 18 US Code §2441(a).
[171] 111 STAT. 2436, SEC. 583 (3)(c)(2) and (3).
[172] OTP Afghanistan Request, para 189.
[173] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).
[174] "Hamdan v. Rumsfeld," Center for Justice & Accountability, accessed May 29, 2023, https://cja.org/what-we-do/litigation/amicus-briefs/hamdan-v-rumsfeld/.

Article 3 of the Geneva Convention of 1949. The crimes that are classified as such "grave breaches" are torture, cruel or inhuman treatment, biological experiments, murder, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault and abuse, and taking hostages.[175]

Note here that the inclusion of only the above-mentioned crimes through the amendment of the previous war crimes legislation effectively decriminalises the following war crimes as defined by Common Art. 3 of the Geneva Convention of 1949:

- Violence to life and person,
- Murder "of all kinds", as opposed to the narrow definition of the MCA,
- Outrages upon personal dignity, in particular humiliating and degrading treatment, and
- the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

This amendment to the existing war crimes legislation is not only relevant to crimes committed *after* the MCA was signed into law in 2006 but the MCA also applies retroactively, taking effect as of November 26, 1997.[176] Therefore, any incident taking place after the above date but before the MCA was signed into law may only be prosecuted under the amendments of the MCA[177] instead of the War Crimes Act, even if it was applicable at the time of the commission of the crime.

It should be noted here that the exercise of federal jurisdiction over crimes committed by active-duty service members is already extremely uncommon in the United States in general, where federal legislation is typically applied only to service members whose previous misconduct is discovered only after their discharge from military service (and thus, the termination of military jurisdiction).[178] This is particularly true in the case of war crimes. In fact, according to Corn and

[175] Military Commissions Act of 2006, US Public Law 109-366, Sec.6 (d)(1)(A-I).
[176] Ibid, Sec.6 (b)(2).
[177] Note that the US Supreme Court Boumediene v. Bush (2008) ruled Section 7 of the MCA, not discussed above or relevant to this thesis, unconstitutional. It is therefore no longer applicable.
[178] Geoffrey S Corn and Rachel E VanLandingham, "Strengthening American War Crimes Accountability," *American University Law Review* 70, no. 2 (2020): 335.

VanLandingham, no US service members have been charged with offenses labelled as “war crimes” since the creation of the UCMJ in 1950, with only two exceptions in the context of the Vietnam War.[179]

[179] Ibid, 339.

3.4 Case study: US investigations into war crimes since 2002

3.4.1 Willingness to investigate and prosecute alleged war crimes

3.4.1.1 The Haditha massacre (2005)

Situation

At around 7:15 a.m. on November 19, 2005, Marines of Kilo Company of the 3rd Battalion of the First Marine Regiment were on a routine resupply mission in the Al Anbar province of western Iraq, when one of their four vehicles was struck by an improvised explosive device (IED), triggered by a remote control, killing one Marine, Lance Corporal Miguel Terrazas, and injuring two other Marines.[180] On the same day, 24 Iraqis were also killed at the same location, near or in the town of Haditha. How exactly their deaths came to be, however, remains contested.

According to the initial press release by the US Marine Corps, the very same IED that had struck the US Humvee had also killed fifteen Iraqi civilians in the explosions and, after coming under gunfire by Iraqi insurgents, the Marines had been forced to fire on and kill another eight Iraqi gunmen.[181] However, forensic evidence, eyewitness accounts, and videotapes and photographs of the aftermath of the incident would later clearly dispute the official version of what had happened in Haditha that day. As it would become evident during subsequent investigations, none of the Iraqi civilians had been killed in the explosion of the IED. Instead, evidence indicates that the civilians were killed first during "a sustained sweep by a small group of marines that lasted three to five hours"[182], which included the shooting of a taxi driver and four students at a roadblock nearby and killings which occurred inside four nearby homes. The incident left 24 Iraqis dead, including 10 women and children, as well as an elderly wheelchair-bound man[183].

[180] Tim McGirk, "Collateral Damage or Civilian Massacre in Haditha?," TIME, March 19, 2006, accessed April 2, 2023.
[181] 2d Marine Division, USMC, "Press Release # 05-141," November 20, 2005, https://www-tc.pbs.org/wgbh/pages/frontline/haditha/etc/release.pdf.
[182] Thom Shanker, Eric Schmitt, and Richard A. Oppel Jr, "Military to Report Marines Killed Iraqi Civilians," *The New York Times*, May 26, 2006.
[183] Ellen Knickmeyer, "In Haditha, Memories of a Massacre Iraqi Townspeople Describe Slaying of 24 Civilians by Marines in Nov. 19 Incident," The Washington Post, May 27, 2006.

The first group of Iraqis to be killed had approached the road of the IED explosion in a car before being stopped by a roadblock set up by the Marines after the incident. After they finally admitted that the Iraqi casualties in Haditha had not died in the IED explosion, military officials claimed in differing reports that the Marines had taken fire from one or more passengers of the vehicle and that they had suspected the passengers of the vehicle to be responsible for setting up the IED that had killed Lance Corporal Terrazas.[184] The explosive ordnance disposal (EOD) team that was called to the scene after the IED explosion later searched the vehicle but found no weapons or evidence of bomb-making materials.[185] Both military and outsiders have subsequently agreed that the Marines shot and killed the taxi driver and his passengers after they had exited the vehicle.[186]

Then, as the leader of the unit, Staff Sgt. Frank Wuterich, would later admit during his trial in 2012, he ordered his Marines to "shoot first, ask questions later" before beginning to "clear" the houses in the vicinity of the IED explosion.[187] Despite this admission, he and other Marines in his unit have since remained steadfast in their statement that on November 19th, they did not seek out to insurgents or civilians for the purpose of avenging their dead friend but were simply following their rules of engagement.[188] Several members of his unit have repeatedly stated that they were engaged by the enemy first, taking AK-47 fire from the first house, before they were ordered to "clear" the house from enemy combatants. They also alleged that upon one of the houses, the unit had encountered multiple men with weapons, and that they had heard the sounds of automatic rifles while inside another house. As a consequence, they had used deadly force against the imminent threat against their lives.

However, there are multiple reasons that cast significant doubt over the accounts of the Marines. According to the official reports into the incident, only two AK-47s were discovered and collected by the Marines after the exchange of gunfire had

---

[184] Ibid.
[185] "Defense Lawyers Give Stories of Marines Under Investigation in Haditha Probe," *Fox News*, January 6, 2007.
[186] "What Happened at Haditha?," *NPR*, May 31, 2006, https://www.npr.org/transcripts/5442144.
[187] Guy Adams, "'Shoot First... Ask Questions Later,' Ordered Marine," *The Independent*, January 10, 2012.
[188] CBS News, "Marine Gets No Jail Time for Haditha Killings," *CBS News*, January 24, 2012, https://www.cbsnews.com/news/marine-gets-no-jail-time-for-haditha-killings/.

concluded, which is significantly fewer than the number of insurgents they had each claimed to have seen wielding and aiming such weapons at the US troops.[189] Moreover, no records could later be found these two weapons had been turned in to the unit's headquarters, as required by regulations.[190]

Furthermore, the accounts of Kilo Company were disputed by a number of witnesses, including survivors of the raid on the houses. One of the survivors of the shooting was 9-year-old Eman Waleed, who lived in one of the houses in very close proximity to the IED explosion. In a conversation with Time Magazine, she described the actions of the Marines as follows:

> "*We heard a big noise that woke us all up […] It was very early, and we were all wearing our nightclothes. […] Then we did what we always do when there's an explosion: my father goes into his room with the Koran and prays that the family will be spared any harm. […] First, they went into my father's room, where he was reading the Koran and we heard shots […] I couldn't see their faces very well—only their guns sticking into the doorway. I watched them shoot my grandfather, first in the chest and then in the head. Then they killed my granny.*"

Forensic evidence and the death certificates have reportedly also contradicted the claims that the Marines withstood heavy gunfire from the three homes that were raided that day.[191] However, this evidence has also not been able to provide conclusive proof that the Marines *deliberately* killed innocent civilians.[192]

Investigation and prosecution

Despite the high number of civilian casualties involved in the incident, and even though the mayor of Haditha had gone to the military camp where the Marines were

---

[189] See, for example, the official report by Lance Corporal Justin Sharratt on the events of Haditha for the investigation officer, presented on 11 June 2006. Available at: https://www.mcmilitarylaw.com/documents/lcpl_sharratt_report_for_the_investigation_officer_11_june_2007.1).pdf

[190] David S. Cloud, "Inquiry Suggests Files on Killings in Haditha Were Excised," *The New York Times*, August 17, 2006.

[191] Lionel Beehner, "What Happens Now on Haditha Investigation," *Council on Foreign Relations*, June 6, 2006, https://www.cfr.org/backgrounder/what-happens-now-haditha-investigation.

[192] McGirk, *supra* note 180.

based to confront their superiors about the unit's actions[193], no investigation was opened immediately following the events in Haditha. It was only after TIME Magazine, which had been conducting an investigation into the situation after receiving video evidence of the aftermath of the incident, presented US military officials in Baghdad with the evidence collected and statements of Iraqi witnesses of the event that the US agreed to open an official investigation into the incident.[194]

Army Lt. Gen. Peter Chiarelli commissioned a preliminary investigation into the Haditha situation and in March 2006, Maj. Gen. Richard C. Zilmer authorized a full criminal investigation, to be conducted by the Naval Criminal Investigative Services (NCIS), based upon the findings and recommendation of the preliminary report.[195] The main goal of the investigation was to determine whether the Marines involved had broken the laws of war by deliberately targeting and killing civilians instead of enemy combatants, perhaps in revenge for the death of Lance Corporal Terrazas. According to spokesmen for the victims' relatives, the residents of Haditha and the eyewitnesses were positively surprised and impressed by the NCIS investigators who had come to the town to investigate the circumstance of the killings that had taken place the previous fall.[196] They highlighted both the frequency of the visits of investigators as well as the meticulousness with which they seemed to conduct their investigation. Parallel to the investigation by the NCIS, another inquiry was launched to examine whether any of the Marines involved in the incident, or any of their superior officer, had attempted to cover up the alleged crimes of the unit.[197]

By August 2006, according to unnamed Pentagon sources, NCIS investigators found that there was enough evidence to support the claims that the Marines of Kilo Company had deliberately shot unarmed civilians during the Haditha incident but that military prosecutors were still considering whether to recommend criminal charges to be brought against the Marines involved.[198]

---

[193] McGirk, *supra* note 180
[194] Ibid.
[195] Tom Bowman, "Timeline: Investigating Haditha," *NPR*, May 8, 2007, https://www.npr.org/templates/story/story.php?storyId=5473735.
[196] Aparisim Gosh, "On Scene: Picking up the Pieces In Haditha," TIME, May 29, 2006.
[197] Shanker, Schmitt, and Oppel, *supra* note 182.
[198] Bowman, *supra* note 195.

Eventually, on December 21, 2006, military officials filed charges of "unpremeditated murder" against four Marines on the ground in Haditha that day: Squad leader Staff Sergeant Frank Wuterich, Sergeant Sanick Dela Cruz, Lance Corporal Justin Sharratt and Lance Corporal Stephen B. Tatum.[199] The group was further charged with a number of smaller infractions, such as violating a lawful order, dereliction of duty, obstruction of justice, improper reporting, and making false statements.[200] In addition, following the investigation into the failure to investigate the incident, charges of dereliction of duty and charges for failing to investigate were filed against four officers of the US Marines Corps.[201]

In April 2007, all charges against one of the Marines, Sergeant Sanick Dela Cruz, were dismissed and he was granted testimonial immunity. Seven other Marines were also granted immunity in exchange for their testimony. The charges against LCpl. Justin Sharratt were also dropped upon recommendation of hearing officer Lt. Col. Paul Ware.[202] Article 32 hearings were initiated for LCpl. Tatum on July 16, 2007, and for SSgt. Wuterich in August 2007.[203] However, all charges against LCpl. Tatum were dropped by April 2008 and SSgt. Frank Wuterich was the only individual involved in the incident to stand trial for the crimes that took place in Haditha.[204]

Instead of the initial unpremeditated murder charge, Wuterich was only charged with nine counts of manslaughter and assault in his general court-martial.[205] The prosecution focused both on Wuterich's own actions as well as his conduct as unit leader responsible for the actions of the Marines under his command, including his order to "clear the houses" in the village. During the trial, Sgt. Dela Cruz[206] testified that he saw Wuterich shoot the five men that had been ordered out of the taxi near

[199] Bowman, *supra* note 195.
[200] US Army Center for Army Leadership, "Written Case Study: Haditha, Iraq," accessed April 21, 2023, https://capl.army.mil/case-studies/wcs-single.php?id=25&title=haditha-iraq.
[201] For further, see Bowman, *supra* note 195.
[202] "Charges Dropped for Two Marines in Haditha Case," *NPR*, August 9, 2007, https://www.npr.org/2007/08/09/12634743/charges-dropped-for-two-marines-in-haditha-case.
[203] "Marine Charged in Iraq Deaths Said Women and Kids Should Be Shot," *The Orange County Register*, July 16, 2007, https://www.ocregister.com/2007/07/16/marine-charged-in-iraq-deaths-said-women-and-kids-should-be-shot.
[204] Dan Whitcomb, "Charges Dropped against Marine in Haditha Case," Reuters, March 28, 2008, https://www.reuters.com/article/us-usa-haditha-marine-idUSN2844311120080328.
[205] "US Marine Reaches Plea Deal over Deaths of Unarmed Iraqis," *The Guardian*, January 23, 2012, https://www.theguardian.com/world/2012/jan/23/us-marine-frank-wuterich-iraqi-deaths.
[206] Sgt. Dela Cruz had been granted immunity in exchange for his testimony in which he also admitted to killing one person, to shooting the dead bodies of four men, and to urinating on one of the bodies.

the site of a IED explosion and that neither of the men was trying to run away, as Wuterich had previously claimed.[207]

The trial reached a premature end when SSgt. Wuterich entered a plea deal with the prosecution for the lesser charge of "dereliction in the performance of duties through neglect"[208], which carried a maximum punishment of forfeiture of two-thirds pay per month for 3 months and confinement for 3 months.[209] However, due to the conditions of Wuterich's plea deal, the judge in the case had to abide by the plea agreement and in the end, Wuterich's sentence amounted to a reduction in rank to private and a pay cut.[210]

Unsurprisingly, the outcome of the 6-year long Haditha investigation and prosecution was met with disbelief, dissatisfaction, and outrage by many Iraqis who felt that the Marines had not received fair sentences and that the plea deal offered to Wuterich was little more than another injustice against the victims of the Haditha massacre. Several public figures stated that the proceedings had proven that "the judicial system in America is unjust" and many called on the Iraqi government and international courts to intervene to bring about justice.[211]

Assessment of "ability and willingness to genuinely investigate and prosecute"

First of all, in the case of the Haditha massacre, an investigation into alleged crimes did take place within a relatively reasonable timeframe, given that an official investigation into the situation was launched within months of the incident. Still, it is possible to argue that there was an *unjustified delay* in the proceedings, *inconsistent with an intent to bring the persons concerned to justice*. Note here that the wording of Article 17(2)(b) as stated above does not necessarily imply an *intent to prevent* the individual concerned from being brought to justice.

[207] Tony Perry, "Marine Testifies Squad Leader Asked Him to Lie about Iraqi Killings," *Los Angeles Times*, January 12, 2012.
[208] As defined by Art. 92(b)(3) of the United States Manual for Courts-Martial (2005 Edition) in that (a) the accused had certain duties, (b) that the accused know or reasonably should have known of the duties; and (c) that the accused was through neglect derelict in the performance of those duties.
[209] MCM (2005 Edition), Part IV, p. IV-25
[210] Stan Wilson and Michael Martinez, "Marine in Haditha, Iraq, Killings Gets Demotion, Pay Cut," *CNN*, January 25, 2012, https://edition.cnn.com/2012/01/24/justice/california-iraq-trial/index.html.
[211] Ibid.

Given the fact that after any incident with such a high number of civilian casualties no formal investigation was opened in its aftermath until after the incident gained international attention, one might make the argument that this delay was inconsistent with an intent to bring the persons concerned to justice.

A report by Maj. Gen. Bargewell into the reporting failure in connection with the Haditha incident asserted that there was insufficient evidence of an intentional cover-up, but instead found that the officers concerned had acted negligently by failing to ask the right questions or press the persons involved about what had happened, particularly after they were made aware of the discrepancy between the unit's report and the later medical examiner's report that all victims had died of gunshot wounds.[212] As a consequence of this inaction, NCIS investigators and prosecutors in the Haditha case faced serious challenges with evidence collection, given that the official investigation had not started until several months after the killings, by which point in time the bodies of the victims had already been buried and most of the physical evidence had gone.[213]

Of course, the failure to open an investigation in a timely manner in the Haditha case is not proof that within the US military justice system there is a generalised lack of intent to bring those who commit war crimes to justice. This is especially true given that three senior Marine officers were censured, i.e. they were reprimanded in an official letter, for their handling of the incident, including the failure to conduct a prompt investigation.[214] Nevertheless, the failure to investigate the Haditha Massacre ought to be taken seriously and cannot simply be categorised as an isolated incident of the failure a singular link in the chain of command without any further investigation. While three individuals were reprimanded for their failure to investigate the Haditha incident, it is not at all clear that individuals further up the chain of command had not also been aware of the incident before the publication of the Times article.

[212] Thomas E. Ricks, "Haditha Probe Finds Leadership Negligent," The Washington Post, July 9, 2006.
[213] Jonathan Karl, "Investigator Urges Against Haditha Murder Charge," *ABC News*, February 28, 2008, accessed April 3, 2023, https://abcnews.go.com/Politics/story?id=3690954&page=1.
[214] Ibid.

Given that the investigation was not opened until after the incident had gained international attention and, more importantly, outrage, it could very well be the case that the incident had already been brought to the attention of the responsible high-level officers, who nevertheless decided not to open an investigation into the incident.

Furthermore, while the Bargewell report clearly indicated negligence and dismissive attitudes towards (the investigation of) incidents with civilian casualties, these findings were not followed-up by any reported recommendations or proposals to examine or improve the reporting structures in place and no inquiry into the accuracy and timeliness of reporting and investigations into suspected misconduct in general was started. This should be of great concern, given that there may be several incidents similar to the Haditha case which have also not been reported but did not gain international attention, and thus, may have remained uninvestigated by the responsible military officials. After all, it is conceivable that the failure to investigate the Haditha incident is only one example indicative of a pattern of negligence and dismissive treatment of incidents with civilian casualties, which needs to be addressed by the US military.

Finally, the last question to be addressed is whether the proceedings in the Haditha case were *not being conducted independently or impartially* while being conducted in a manner which is *inconsistent with an intent to bring the person concerned to justice* or if the proceedings that were being undertaken *for the purpose of shielding* the person(s) concerned from criminal responsibility, as established by Art. 17(2)(a) and (c) of the Rome Statute.

It is clear that the prosecution in the Haditha case failed to convict any of the individuals implicated in the incident of any serious crimes that had been committed in Haditha. Of course, as previously stated, the genuineness of national proceedings cannot be judged simply by their outcome. However, after reviewing the manner in which the proceedings were conducted, as well as the kinds of statements made by prosecutors and military officials alike, there are several reasons to believe that the investigation and prosecution in the Haditha case was conducted in a manner that was not entirely consistent with the intend to bring the individuals responsible to justice.

First of all, it should be noted that of the four Marines that had initially been charged with murder in connection with the Haditha incident, only SSgt. Wuterich stood trial for his alleged crimes. One of the Marines charged with murder and seven others involved in the incident but who were not yet charged with any crimes had been granted immunity in exchange for their cooperation and testimony against their fellow Marines. However, two of the Marines charged with murder had their charges dismissed entirely. While not in itself evidence for a lack of impartiality or independence, it does seem highly questionable that the Prosecution would offer immunity deals in exchange for testimony in cases they would decide not to pursue after all.

One of the indicators mentioned in the informal expert paper which is relevant when considering whether the prosecution has shown unwillingness to bring the individuals responsible to justice is the adequacy of the charges vis-à-vis the gravity of the crime and evidence available in a particular case.[215] Here it is important to note that the prosecution in this case has clearly stated that, in their understanding of the events, the US Marines had not been under attack that day and that they had either erroneously or maliciously chosen to indiscriminately commit acts of violence against the Iraqi residents of Haditha. This is crucial since it goes to show that the Marine Corps decided not to pursue criminal charges despite their knowledge that unlawful killings had taken place in Haditha.

One of the Marines who had his charges dropped was Lance Cpl. Stephen Tatum, who had been charged with the murder of two girls and several other Iraqis in the Haditha killings. Lt. Col. Ware, the investigating officer, had recommended that the charges against Tatum be dropped even though Tatum was found to have deliberately shot and killed civilians that day, emphasising that Tatum had done so, ”only because of his training and the circumstances he was placed in, not to exact revenge and commit murder”.[216] This statement stands in stark contrast with the testimony of another Marine involved in the incident, Lance Cpl. Humberto Manuel

[215] Informal expert paper, 30.
[216] Mark Walker, “Hearing Officer Recommends Charges Be Dropped in Haditha Case,” *North County Times*, August 23, 2007.

Mendoza, who had previously testified[217] that before the sweep of the houses began, Tatum had told him to "just shoot" women and children, should he encounter them inside any of the houses.[218] What is even more concerning than the discrepancy between the two characterisations of LCpl. Tatum's conduct and state of mind that day is, of course, that even if Tatum had committed the killings that day due to his training and the particular circumstance of the events that day, this does not negate the fact that the Marine did commit unlawful killings constituting war crimes in Haditha.

The above characterisation of Tatum's conduct in the given situation is indicative of a greater concern that arises through the conduct of the Haditha proceedings, namely, the question of whether the US military justice system is able to conduct impartial proceedings in a manner consistent with the intent to bring perpetrators of war crimes to justice, particularly in cases that involve "fog-of-war" narratives. These narratives often point towards the general danger US military members in war zones are under and try to paint unlawful actions such as murder and manslaughter as justified split-second decisions "in the heat of the moment".[219] The "fog-of-war" narrative was summarised well during in the Haditha case by the legal representative of Jeffrey Chessani, who was the commanding officer 3rd Battalion, 1st Marines, during the Haditha incident and who has been charged in connection to the failure to investigate, in his statement that:

> "If it's a gray area, fog-of-war, you can't put yourself in a Marine's situation where he's legitimately trying to do the best he can. […] When you're in a town like Haditha or Fallujah, you've got bad guys trying to kill you and trying to do it in very surreptitious ways."[220]

As the following paragraphs will show, there is considerable reason to believe that in such "fog-of-war" cases, the US military justice system has demonstrated both unwillingness and inability to bring the individuals concerned to justice.

---

[217] Note that Mendoza was granted immunity for his testimony before charges were filed in 2006. He also had an application for U.S. citizenship pending at the time of the proceedings, which could have been denied, had he been charged with a crime. See The Orange County Register, *supra* note 203.
[218] The Orange County Register, *supra* note 203.
[219] Christopher M. Booth, "Prosecuting the 'Fog of War?' Examining the Legal Implications of an Alleged Massacre of South Korean Civilians by U.S. Forces during the Opening Days of the Korean War in the Village of No Gun Ri," *Vanderbilt Journal of Transnational Law* 33, no. 4 (2000): 933–86.
[220] CBS News, *supra* note 188.

Let us consider, for example, how Maj. Nicholas Gannon, the prosecutor in the trial of SSgt. Frank Wuterich, choose to present the actions of Wuterich to a jury fellow active-duty Marines. In his opening statement, Gannon stated that:

> *"[Wuterich] never lost control of his squad […] but he made a series of fatal assumptions, and he lost control of himself.*"[221]

If we recall Art. 8(2)(c) of the Rome Statute clearly states that in the case of an armed conflict not of an international character, any instance of *violence to life and person, in particular murder of all kinds, committed against persons taking no active part in the hostilities* constitutes a war crime. Therefore, it is once again not at all clear why the fact that a perpetrator "lost control" during the commission of a crime should therefore be considered any less responsible for it. After all, Maj. Gannon had also stated during the trial that the evidence in the case showed that "none of the victims had posed a threat" to Wuterich or any of the Marines in Haditha that day.[222]

Nevertheless, Wuterich was offered a plea deal that saw him plead guilty only to the lesser charge of negligent dereliction of duty[223], i.e. the offense of failing to fulfil his duty vis-à-vis the Marine Corps, but not any of the violent acts he or the Marines under his command had committed in Haditha. This plea deal reflects the belief of some of the investigating officers, such as Lt. Col. Ware, that evidence could only prove definitively that Wuterich had failed to exercise *due* care in his own actions and as a supervisor to the Marines in his unit, implying that the killings that took place that day were nothing more than an unfortunate error in judgment that should not be punished by a criminal court.

Such statements are consistent with an expression of the belief that Marines were justified in their actions, even without evidence that the targets of the killings had been insurgents or that the Marines had genuine reason to believe they were

---

[221] "Marine 'Lost Control' in Haditha: Prosecutors," *NBC San Diego*, January 9, 2012, https://www.nbcsandiego.com/news/local/opening-statements-to-begin-in-trial-of-frank-wuterich/1947989/.

[222] Ibid.

[223] Another aspect of this case to consider, even if perhaps not entirely relevant to the discussion of "a genuine willingness to prosecute" is the fact that none of the eight individuals were either convicted or acquitted of "the same conduct". All charges of seven individuals concerned were dropped, and SSgt. Frank Wuterich had only plead guilty to "negligent dereliction of duty" in exchange for his manslaughter and assault charges to be dropped. This, it may be argued, is not the same conduct as the act of wilful killing, and therefore, the ICC, if it exercised jurisdiction over this case, may still determine it to be admissible for failing the "same conduct test" and try Wuterich for war crimes.

insurgents. However, if the US Marines Corps did not charge or push for a conviction of Tatum and Wuterich for the violent crimes committed in the Haditha massacre, i.e. assault, manslaughter or murder, due to a belief that war crimes *should not be pursued* in a criminal court if the defendant "was confused and lost control", this clearly constitutes an example of "unwillingness" to genuinely prosecute war crimes.

Numerous US military law experts have warned in the past that it is exceedingly difficult to convict those individuals before courts-martial who can make a plausible, if decidedly unlikely, claim that at the time of the incidents, they believed that their lives were in danger and that they needed to defend themselves against all potential targets, no matter the facts or evidence in the case to the contrary. Some have even gone so far as to state the US military and its justice system have "repeatedly shown an **unwillingness**" to second-guess the decisions made by military members who said they believed they were in danger.[224]

Gary Solis, a professor who teaches the laws of war at Georgetown University, has argued that such "heat-of-the-moment" killings are often simply characterised as cases of "kids making dumb decisions" and are very rarely brought to trial, even if the killings themselves were entirely unjustified.[225] For example, in a very similar case to the Haditha incident in 2008, the US military decided not to bring any criminal charges against two Marines who had been in charge of a unit accused of indiscriminately firing upon vehicles and pedestrians in Afghanistan after a suicide bomber had attacked the units convoy, even though a military investigation had concluded that in the shooting 19 people were killed and at least 50 more were injured.[226] It is Solis' opinion as both a law expert and a veteran of the Marine Corps himself, that the US military justice system is only focused on trying and convicting only those individuals who had taken deliberate, premeditated actions. The question remains whether military prosecutors are generally of the legal opinion that these cases *should* not be tried as a principle, or whether such cases were not tried simply because prosecutors knew they could not get a conviction on serious charges, even though they ought to be pursued in the interest of justice.

---

[224] Charlie Savage and Elisabeth Bumiller, "An Iraqi Massacre, a Light Sentence and a Question of Military Justice," *The New York Times*, October 3, 2010.
[225] Charlie Savage, "Case of Soldiers Accused in Civilian Killings May Eclipse Those That Came Before," *The New York Times*, October 4, 2010.
[226] Ibid.

Furthermore, even if prosecutors in the Haditha case had pushed harder to pursue the more serious criminal charges against SSgt. Wuterich or LCpl. Tatum, the characteristics of general courts-martial in the US may have made it exceedingly difficult to achieve a conviction, given the composition of its panels. The fact that cases of the most serious crimes are tried before a jury of combat Marines, many of whom have also served in war zones in Afghanistan or Iraq, may be a contributing factor as to why prosecutors are reluctant to charge individuals with the most serious crimes if they believe the jurors in the case may have sympathy for the individuals concerned.

Of course, one may also argue that it is precisely the fact that in the US military justice system, panels are composed of military members with experiences similar to the defendants, that they are uniquely qualified to judge the actions of an active duty servicemember. After all, it may be the case that those who have been in similar situations under similar circumstance can better judge when a soldier has crossed the line or when their actions were justified. However, according to Eugene R. Fidell, Professor of military justice at Yale Law School, there has been a concerning pattern of acquittals in cases concerning the conduct of soldiers in Afghanistan and Iraq. Fidell notes the existence of "an unwillingness in some cases of military personnel to convict their fellow soldiers in the battle space."[227] This is consistent with Lt. Col. Ware's recommendation to reduce the charges brought against SSgt. Wuterich to the minor charge of dereliction of duty, in which the investigation officer asserted that no conviction could conceivably be achieved, except in the case of charges relating to Wuterich's failure to obey his orders or his failure to keep the Marines under his command in line.

Finally, the trial of SSgt. Wuterich also demonstrated serious weaknesses of the US military justice system, allowing for a potential lack of independence and impartiality. For example, during the course of the trial, one of the jurors on the panel, told judge Lt. Col. Jones in the case that he had previously served in the Marines with Sgt. Dela Cruz, who testified against Wuterich. He also stated that he knew Sgt. Dela Cruz to be "an average Marine who had appointments to get help for post-traumatic stress

[227] Ibid.

disorder and other mental health issues".[228] After this was revealed, the judge asked for the juror to be taken off the panel. The juror declined and remained on the panel for the rest of the trial. Of course, it is impossible to say from the position of an outside observer whether his prior opinion of Dela Cruz would have influenced the juror's final decision, especially given that the trial ended with Wuterich entering a plea deal. However, the fact that a judge who had reason to belief that a juror's ability to make an impartial decision in a case concerning alleged war crimes was compromised could not remove the juror in question from the panel raises serious questions about the impartiality of the US military criminal justice system.

[228] Tony Perry, "Marine Testifies Squad Leader Asked Him to Lie about Iraqi Killings," *Los Angeles Times*, January 12, 2012, https://www.latimes.com/local/la-xpm-2012-jan-12-la-me-marine-trial-20120112-story.html.

3.4.1.2 The "Kill Team" (2010)

Situation

In the period from January to May 2010, members of the 3rd Platoon, B Company, 2nd Battalion, 1st Infantry Regiment of the US Army murdered at least three Afghan civilians in the Maywand district, in the Kandahar Province of Afghanistan.

It is believed that senior non-commissioned officer (NCO) SSgt Calvin Gibbs, the main instigator behind the murders, had begun testing out the soldiers in his unit to determine which ones would be suitable to be recruited to form a "kill team", a group that would commit thrill killings, since his arrival at the Forward Operating Base in November 2009.[229] By December 2009, the "kill team" was actively discussing plans to target and kill unarmed Afghan civilians with the strategy in mind to use illegally collected weapons to stage attacks on their unit to legitimize the engagement.[230]

The first murder took place in January 2010 in the village of La Mohammed Kalay. While officers of the unit were meeting with village elders, soldiers of 3rd Platoon were wandering the village to establish security. When 15-year-old Gul Mudin emerged from a field where he had been doing farm work for his father, Spc. Jeremy Morlock decided to order the boy to stop and throw a grenade in Mudin's direction so as to implement one of the "scenarios" designed by SSgt. Gibbs to make it look as if he had become the subject of an attack by Mudin.[231] After the grenade had detonated, Pfc. Andrew Holmes, who had taken cover behind a wall, also started opening fire, shooting Gul Mudin repeatedly at close range with his machine gun.[232]

After the soldiers had committed the murder, they were joined by SSgt. Gibbs and the three soldiers proceeded to take photographs of themselves with the boy's corpse to celebrate their kill, posing the corpse in different positions. SSgt. Gibbs

[229] McGreal, Chris. "US Soldiers 'Killed Afghan Civilians for Sport and Collected Fingers as Trophies.'" The Guardian, September 9, 2010. https://www.theguardian.com/world/2010/sep/09/us-soldiers-afghan-civilians-fingers.
[230] "Case Study: Maywand District Murders," Center for Army Leadership, accessed May 4, 2023, https://cal.army.mil/case-studies/wcs-single.php?id=77&title=maywand-district-murders.
[231] Luke Mogelson, "A Beast in the Heart of Every Fighting Man," The New York Times, April 27, 2011, https://www.nytimes.com/2011/05/01/magazine/mag-01KillTeam-t.html.
[232] Mark Boal, "The Kill Team: How U.S. Soldiers in Afghanistan Murdered Innocent Civilians," *Rolling Stone*, March 28, 2011, https://www.rollingstone.com/politics/politics-news/the-kill-team-how-u-s-soldiers-in-afghanistan-murdered-innocent-civilians-169793/.

was also said to have played with the corpse "as if it was a puppet", moving the boy's arms and chin to act as if the corpse was talking.[233]

The second confirmed murder was committed by SSgt. Gibbs, Spc. Morlock, and Spc. Michael Wagnon on February 22, 2010, during a counterinsurgency mission to compile photographs of male inhabitants in the village of Kari Kheyl.[234] Gibbs had reportedly brought a "drop" weapon from his collection of weapons stolen from the Afghan National Police, apparently to test his theory that if he left behind a Russian weapon and signs of a fire fight, the unit would not be suspected of any wrongdoing.[235] When the men came upon a man, Marach Agha, sleeping or laying down by a roadside next to a wall, the "Kill Team" had found its next victim.[236] Gibbs used the stolen Kalashnikov to fire shots into the wall close by Agha and then dropped the weapon next to the man who was still laying on the ground. With the scene staged to suit his narrative, he proceeded to shot Agha at close range with his M4 rifle, followed by both Worlock and Wagnon who fired several rounds at Agha each.[237] Gibbs reported the incident, claiming that Agha had attacked him and his men.

On May 2, 2010, 3rd Platoon would commit its third and final confirmed murder while on patrol in the village of Qualaday. The unit leaders were sent to the village to interview a man who had previously been arrested for possessing an IED, leaving the rest of the platoon free to roam the village without supervisions.[238] While driving around the village, SSgt. Gibbs, Spc. Morlock and Spc. Winfield spotted Mullah Allah Dad, the village imam, watching the American soldiers outside his house. According to Spc. Winfield's later testimony, Mullah Allah Dad seemed friendly and displayed no animosity towards the soldiers.[239]

---

[233] Chris McGreal, "'Kill Team' US Platoon Commander Guilty of Afghan Murders," The Guardian, November 11, 2011, https://www.theguardian.com/world/2011/nov/11/kill-team-calvin-gibbs-convicted.
[234] Center for Army Leadership, *supra* note 230.
[235] Ibid.
[236] John Goetz and Marc Hujer, "Adam's War: The Good Boy and the 'Kill Team,'" *Der Spiegel*, March 31, 2011, https://www.spiegel.de/international/world/adam-s-war-the-good-boy-and-the-kill-team-a-754141.html.
[237] Boal, *supra* note 232.
[238] Ibid.
[239] Goetz and Hujer, *supra* note 236.

SSgt. Gibbs indicated to the other two soldiers that the imam would be a suitable victim and ordered the man to leave his house and walk towards a nearby ditch, forcing him on his knees. Then, after ordering Mullah Allah Dad to stay where he was, Gibbs positioned Morlock and Winfield in shooting positions behind a small berm before taking cover behind a low wall.[240] From his position, Gibbs threw a grenade in the direction of the imam and Morlock and Winfield opened fire. After the three had killed Mullah Allah Dad, Gibbs made sure to drop a Russian pineapple grenade next to the body to ensure they would once again have a justification for their violent actions. According to the soldier charged with identifying and fingerprinting the body of Mullah Allah Dad, SSgt. Gibbs used medical scissors to cut the left little finger off the body to keep as a trophy.[241]

Investigation and Prosecution

The murders committed by the "Kill Team" were finally uncovered after a disagreement between Pfc. Justin Stoner and some of the other soldiers in the unit about their frequent hashish use in his room. Pfc. Stoner made a report about the illegal drug use of the unit to the sergeant on duty in May 2010.[242] While speaking to the duty sergeant, Pfc. Stoner also mentioned one of the murders which he had witnessed but the duty sergeant did not alert his superiors about the murder allegation.[243] Instead, Pfc. Stoner was simply told that the matter would be handled quietly and confidentially.

However, the rest of Pfc. Stoner's unit soon found out about the report he had made and shortly after, SSgt. Gibbs and six other soldiers attacked Stoner, beating him and threatening his life for "snitching" on the unit's drug use. Gibbs also threatened Stoner by return to the latter's quarters with the severed fingers of his victims he had taken as trophies to remind Stoner of what Gibbs and the other soldiers were willing to do to him.[244] On May 7, 2010, a physician's assistant at the Forward Operating

[240] Boal, *supra* note 232.
[241] Goetz and Hujer, *supra* note 236.
[242] McGreal*, supra* note 233.
[243] Boal, *supra* note 232.
[244] Elaine Porterfield, "Army Whistleblower Recalls Sergeant's Chilling Threat," *Reuters*, November 4, 2011, https://www.reuters.com/article/us-soldiers-crimes-idUSTRE7A30NF20111104.

Base examined Pfc. Stoner and found the physical evidence of the beating.[245] Stoner was then ordered to speak to Army investigators about his assault and he later told investigators that he feared being killed the same way Afghan civilians had been killed by Gibbs, staged in a way to suggest he had died in legitimate combat.[246] It was the ensuing investigation into the reported drug abuse and the assault of Pfc. Stoner that brought to light the much more serious crimes that had been committed by the unit's soldiers.

Interviews with other soldiers from the platoon soon confirmed Pfc. Stoner's allegation that premeditated murders had been committed by soldiers in the unit and the US Army Criminal investigation Division launched a large-scale investigation into the matter, conducting interviews and collecting physical evidence, photographs, and videos.[247] Already in in June 2010, five soldiers were charged with the premeditated murders of the three Afghan civilians: SSgt. Calvin Gibbs and Spc. Jeremy Morlock were charged with premeditated murder in all three killings, whereas Pfc. Andrew Holmes, Spc. Michael Wagnon, and Spc. Adam Winfield were charged with one count of premeditated murder each.[248] Additional charges were filed against seven other soldiers for participating in the cover-up of the murders and in connection to the attack on Pfc. Stoner.

In March 2011, Spc. Jeremy Morlock plead guilty to all three counts of premeditated murder, testifying that the killings had not occurred in situations that "got out of hand" but that the plan had always been to kill innocent people.[249] Morlock also agreed to testify against the other soldiers in his platoon in exchange for reduced charges. However, as opposed to the immunity granted to many of the individuals implied in the Haditha case, Morlock was still sentenced to 24 years[250] in prison.[251]

---

[245] Center for Army Leadership, *supra* note 230.
[246] William Yardley, "Young Soldier Both Revered and Reviled," *The New York Times*, October 5, 2010, https://www.nytimes.com/2010/10/05/world/asia/05gibbs.html
[247] Center for Army Leadership, *supra* note 230.
[248] C. Todd Lopez, "Five Soldiers Charged in Murders of Afghans," June 17, 2010, https://www.army.mil/article/41017/five_soldiers_charged_in_murders_of_afghans.
[249] Hal Bernton, "Morlock Sentenced to 24 Years for Afghanistan Murders," The Seattle Times, March 23, 2011, https://www.seattletimes.com/seattle-news/morlock-sentenced-to-24-years-for-afghanistan-murders/.
[250] It may be interesting to note here that the military judge in the case, Lt. Col. Kwasi Hawks later remarked that after hearing the evidence in the case, he had intended to sentence Morlock to life in prison but had been bound by the conditions of the plea bargain set out by the prosecutors ("Murder in Afghanistan: Court Sentences 'Kill Team' Soldier to 24 Years in Prison," *Der Spiegel*, March 24,

Spc. Adam Winfield pled guilty to reduced manslaughter charges in August 2011. During the hearings Winfield told the court that while he did not participate in the murder, he had nevertheless failed to stop Gibbs and Morlock from killing Mullah Adahdad and failed to fulfil his "*duty as an American soldier […] to protect any detainee […] that is in the custody of U.S. personnel".*[252] He was sentenced to three years in prison. Pfc. Andrew Holmes also entered a plea deal with the prosecution in September 2011. Holmes confessed to participating in the murder of Gul Mudin and to keeping a finger bone as a trophy-[253] He was sentenced to seven years in prison.

In November 2011, Platoon leader SSgt. Calvin Gibbs was convicted on two counts of premeditated murder for his own actions and on a third count for inciting Morlock and Holmes to kill 15-year-old Gul Mudin.[254] He was sentenced to life in prison with the possibility of parole after ten years. During the hearings, Gibbs admitted slicing off body parts from the victims and keeping them as trophies but denied any responsibility for the killings while maintaining that all victims had died in legitimate combat.[255]

The charges against the third soldier implicated in the murder of Marach Agha, Spc. Michael Wagnon were dropped in February 2012 "in the interest of justice" without any further explanation.[256] The responsible army investigating officer had recommended that prosecutors dismiss the case against Wagnon twice before.

2011.) This is, of course, not to say that the prosecution's deal points towards an unwillingness to genuinely prosecute Spc. Morlock and bring him to justice for his actions. However, given the large amount of evidence and the other soldiers that were willing to testify against SSgt. Gibbs, it is not entirely clear why prosecutors showed more leniency than the judge in the case.

[251] Paul Harris, "US Soldier Admits Killing Unarmed Afghans for Sport," *The Guardian*, March 23, 2011, https://www.theguardian.com/world/2011/mar/23/us-soldier-admits-killing-afghans.

[252] Matthew Cole, "'Kill Team' Soldier Gets Three Years in Prison," *ABC News*, August 6, 2011, https://abcnews.go.com/Blotter/kill-team-soldier-years-prison/story?id=14239130.

[253] Amy Fallon, "US Soldier Jailed for Seven Years over Murders of Afghan Civilians," *The Guardian*, September 23, 2011, https://www.theguardian.com/world/2011/sep/24/us-soldier-jailed-afghan-civilians.

[254] McGreal, *supra* note 233.

[255] Ibid.

[256] "US Military Drops 'kill Team' Charges against Soldier," *The Guardian*, February 4, 2012, https://www.theguardian.com/world/2012/feb/04/us-military-drops-kill-team-charges.

Assessment of “ability and willingness to genuinely investigate and prosecute”

At first glance, the investigation and prosecution of the perpetrators of the Maywand district murders stands in stark contrast to the investigation and failed prosecution of the perpetrators in the Haditha case. There was a considerable improvement in the both the speed and the means used in the investigation in the “Kill Team” case. Less than a month after the US Army Criminal Investigation Division was tasked with investigating the incidents of alleged murder, five individuals were charged with murder and seven more were charged in connection to the cover up of the crimes. During the trial, prosecutors did not attempt to find excuses for the irrational behaviour of the group and prosecutors did not attempt to paint Gibbs or any of the soldiers under his command in a positive light.[257] While some of the individuals charged in connection to the murders were offered reduced sentences in exchange for their testimony against the other perpetrators, none of them received complete immunity. Finally, four of the five individuals charged with premeditated murder were convicted of murder or manslaughter charges and all four received significant prison sentences for their crimes.

However, as it has been stated before, the ability and willingness to prosecute war crimes cannot be determined solely by the outcome, i.e. the convictions, in the “Kill Team” case. Instead, other characteristics of the investigative and prosecutorial steps must be taken into account, such as whether the conduct of the individuals responsible for investigating the incidents was consistent with an intent to bring the perpetrators of war crimes to justice. Despite being a positive example of an apparent genuine investigation and prosecution, the case of the Maywand district murders still demonstrates concerning evidence that points towards a lack of responsiveness towards reports of alleged crimes committed against the civilian population of countries in which the US and its military operate.

One month after the murder of Gul Mudin had taken place, Spc. Adam C. Winfield, who was later charged with murder in the death of Mullah Adahdad, alerted his father of the incident via Facebook in hopes that their communication would not be observed by his fellow soldiers.

[257] For example, prosecutors called SSgt. Gibbs "monstrous" and "savage" during his trial and told the military jury in the case that he should never be released from prison. See, McGreal, *supra* note 233.

Winfield had contacted his father, Christopher Winfield for advice on whether he should report the incident and voicing his fears about the consequences he could suffer if his complaint was not taken seriously. In Facebook messages[258], Spc. Winfield told his father:

> *"Pretty much the whole platoon knows about it. It's OK with all of them pretty much, except me. I want to do something about it, the only problem is I don't feel safe here telling anyone. […] I have to make up my mind. Should I do the right thing and put myself in danger, or should I just shut up and deal with it?"*

In response, Christopher Winfield told his son that he would attempt to report the incident discreetly and in confidence by getting authorities involved on his son's behalf. According to Winfield, the soldier's father called the Army Inspector General's Office, the Army Investigative Agency, and Florida Senator Bill Nelson's office, leaving messages with all relevant authorities, voicing his concerns over a possible murder that could have been committed by members of his son's unit.[259]

Winfield also spoke directly to the duty Sergeant of Fort Lewis, the US base of his son's brigade, for more than 12 minutes, during which he told Sergeant James Beck that at least one innocent civilian had been killed in Afghanistan and that the someone needed to stop the killings before more innocent civilians lost their lives. Despite this worrying report, Winfield was told that while it certainly seemed like Adam was in potential danger, unless his son was willing to make an official report of the incident to his direct superiors in Afghanistan, there was little the Army could do.[260] Sergeant Beck took Winfield's phone number and told him that someone might get back to him regarding the matter. Christopher Winfield did not hear from Sergeant Beck or any other military official and the incident was not investigated.[261]

Eventually, Adam urged his father to discontinue his pursuit of reporting the killings to authorities back in the United States since he had gotten the feeling that he would be putting his own safety at risk if others, particularly his superior NCO, SSgt. Gibbs,

---

[258] Goetz and Hujer, *supra* note 236.
[259] Ibid,
[260] Craig Whitlock, "Members of Stryker Combat Brigade in Afghanistan Accused of Killing Civilians for Sport," The Washington Post, September 18, 2010, https://www.washingtonpost.com/wp-dyn/content/article/2010/09/18/AR2010091803935_pf.html.
[261] Goetz and Hujer, *supra* note 236.

found out about his fathers' actions. His fears were well founded, given that Spc. Morlock later testified that Gibbs had openly discussed how he might kill Adam Winfield and another soldier in the unit, who he worried would report the murders. According to Morlock, Gibbs offered two scenarios:

> "*The first scenario was going to take him to the gym and drop a weight on his neck. The second scenario was SSG Gibbs was going to take him to the motor pool and drop a tow bar on him*."[262]

It must be highlighted that two of the three confirmed murders committed by the "kill team" took place after Christopher Winfield had already alerted the US Army about the first murder. Not only did the military authorities fail to investigate the incident at all, but their inaction may also be the reason why the subsequent murders could not be prevented by the responsible military commanders on the ground. It should strike any observer as worrying that such a report of civilian deaths was ignored entirely, and casts further doubt on the genuine willingness of US military officials to investigate and prosecute war crimes committed by US service members abroad.

In addition to the failure of US military officials to investigate the report made by Christopher Winfield, locals and family members of the deceased tried to alert the responsible commander on multiple occasions about the murders that had been committed by the unit.[263] The US Army failed to take the allegations seriously and did not conduct an investigation at any point before the drug use of the unit was reported months later.

After Gul Muldin's uncle accused the unit of murdering his nephew in February 2010, a senior officer at the base ordered that the soldiers be interviewed about what had taken place during the incident. However, after finding no inconsistencies in their statements, the unit's leaders decided there was no need for an investigation into the incident, or whether the alleged mutilation of the corpse.[264] Yet, as it would later be revealed, several perpetrators of the murder had openly talked and had shared pictures of their "accomplishment" with other soldiers at the base.

---

[262] Yardley, *supra* note 246.
[263] The following paragraphs are based on the information made available by the US Army Center for Army Leadership, which published the details of events in a case study on its website. See *supra* note 230.
[264] US Army Center for Leadership, *supra* note 230.

When SSgt. Gibbs reported the incident of the second murder, he claimed that Marach Agha had fired at him and that when the Afghan's AK-47 jammed, Gibbs, Morlock, and Wagnon were given the time to react and kill their attacker. However, the responding NCO, SSgt. Sprague, noted that the AK-47 was not jammed but seemed in perfect operating condition.[265] SSgt. Sprague reported this suspicious detail but neither the platoon leader nor the troop commander in charge inquired any further, even though the unit had already been involved in more than one suspicious shooting.

The murder of Mullah Allah Dad had caused outrage among the Afghan population of the Maywand district who did not believe that US Army's narrative that the peaceful and friendly imam would have tried to attack or otherwise provoke the American soldiers. Two days after the murder, Captain Matthew Quiggle, the unit's commanding officer, attended a districtwide council meeting at which the district leaders accused the soldiers of 3rd platoon of planting bogus evidence in order to justify the shooting of Mullah Allah Dad.[266] However, instead of launching an investigation into the incident, Captain Quiggle respond by sending an officer to the village to do damage control by pushing back on the accusations and the witnesses. A US soldier sent to the village reportedly explained the following to the villagers:

> "*This guy was shot because he took an aggressive action against coalition forces. […] We didn't just fucking come over here and just shoot him randomly. And we don't do that. […] Not only is it important that you understand that, but that you tell everybody. […] Because this is the type of stuff the Taliban likes to use against us and fucking try to recruit people to fight against us."* [267]

Finally, the US Army also appears to have failed to conduct a thorough and genuine investigation into the failure on the command level and reporting responsibilities in the case of the Maywand district murders. In October 2010, Brigadier General Stephen Twitty was authorized to lead an administrative probe into officer

[265] Boal, *supra* note 232.
[266] Ibid.
[267] Goetz and Hujer, *supra* note 236.

accountability and the command climate of the Fifth Brigade.[268] While his report recommended that five officers and three senior NCOs should be reprimanded for their failure to investigate the suspicious incidents, it also concluded that there was no evidence to support that the 5th Brigade Combat Team's command climate had contributed to the willingness of the unit to commit the murders.[269] However, a review of internal records and investigative files obtained by Rolling Stone indicate that the soldiers connected to the "Kill Team" were far from secretive in their actions, operating in plain view of the rest of the entire company of dozens of soldiers.[270] Without any further details of the report, the finding of the Twitty inquiry seems questionable given the demonstrated willingness of the unit to talk openly about their crimes and the type of atmosphere reported by Adam Winfield.

[268] Craig Whitlock, "Army Probe: No 'Causal Relation' between Commander, Afghan Killings," *Washington Post*, April 5, 2011, https://www.washingtonpost.com/world/army-probe-no-causal-relation-between-commander-afghan-killings/2011/04/04/AFhAPFgC_story.html.
[269] US Army Center for Army Leadership, *supra* note 230.
[270] Boal, *supra* note 232.

3.4.1.3 Discussion of findings

Several conclusions about the genuine willingness of the US military to investigate and prosecute war crimes committed by US national can be drawn from the analysis of the above cases.

First of all, the Haditha case draws attention to a worrying lack of impartiality and pattern of inaction in cases in which perpetrators can rely on a justification for their crimes based on the "fog-of-war". The findings of the case analysis raise a serious question of whether the US military judicial system has a blind spot for such "shoot first, ask questions later" cases, which indicate an inability and/or unwillingness to genuinely prosecute. The Haditha case has shown that military prosecutors are reluctant to bring charges against defendants who claim to have simply lost control during difficult circumstance, whether this is the case due to a genuine believe that these individuals should not be prosecuted or due to a belief that such individuals would not be convicted by a military jury. This worry has been supported by the commentary of several US military law experts, who have also noted an unusually high number of acquittals in "fog-of-war" cases, despite overwhelming evidence supporting the guilt of the accused individuals. The prosecution in the Haditha case was not only ineffective but, as the analysis has shown, also employed several questionable tactics that are not entirely consistent with an intent to bring those individuals who committed war crimes to justice.

Secondly, while the prosecution in the case of the "Kill Team" was much more effective and avoided many questionable steps the prosecution in the Haditha case had taken, such as the many absolute immunity deals offered to individuals accused of murder and manslaughter, the analysis was nevertheless able to identify several concerns with respect to the US military's genuine willingness to investigate allegations of serious crimes committed by its servicemembers.

Both the Haditha case and the "Kill Team" case point towards a significant problem with unjustified delays in the reporting and investigation of incidents of alleged war crimes. As the analysis in both cases has shown, there seems to be a demonstrated disregard of allegations of misconduct and criminal activity reported by the local civilian population. The lack of responsiveness towards such serious allegations of war crimes and the unjustified delay in the investigation of such allegations is

essentially incompatible with an intent to bring perpetrators of war crimes to justice. Therefore, it can be concluded that the cases analysed point towards an unwillingness by US military officials to genuinely investigate and prosecute war crimes.

3.4.2 Investigations into airstrikes with civilian casualties

3.4.2.1 Airstrikes with civilian casualties

Civilians are protected under international humanitarian law in armed conflicts of both international and non-international character. While the four Geneva Conventions were primarily concerned with the protection of prisoners and non-combatants in the hands of the enemy, Additional Protocols I and II laid down detailed rules on the protection of civilians and on the conduct of hostilities against enemy forces that may affect the civilian population.

Additional Protocol I of 1977[271] applies to international armed conflicts and prohibits the deliberate or discriminate attack of civilians and civilian objects in warzones, including such attacks conducted through the use of airstrike.[272] The provisions of Additional Protocol I include, inter alia:

- the principle of distinction[273] between the civilian population and combatants and between civilian objects and military objectives, as well as the fundamental rules derived from it, such as:
- the prohibition of direct attacks at civilians or civilian objects[274]
- the prohibition of indiscriminate attacks[275], including those that may be expected to cause incidental civilian casualties or damages, which would be excessive in relation to the concrete and direct military advantage anticipated[276] (= principle of proportionality)

While the Additional Protocols to the Geneva Convention are not necessarily legally binding themselves to all states, many of their provisions, including those mentioned above, have become customary rules of international humanitarian law. States are thus nevertheless bound to the prohibition of indiscriminate or direct attacks against the civilian population during an armed conflict. This obligation is reflected by the fact that the Rome Statute, as negotiated in 1998, defines war crimes not only as grave breaches of the relevant Geneva Convention, but also as “other serious violations of

[271] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), of 8 June 1977 [*AP **I** hereinafter*].
[272] Dörmann and Colassis, *supra* note 150, 196.
[273] AP I, Art. 48 and AP II, Art. 13.
[274] AP I, Art. 51 (2) and AP II, Art. 13 (2).
[275] AP I, Art. 51 (4) and AP II, Art. 13 (2).
[276] AP I, Art. 51 (5)(b).

the laws and customs applicable to armed conflicts" of either international or non-international character.[277]

Under the Rome Statute, in international armed conflicts, attacks against civilians that constitute war crimes are defined by Article 8(2)(b)(iv), which criminalises *"intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects […] which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."* Similarly, Article 8(2)(e)(i) defines the kinds of attack against civilians that constitute war crimes in armed conflicts of non-international character as *"intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities."*

Having established the protection of civilians in armed conflicts under international humanitarian law, the thesis will now move on to an analysis of the efforts undertaken by the US to investigate and prosecute incidents of alleged attacks against civilians, specifically through the use of targeted airstrikes.

[277] See Rome Statute, Art. 8(2)(b) and (e).

3.4.2.2 The Azizabad airstrike

In the early morning hours of Friday, 22 August 2008, the US military carried out an airstrike in Azizabad, a village in the Shindand district of the Herat Province in Western Afghanistan. Military officials reported that soldiers of the Afghan forces had been ambushed earlier that day while in pursuit of a "high-value" target, notorious Taliban commander Mullah Siddiq who was known to build and supply improvised explosive devices around the region,[278] when US special forces called in for an airstrike to be carried out by a US Lockheed AC-130 gunship during an operation to eliminate the target. The gunship crew coordinated for two hours with the commander on the ground to blast apart buildings where Taliban fighters were suspected to have taken up position, unleashing 40-millimeter and howitzer rounds into alleys and onto rooftops, with some exploding above ground, flinging shrapnel fragments into a rainbow pattern across the entire area.[279]

Up until 24 hours later, US officials called the operation a success and "remained confident" that while two civilians may have been injured, no civilians had been killed.[280] Instead, they claimed that only thirty militants, including Mullah Siddiq, had been fatalities of what has been called a "retaliatory airstrike" by the US forces.[281] However, accounts of both local and international actors on the ground offered a vastly different interpretation of the events that took place that night.

According to a UN statement released in late August of 2008, a team of human rights officers from the United Nations Assistance Mission in Afghanistan had conducted an investigation into the incident and found "convincing evidence based on the testimony of eyewitnesses, and others," that around 90 civilians had been killed in the air strike, including 15 women and 60 children.[282]

---

[278] Brett Murphy, "Inside the U.S. Military's Raid against Its Own Security Guards That Left Dozens of Afghan Children Dead," *USA Today*, December 12, 2019, https://www.usatoday.com/in-depth/news/investigations/2019/12/29/security-guards-afghan-warlords-mass-civilian-casualties/2675795001/.

[279] Ibid.

[280] Jonathon Burch, "Afghan President Condemns Civilian Killings," *Reuters*, August 23, 2008, https://www.reuters.com/article/afghan-violence-idINSP17925320080823.

[281] Alastair Leithead, "Afghan Bombing Drives Allies Apart," BBC News, August 27, 2008.

[282] UN News, "At Least 90 Afghan Civilians Killed in Recent Military Operations, Says UN," August 26, 2008, https://news.un.org/en/story/2008/08/270632.

The report further implied that since the raid ("Operation Commando Riot") had lasted several hours when air strikes were called in, US forces had had enough time to confirm the presence of their target and to assess whether civilians would be subjected to the destructive force of the bombs, if the airstrike was to be carried out. It is evident that this was either not done at all, or those in charge of weighing the cost of potential civilian casualties decided that the mere possibility of neutralising Siddiq and other Taliban fighters was worth the risk anyway.

Investigation

According to a US military spokesman at the Bagram Air Base, a US military investigative officer visited Azizabad in the days after the airstrikes after Afghan officials had complained of "significant civilian casualties" and, guided by aerial photographs, the officer inspected six burial sites within a six-mile range of the attack.[283] The officer's 12-page investigation report noted that only one of the sites that was visited had freshly dug graves and it did not indicate whether any of the 18-20 graves discovered belonged to women or children.[284] The investigating officer did not interview any Afghan villagers or witnesses to the incident.

In response to the UN report, a spokesperson of the US Department of Defense reiterated that the actions taken by US forces were "a legitimate strike against the Taliban" and while they contended that there had been at least 30 militant casualties and they acknowledged the reports of civilian casualties, they decidedly disputed the high figures of civilian casualties which had been reported by local reporters and by the UN investigation.[285] Prompted by the outrage the incident had caused among the Afghan population and political leadership, US officials announced that they, too, would open an formal investigation into the incident.[286]

[283] Carlotta Gall, "Evidence Points to Civilian Toll in Afghan Raid," *The New York Times*, September 8, 2008, https://www.nytimes.com/2008/09/08/world/asia/08afghan.html.
[284] Ibid.
[285] "Afghan Cabinet Demands Review of Troops' Presence," *Brisbane Times*, August 26, 2008, https://www.brisbanetimes.com.au/world/afghan-cabinet-demands-review-of-troops-presence-20080826-geaajo.html.
[286] Burch, *supra* note 280.

In their official report on the incident, the US military claimed that when American and Afghan forces had taken fire from militant while approaching the village of Azizabad, the decision was made to employ the "*justified use of well-aimed small-arms fire and close air support*" to protect the troops on the ground.[287] The report stated that in order to determine the number of civilian casualties, the investigating officer watched video of the engagement and used topographic photo comparisons of the area before and after the incident.[288] It also referred to the initial on-site observation of the investigating officer in the first report. The report concluded that the overwhelming majority of the fatalities of the Azizabad incident were Taliban, including Mullah Siddiq, the initial target of the raid, and that only between five and seven civilians had died during the raid.[289]

However, in early September, phone-recorded images and videos emerged and were published by the New York Times, showing 30 to 40 bodies, some with apparent blast injuries, including those of at least 11 dead children, laid out in the village's mosque.[290] The emergence of these materials contradicted the findings of the US probe into the incident. Soon after, General David McKiernan, NATO's commander in Afghanistan, ordered a second investigation into the Azizabad incident with the justification that *"in light of emerging evidence pertaining to civilian casualties",* he felt it was *"prudent to request that US Central Command send a general officer to review the US investigation and its findings with respect to this new evidence".*[291] Pentagon spokesman Bryan Whitman later clarified that this new evidence was "imagery" in nature[292] and while Whitman did not give any specific details, it seems most likely that the cell phone footage reported by the New York Times and, more importantly, the public outrage it caused, had prompted the second investigation.

---

[287] Jason Straziuso, "US Probe Finds Fewer Afghan Deaths than UN Claimed," *Associated Press*, accessed April 28, 2023, available at: http://ap.google.com/article/ALeqM5i8dGftYb0s4XWdUMRdIVs3vh1CKAD92ULSLO0.
[288] Ibid.
[289] Ibid.
[290] Gall, *supra* note 283.
[291] Haroon Siddique, "US Reopens Inquiry into Afghanistan Attack as New Evidence Emerges," *The Guardian*, September 8, 2008, https://www.theguardian.com/world/2008/sep/08/afghanistan.usa1.
[292] Sanjeev Miglani, "U.S. to Look Again at Civilian Deaths in Afghan Raid," *Reuters*, September 8, 2008, https://www.reuters.com/article/us-afghan-civilians/u-s-to-look-again-at-civilian-deaths-in-afghan-raid-idUSSP33911220080908.

The following investigation conducted by Brigadier General Michael Callan concluded that at least 33 civilians, including 12 children, were killed in the airstrike, still falling short of the 90 civilians that both the Afghan government and the United Nations had claimed to have died in the incident. Eventually, the US DoD was forced to admit not only that most of the casualties of the airstrike had been non-combatants but also that their initial target, Mullah Siddiq, had reportedly turned up alive.[293]

Despite these findings, the Pentagon continued to deny any wrongdoing. US military officials insisted that the airstrike had been conducted on the basis of credible intelligence and in accordance with their rules of engagement and International Humanitarian Law. The Callan report defended the actions of the US forces, stating that:

> "*The use of force was in self-defence, necessary and proportional, based on the information the on-scene commander had at the time,*" and that US forces had "*demonstrated due diligence in engaging positively identified hostile ACM (anti-coalition militants) with close air support and small arms.*" [294]

According to the Callan report, its conclusions were based on 28 interviews, reviews of documents, and 11 videos.[295] However, the full report of the investigation remained classified, leaving many questions unanswered. For example, no details of the coordination of the airstrikes between ground forces and air support were published and the report offered no specifics on the "due diligence" with which enemy targets were identified and distinguished from civilians who would become potential targets of the attacks.

<u>Assessment of "ability and willingness to genuinely investigate and prosecute"</u>

It is important to note in the beginning of this section that in order to assess US officials' willingness to investigate and prosecute the *alleged* war crimes, it is not

[293] Meo, Nick. "Afghan Villager Sentenced to Death for 'wrong Information' Which Caused Bombing Tragedy." *The Telegraph*, February 28, 2009. https://www.telegraph.co.uk/news/4886078/Afghan-villager-sentenced-to-death-for-wrong-information-which-caused-bombing-tragedy.html.
[294] "US Army Acknowledges Killing 33 Civilians in Air Strike," *France 24*, December 10, 2008, https://www.france24.com/en/20081009-us-army-acknowledges-killing-33-civilians-air-strike-.
[295] Ibid.

necessary to determine whether war crimes were, in fact, committed nor whether the responsible US military members both on the ground and in the air that day were acting within the rules of engagement or in accordance with international humanitarian law. The question that is to be answered is whether the US was willing, given allegations and evidence of wrongdoing, to conduct a genuine investigation of the incident and pursue the prosecution of those responsible.

Firstly, as in the Haditha case and in the "Kill Team" case, there is once again significant evidence that suggests that the US military did not carry out the necessary in-depth investigations into the allegations of civilian casualties as a result of the Azizabad airstrike in a manner consistent with the genuine intent to bring about justice in the matter. After the Callan report was released, Pentagon spokesman Bryan Whitman told the press that:

> *"There's no other military in the world that goes to greater extent to prevent civilian casualties. This is something that we take very seriously and, when we have allegations of loss of innocent life, we investigate it."*[296]

However, the conduct of the persons responsible for investigating the Azizabad incident has demonstrated that US military officials are at least hesitant, if not entirely unwilling, to genuinely investigate alleged breaches of international humanitarian law, unless prompted otherwise.

After the incident, US officials released a statement declaring that no civilians had been killed in the airstrike and indicated that they had no intention of investigating the matter any further. No explanation was given how this determination was made or what steps were taken to verify it. While the initial statement was later revised and an investigation was opened, this course of action was only taken in response to the publication of the UN report on the matter. It is to be questioned whether the US would have seen any reason for further investigation without this report. According to the Department of Defense, the second investigation found that no more than seven civilians had been killed in the airstrike. Again, US officials insisted that their findings were correct and that their investigation had taken all available evidence into account.

---

[296] David Morgan, "Inquiry Shows Afghan Raid Killed 33 People," *Reuters*, October 8, 2008, https://www.reuters.com/article/us-afghan-usa-civilians-report-idUSTRE49777T20081008.

The fact that it took no less than three Pentagon investigations before US military officials admitted that more civilians than Taliban had been killed in the Azizabad airstrike alone casts significant doubt over the genuine willingness to investigate the incident in at least the first two investigations. This doubt is of course exacerbated by the fact that each subsequent investigation was not prompted by internal factors but rather by pressures from international actors and the international community to re-examine the matter and consider additional evidence that had been previously accessible to investigators. Despite the three separate US investigations, there are still large discrepancies to this day between the alleged numbers of casualties reported by both the UN and the Afghan investigations and the US investigation.

Of course, given the limited evidence made available to the public about the full extent of each investigation conducted by the US military, it is difficult to assess whether the overall instigative steps can truly be considered insufficient in light of the evidence available to US officials at the time of the respective investigations.

USA Today conducted an in-depth investigation into the Azizabad raid and airstrike during which the periodical ended up suing the Department of Defense for access to almost 1,000 pages of investigative files, including photographs of the aftermath of the airstrike and sworn testimony from US troops who had planned and/or executed the operation.[297] The documents had previously been kept secret as the DoD had claimed they contained “classified national security information”. While the USA Today investigation focused primarily on the incident itself, i.e. the execution of the raid and the information failures that led to the high number of civilian casualties, the article nevertheless revealed disturbing findings about the conduct of investigators and responsible US military officials in the Azizabad matter.

As reported by USA Today, Lt. Colonel Rachel E. VanLandingham, who was the chief of international law at the US military’s Central Command’s headquarters during the Azizabad raid, said that the evidence presented to her by USA Today clearly showed that the Central Command investigation “seemed more worried about looking good than being good”, and that the military commanders responsible for

[297] Murphy, *supra* note 278.

investigating the airstrike seemingly ignored the investigative failures rather than trying to learn from them.[298]

One conclusion that can be drawn with certainty about the investigation of the US military, is that the actions, or rather the inaction, of the responsible US officials stand in stark contrast with the actions taken by Afghan officials in response to the incident. It is crucial to take note of the fact that the Azizabad raid was not conducted by US forces alone but that the operation was carried out jointly with Afghan forces.

Whereas US military officials refused to or delayed investigating the incident and continued denying the high number of civilian casualties, Afghan President Hamid Karzai was quick to condemn the incident and order an in-depth investigation into the incident.[299] The investigation conducted by the Afghan government soon confirmed the UN investigation's findings that up to 90 civilians had been killed in the airstrike in August. As opposed to the US investigation, the Afghan investigation did not shy away from admitting that the Afghan National Army was partially at fault for the failures that led to the tragic outcome of the Azizabad airstrike. The investigation found that two senior Afghan military officials had acted negligently in their failure to verify the information which ultimately led to the airstrike in Azizabad. On the recommendation of the investigators, President Karzai decided to dismiss Brigadier General Jalandar Shah, commander of the Afghan National Army's 207 Zafar Military Corps in Herat, and Major Abdul Jabar, leader of commando forces in the Herat region.[300]

[298] Murphy, *supra* note 278.
[299] Burch, *supra* note 280.
[300] Abubakar Siddique, "Afghanistan Concludes 90 Civilians Killed In Coalition Air Strike," *RadioFreeEurope/RadioLiberty*, February 2, 2012.

The failure of the US investigation into the Azizabad incident, particularly when contrasted with the considerable investigative efforts of the relatively resource-poor Afghan government, drew strong criticism from numerous international actors and human rights organisations. In a letter an open letter, Human Rights Watch urged US Secretary of Defense Robert Gates to initiate "*a comprehensive review of the methods used in post-incident investigations"* and to *"take responsibility for civilian casualties when warranted and take appropriate disciplinary or criminal action against those responsible".*[301] The NGO recalled the obligations of the US military under international law to adhere to the principle of distinction and emphasised the necessity of the recommended steps to restore the lost credibility of the US military presence in the Middle East. Such reactions to the Azizabad reflect the belief of the international community that US officials were unwilling to genuinely deal with the potential violations of international humanitarian law committed by the US military.

To summarise, the analysis of the Azizabad incident points towards the conclusion that those responsible for investigating the Azizabad incident failed to conduct the investigation in a manner *consistent with the intent to find the truth and to bring about justice*. At the very least, this seemed to be the case until the US military was confronted with damning evidence in a public forum and with international public outrage. Furthermore, the fact that US officials continue to deny any wrongdoing despite their acknowledgement of the high number of civilian casualties as a consequence of the airstrike calls into question both the conformity of the US rules of engagement with international humanitarian law, as well as the willingness of US officials to take action against potential violations of international humanitarian law caused by decisions of high-ranking officials.

[301] "Letter to Secretary of Defense Robert Gates on US Airstrikes in Azizabad, Afghanistan," *Human Rights Watch*, January 14, 2009, https://www.hrw.org/news/2009/01/14/letter-secretary-defense-robert-gates-us-airstrikes-azizabad-afghanistan.

3.4.2.3 Discussion of findings: Airstrikes with civilian casualties as an acceptable strategy

Individual responsibility for civilian casualties in air strikes is notoriously difficult to determine given the complex interaction between individuals on the ground calling in air support, pilots conducting the bombings, and those that ultimately authorize the actions. In the past, investigation by US officials into events that have caused civilian casualties to occur have generally focussed on the assessment of whether the actions taken were in violation of the rules of engagement and, if so, on which level of command the responsibility for such violations lie.

However, any thorough investigation of such incidents would not only assess the compatibility of the actions taken with the US military rules of engagement but also ought to consider whether the actions that led to the civilian causalities were in compliance with international humanitarian law. There is no public information available that would suggest that such an investigation into the rules of engagement with regard to airstrikes took place and no report has been made available on that matter. In addition, the exact circumstances which led to air strikes with mass civilian casualties remains unclear, since the U.S. military has in most cases refused to release complete information about its investigations, even in cases with as many as 90 fatalities.[302]

As far as the information that has been published is concerned, the US military has yet to acknowledge a single violation of international humanitarian law relating to the use of airstrikes by the US military and not a single individual has so far been charged with, prosecuted, or reprimanded in connection to with airstrikes with civilian casualties. Of course it is possible that the US has genuinely investigate all incidents of targeted air strikes that have resulted in civilian casualties in the past and found no wrongdoing on their part. However, the analysis of the Azizabad incident alone and coupled with the fact that the US continues to refuse to make their investigation reports into such incidents available to the public, casts serious doubt over this explanation.

[302] Patricia Gossman, “How US-Funded Abuses Led to Failure in Afghanistan,” *Human Rights Watch*, July 6, 2021, https://www.hrw.org/news/2021/07/06/how-us-funded-abuses-led-failure-afghanistan.

Furthermore, the New York Times published a damning article in December 2021 about documents it obtained on the US military's confidential assessments of more than 1,300 reports of excessive civilian casualties of air strikes conducted by US forces in Afghanistan, Iraq, and Syria.[303] The article looked into hundreds of these incidents and found a pattern of the phenomenon of "confirmation bias", that is, the psychological phenomenon to selectively search for and interpret information in such a way that it serves to confirm pre-existing assumptions. For example, in one incident in November 2015, US forces had carried out an air strike on a building in Ramadi, in the Al Anbar Governorate of Iraq, after they had observed a man carrying an "unknown heavy object" into an ISIS "defensive fighting position".[304] A subsequent review of the incident found that the heavy object the man had carried was actually a person of small statute, which turned out to be a child that died in the strike carried out that day. The investigation also found a worrying lack of due diligence in ensuring that no or as few civilians as possible were within the range of airstrikes, even when they were being conducted in areas that were known to be inhabited mostly by civilians rather than enemy fighters.

When confronted with the statistics of civilian casualties as a result of airstrikes, US military officials throughout all recent US administrations continue to insist that while such casualties do unfortunately occur, they only result from actions that are necessary and in compliance with their rules of engagement. For instance, in a statement eerily familiar from the earlier discussions of this paper, military spokesman Captain Urban justified US actions as follows:

> *"In many combat situations, where targeteers face credible threat streams and do not have the luxury of time,* ***the fog of war can lead to decisions that tragically result in civilian harm****."* [305]

In the past, numerous US military servicemembers have commented on the policy of the US to call in airstrikes with a worrying degree of disregard for the potential civilian casualties of such action. Take, for example, the following statements made by LCpl. Justin Sharratt, who was one of the members of the Marines initially

[303] Azmat Khan, "Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes," *The New York Times*, April 6, 2022.
[304] Ibid.
[305] Ibid.

charged in connection to the deaths in the Haditha incident. In an interview for a PBS documentary[306], LCpl. Sharratt reported that it was typical procedure for an entire house be declared hostile, i.e. an enemy target, if a specific enemy target was identified either in or within proximity of that particular house. As a consequence, US troops on the ground were able to call in air support to carry out an airstrike against the house instead of having to engage the enemy themselves. During the interview, Sharratt stated that if on the day of the Haditha massacre his unit had not been in such close proximity to the houses, they *"most likely would have just dropped a 500-pound bomb on the house"*. In this case, he argued, no one would have called the airstrike into question and his unit would not have had to justify their actions any further. Sharratt further explained the following:

> *"If it was just a bomb dropped on those, then it most likely wouldn't have been us being in the news as being murderers or massacrists, because with the 500-pound being dropped, sad to say, there would be no evidence there of who was in the house.*"

A very similar sentiment was echoed by Sgt. Hector Salinas, another Marine of the unit involved in the Haditha incident. During the trial of Staff Sgt. Wuterich, when asked about what he would do differently that day if was given the chance, Sgt. Salinas stated that he would have simply used his air support "*to level the house*"[307], implying that in this case, no one would have questioned the actions of his unit despite the same, if not greater, number of casualties.

Statements such as those made by Justin Sharatt and Hector Salinas are a worrying reflection of both the callousness with which airstrikes that result in civilian casualties are treated by the US military and the willingness of US servicemembers to use such airstrikes despite the potential cost of innocent human lives. The demonstrated unwillingness of US officials to investigate whether airstrikes have caused civilian casualties and whether airstrikes with civilian casualties could have been avoided in combination with the unwillingness to hold the responsible decisionmakers

[306] Transcript available at https://www.pbs.org/wgbh/pages/frontline/haditha/interviews/sharratt.html.
[307] "Marine Says He Would Have Leveled Iraqi Home," *CBS News*, January 12, 2012, accessed April 16, 2023, https://www.cbsnews.com/news/marine-says-he-would-have-leveled-iraqi-home.

accountable in cases of excessive civilian casualties are and should be of serious concern to the international community.

3.4.3 Investigations into torture methods used on foreign territories

The analysis in this section will differ substantially from the previous analyses due to the fact that many of the acts of torture that were committed by US personnel were not only permitted but, in several cases, encouraged through its interrogation guidelines approved by the highest officials in the US military, the CIA, and the Georg W. Bush administration. Consequently, much of the following analysis will focus on the development of the interrogation and detention policies that allowed for cruel and inhuman treatment amounting to war crimes as well as the subsequent investigations into individual acts of torture and into those most responsible for the implementation of unlawful interrogation policies.

The key source of information for the following section will be the Office of the Prosecutor of the ICC's request for authorization to open a formal investigation into the situation in Afghanistan. The document is of particular importance to this section, given that much of the investigation and recommendation for further investigation has focussed on the acts of torture and cruel treatment committed by members of the US armed forces and members of the CIA.[308] As a consequence, this section will analyse the key documents highlighted by the OTP's request for its analysis.

[308] It should be mentioned that the OTP did eventually decide to limit its investigation in Afghanistan to the crimes committed by the Taliban and the IS – Khorasan Province, "deprioritising" the crimes allegedly committed by US nationals in the region. However, this decision was justified by the limited resources available to the OTP relative to the scale and nature of crimes within the jurisdiction of the ICC that are being committed over the whole world but not due to a change in the facts or the belief that crimes had been committed. For further, see the 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 Authorisation to Resume Investigations in the Situation in Afghanistan," Press release, September 21, 2021, https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application.

3.4.3.1 The prohibition of torture applicable to US nationals

In 1988, the US signed the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention hereinafter). Article 1.1 of the Convention defines "torture" as follows:

> *"[Any] act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[…]*

Article 2 of the Convention imposes the obligation upon all State Parties to put in place effective measures to prevent acts of torture. Article 2 constitutes an absolute and non-derogable prohibition of torture, stating in Art. 2.2 that there are "no exceptional circumstances whatsoever", which would justify the use of torture.

The US ratification of the Convention in 1994 was subject to a number of reservations, understanding, and declarations which significantly altered the legal effect on the US.[309] For example, in its understandings, the US further defined mental pain or suffering as only the kind of "*prolonged mental harm caused by or resulting from"* (1) the intentional (or threat of) infliction of severe physical pain or suffering; (2) the administration or threatened administration of mind altering substances or procedures intended to cause profound disruption to the senses or the personality of the subject; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, (1), (2), or (3).

Importantly, the US further declared that Articles 1-16 were not self-executing and that the Convention would be implemented only "*to the extent that it exercises legislative and judicial jurisdiction over the matters covered"*. As a consequence of the two declarations, the Convention had therefore no legal effect in the US,

[309] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, available at: http://hrlibrary.umn.edu/usdocs/tortres.html

requiring the US as bound by their treaty obligation to enact and enforce domestic law to achieve conformity with the provisions of the Convention.

The US implemented the prohibition of torture with 18 U.S. Code § 2340A, which came into effect in November 1994:

> *"[Any national of the US] outside the United States [who] commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life."*

"Torture" is defined by 18 U.S. Code § 2340 as "*an act committed by a person acting under the colour of law specifically intended to inflict severe physical or mental pain or suffering […] upon another person within his custody or physical control".*

3.4.3.2 Torture methods and policies

CIA

After the 9/11 attacks, the CIA had been granted unprecedented authority to conduct counterterrorism operations to protect the US and its interests from future threats. In their counterterrorism strategy, the CIA conducted operations that saw the capturing and interrogation of high-level targets in order to obtain information relating to terrorist threats and to information necessary for the effective operations on the ground in Afghanistan and Iraq.

However, the CIA found that their interrogation methods and techniques did not achieve the expected results in some individuals. One of these individuals was Abu Zubaydah, a Palestinian citizen born in Saudi Arabia who was captured by US forces in Pakistan and who was believed to have strong connections to Osama bin Laden, the architect of the 9/11 attacks.[310] Despite interrogations being conducted by both CIA and FBI operatives, meetings took place in spring of 2002 between senior White House officials and the CIA to deliberate whether harsher interrogation techniques

[310] Dan Eggen and Walter Pincus, "FBI, CIA Debate Significance of Terror Suspect," December 18, 2007,https://www.washingtonpost.com/wp-dyn/content/article/2007/12/17/AR2007121702151_pf.html.

needed to be approved to extract information that Zubaydah was allegedly holding back.[311]

On July 13, 2002, the CIA made an official request to the Office of Legal Counsel (OLC) of the Department of Justice (DOJ) for a definitive legal opinion on the lawfulness of several proposed "enhanced interrogation techniques" (EITs), the agency planned on using against Abu Zubaydah.[312] In response to the request, the OLC issued two memoranda drafted by US Deputy Assistant Attorney General John Yoo and signed by Assistant Attorney General Jay S. Bybee, head of the Office of Legal Counsel of Department of Justice (DOJ), concerning the issue of torture in August 2002, which would later become known as the "Torture Memos".

The first memorandum addressed to Alberto R. Gonzales, Counsel to President Bush, concerned the definition of torture under Section 2340A. and stated that while Section 2340A prohibits acts specifically intended to cause severe mental or physical pain or suffer, "*those acts must be of an extreme nature to ruse to the level of torture within the meaning of Section 2350A and the [Convention Against Torture]".* [313] The memo essentially adopted an exceedingly narrow definition of the acts that would fall within the definition of torture under domestic US law. The memo thus concluded that:

> *"Certain acts may be cruel, inhuman or degrading, but still not produce pain and suffering of the requisite intensity to fall within Section 2340A's proscription against torture.*"[314]

The second memorandum made reference to the determination in the first memo and was addressed to John A. Rizzo, the acting General Counsel of the CIA, in response to the CIA's request for a legal opinion on the ten specific interrogation techniques the CIA intended to use against Abu Zubaydah including, *inter alia*, placing detainees in cramped conditions, stress positions, sleep deprivation, and

[311] Mark Mazzetti, "Bush Officials Linked to Debate on Interrogation Methods for Detainees," *The New York Times*, September 25, 2008, https://www.nytimes.com/2008/09/25/washington/25detain.html.
[312] OTP Afghanistan Request, para 235.
[313] Jay S. Bybee, "Memorandum for Alberto R. Gonzales, Counsel to the President. Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A," Office of Legal Counsel, US Department of Justice, August 1, 2002, https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf.
[314] Ibid, 1.

waterboarding.[315] The memorandum concluded none of the proposed techniques would violate Section 2340A. The memo made this determination despite the fact that the OLC could not say with certainty that techniques such as waterboarding might constitute a threat of severe physical pain or suffering, especially when used multiple times.[316] However, given that the "*specific intent to inflict prolonged mental pain or suffering*" was not present, as asserted by the CIA, the OLC determined that such a threat of severe pain or suffering did also not fall under the prohibition of Section 2340A.[317] In addition to the EITs approved by the OLC, the CIA also approved later requests to add the use of water dousing, forced nudity, and dietary manipulation to the allowed interrogation techniques despite the fact that they had not been reviewed or approved by the DOJ.[318]

In 2005, the Detainee Treatment Act of 2005, which established that "*no individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment*", was passed by Congress and signed into law.[319] In response, the CIA suspended its enhanced interrogation program over potential legal consequences in the case of its continuation. However, the CIA began using enhanced interrogation techniques again in July 2007, after it had sought and received approval by President Bush to use six previously approved EITs, including sleep deprivation and dietary manipulation, in the interrogation of one detainee at Detention Site "Brown" in Afghanistan.[320] It was only on January 22, 2009, when newly sworn-in President Barack Obama issued Executive Order 13491 on "Ensuring Lawful Interrogations", that the CIA was forced to end the use of enhanced interrogation techniques on a permanent basis.[321]

---

[315] Jay S. Bybee, "Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency. Interrogation of al Qaeda Operative," Office of Legal Counsel, US Department of Justice, August 1, 2002.
[316] Ibid, 15-16.
[317] Ibid, 18.
[318] OTP Afghanistan Request, para 338.
[319] Prohibition on cruel, inhuman, or degrading treatment or punishment of persons under custody or control of the United States Government, 42 U.S.C. 2000dd, SEC 1003. Available at: https://www.govinfo.gov/content/pkg/COMPS-489/pdf/COMPS-489.pdf.
[320] OTP Afghanistan Request, para 243.
[321] Barack Obama, "Executive Order 13491: Ensuring Lawful Interrogations," The White House, January 22, 2009, https://obamawhitehouse.archives.gov/the-press-office/ensuring-lawful-interrogations.

The torture policy of the US Military

On February 7, 2002, then-President George W. Bush issued a memorandum regarding the "Humane Treatment of Taliban and al Qaeda Detainees". In this memorandum, President Bush declared, upon legal recommendation by the Department of Justice, that Common Article 3 of the Geneva Conventions did not apply to either Al-Qaeda or Taliban detainees.[322] Furthermore, he concluded that while the US would continue to treat detainees humanely, it would do so as a matter of policy rather than legal obligation.[323] This memorandum would soon significantly affect the policy take with respect to the treatment of detainees by US servicemembers.

The US Army Field Manual 34-52 on Intelligence Interrogation of 1992[324] expressly prohibits *"acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment*" during interrogations and clearly states that the commission of any such acts is punishable under the UCMJ.[325] It also provides examples of prohibited acts of torture, such as food deprivation, infliction of pain through the use of restraints and bondage, sleep deprivation, and any forms of physical assault. However, the OTP's preliminary *proprio motu* investigation found that by 2003, aggressive interrogations techniques were not only being used against detainees by US servicemembers in Afghanistan but that they were often used after "review and approval" of the responsible commanding officers.[326] This arose as a consequence of the new understanding provided by the Bush memo on how detainees *could* be treated without necessarily violating international law.

On January 24, 2003, the Staff Judge Advocate for Combined Joint Task Force 180 (CJTF-180) based in Afghanistan submitted a memorandum on "Interrogation Techniques" to the US Central Command, which described the "current and past"

[322] George W. Bush, "Memorandum on the Human Treatment of Taliban and al Qaeda Detainees," February 7, 2002.: 2c.
[323] Ibid, 3.
[324] US Department of the Army, "Field Manual 34-52 'Intelligence Interrogation,'" September 28, 1992, https://irp.fas.org/doddir/army/fm34-52.pdf.
[325] Ibid, "Prohibition against use of force", 1-7 - 1-9.
[326] OTP Afghanistan Request, para 243.

interrogation methods used by CJTF-180 interrogators in Afghanistan.[327] The methods identified included, inter alia,

- up to 96 hours of isolation,
- so-called “sleep adjustment”, defined as allowing only four hours of sleep every 24 hours, not necessarily consecutively,
- the removal of comfort items,
- and the use of a hood during interrogations.[328]

The memo also strongly recommended approval for the future use of five additional techniques, i.e. the "deprivation of clothing" to provoke shame and discomfort, food deprivation, sensory overload, light and noise deprivation, and the use of “controlled fear through the use of muzzled, trained, military working dogs”.[329]

The memorandum was sent to the DoD Working Group on Interrogations as well as the Office if the Secretary of Defense for review. While Deputy Commander of the US Central Command John Abizaid stated in August 2004 that the memorandum had been thoroughly reviewed by the Working Group, neither Central Command nor the Join Staff responded to the memorandum.[330] A pentagon investigation of interrogation techniques at military detention centres in Cuba, Afghanistan and Iraq led by Vice Admiral Alber T. Church later found that in the absence of any response to the memo, CJTF-180 “*interpreted this silence to mean that the techniques were unobjectionable to higher headquarters and therefore could be considered approved policy*”.[331]

In response to the signing into law of the Detainee Treatment Act of 2005, the US Army issued Field Manual 2-22.3[332], essentially a re-issuing of FM 34-52, applicable to all DoD detention operations, which “restored” the Geneva Conventions as the legal basis to consider with respect to treatment and interrogation of detainees.[333]

---

[327] Committee On Armed Services United States Senate, “Inquiry into the Treatment of Detainees In U.S. Custody,” accessed November 20, 2008: xxii-xxiii,
[328] Ibid, 155.
[329] Ibid.
[330] OTP Afghanistan Request, para 224.
[331] Eric Schmitt, “Abuse Inquiry Finds Flaws,” *The New York Times*, December 4, 2004, https://www.nytimes.com/2004/12/04/politics/abuse-inquiry-finds-flaws.html.
[332] Field Manual 2-22.3 is available at: https://irp.fas.org/doddir/army/fm2-22-3.pdf.
[333] OTP Afghanistan Request, para 226.

Torture and Cruel Treatment amounting to War Crimes

In 2017, the OTP found that, consistent with ICC jurisprudence, a number of the interrogation techniques used and approved by both the CIA and the US military meet *per se* the threshold of severity and therefore amount to acts of torture or cruel treatment[334] constituting war crimes, as they necessarily cause severe pain or suffering, including:

- severe isolations
- suffocation by water or waterboarding
- hooding under special conditions
- threats of torture, and
- the use of dogs to induce fear.[335]

The OTP also identified a number of techniques used which may amount to torture or cruel treatment when used "*for prolonged periods of time or in combination with other acts*", such as:

- stress positions,
- isolation and sensory deprivation,
- exposure to extreme temperatures
- sensory overstimulation
- prolonged sleep deprivation
- food deprivation, and
- deliberately placing detainees in cramped conditions. [336]

3.4.3.1 The US approach to investigation and prosecuting of acts of torture

First of all, it should be noted that the US has not investigated or prosecuted the conduct of an individual who committed acts of torture if these acts were committed in accordance with the guidelines or policies in force at the time of their commission. After a preliminary review into the conduct of US personnel was launched, US Attorney General Eric Holder assured in August 2009 that:

[334] Pursuant to Articles 8(2)(c)(i)(3) and 8(2)(c)(i)(4) of the Rome Statute
[335] OTP Afghanistan Request, para 194.
[336] Ibid.

> "*The men and women in our intelligence community perform an incredibly important service to our nation, and they often do so under difficult and dangerous circumstances. […] Further, they need to be protected from legal jeopardy when they act in good faith and within the scope of legal guidance. That is why I have made it clear in the past that the Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees.*"[337]

Even if an investigation into the torture committed within the framework of the approved torture methods was launched by US officials, any attempt at prosecuting such crimes would conflict with US domestic law. Specifically, the Detainee Treatment Act of 2005 serves to prevent any such prosecutions, since it states that any US citizen who is an officer, employee, servicemember of the US government commits illegal acts during the detention and interrogation of suspected terrorists while using operational practices that were officially authorised, may use this as a defence against any criminal charges.[338]

Consequently, the conduct of US citizens falling under the above definition was excluded from the possible prosecution, regardless of the nature, circumstances, or gravity of said conduct.

[337] US Department of Justice, "Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees," Press release, August 24, 2009, https://www.justice.gov/opa/speech/attorney-general-eric-holder-regarding-preliminary-review-interrogation-certain-detainees.

[338] Protection of United States Government personnel engaged in authorized interrogations.42 US Code § 2000dd-1. "In any civil action or criminal prosecution against [a US employee, government agent, or servicemember], arising out of the [their] engaging in specific operational practices, that involve detention and interrogation of aliens who [..] are believed to be engaged in or associated with international terrorist activity […], and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such [person] did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful."

3.4.3.2 Investigation into acts of torture not approved by applicable policies

CIA

Within the Central Intelligence Agency, the Office of the Inspector General (IG) is responsible for, inter alia, ensuring accountability across CIA programs as well as compliance with the establish government and agency policies.[339] Effectively the Office of the IG serves as a general auditor to the CIA. John L. Helgerson was appointed IG in April 2002 and by the beginning of 2003, he had initiated an internal review of the CIA's detention and interrogation program. Over the span of one year, a team of 12 members conducted an in-depth investigation which included interviewing more than 100 individuals, a review of more than 38.000 documents, on-site visits to all CIA black sites, and an analysis of any existing videotapes of interrogations.[340]

In May 2004, the IG released his report, as a result of which two cases were referred to the Department of Justice for the potential prosecution.[341] One case involved a CIA contractor's use of unauthorized interrogation techniques which may have resulted in the detainee's death while the other concerned an incident of "unauthorized" and "inhumane" interrogation techniques. The first case resulted in a prosecution and a conviction with a sentence to 100 months of imprisonment. The second case was, and remains, redacted.

In addition to the two specific cases mentioned above, the report of the IG also found that interrogators had used interrogation methods which had not been approved, including intimidation with handguns and power tools, the use potentially injurious stress positions, as well as methods strictly prohibited and e*xplicitly defined as torture* by Section 2340, such as mock executions and threats of death, injury and sexual assault against members of the detainee's family.[342]

---

[339] "Office of Inspector General," Central Intelligence Agency, accessed June 3, 2023, https://www.cia.gov/about/organization/inspector-general/.
[340] "The Agency Went over Bounds and Outside the Rules," *Der Spiegel*, August 30, 2009, https://www.spiegel.de/international/world/ex-cia-inspector-general-on-interrogation-report-the-agency-went-over-bounds-and-outside-the-rules-a-646010.html.
[341] OTP Afghanistan Request, para 317.
[342] CIA Inspector General, "Special Review of the Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)," May 7, 2004, https://int.nyt.com/data/int-shared/nytdocs/docs/50/50.pdf.

While several instances of such unauthorized methods were referred to the DOJ for investigation and potential prosecution, the referrals did not result in any prosecution.[343]

In 2009, Assistant US Attorney John Durham[344] was mandated by US Attorney General Eric Holder to conduct a review of the conduct of CIA personnel during detention and interrogations to determine whether there was "*sufficient predication for a full investigation into whether the law was violated*" during CIA interrogations.[345] However, as the Attorney General noted in his statement,[346] the scope of the review would be strictly limited to the determination of whether any unauthorized interrogation techniques had been used by CIA interrogators, and if so, whether these techniques were in violation of domestic or international law.[347]

On June 30, 2011, two years after the investigation was opened, the DOJ announced that it had concluded its review of the interrogation of "101 detainees who were in US custody subsequent to the terrorist attacks of September 11, 2001".[348] In his statement, the Attorney General confirmed that he had accepted the recommendation to open full criminal investigations with respect to the death of two individuals in custody of the CIA and that all remaining matters "*did not warrant an expanded criminal investigation*". Both investigations into the deaths of detainees in CIA custody were closed after the DOJ determined that there was not enough admissible evidence "*to secure a conviction beyond reasonable doubt*".[349] The DOJ did not elaborate on whether any laws had been violated during CIA interrogations, which had been the focus of the investigation in the first place.

[343] OTP Afghanistan Request, para 319.
[344] John Durham had also been appointed the Special Prosecutor in the case of the CIA's destruction of interrogation tapes by then-Attorney General Michael Mukasey. Durham decided to close the investigation without bringing any criminal charges in the destruction of the evidence of torture.
[345] OTP Afghanistan Request, para 322.
[346] See section 3.4 and 3.1.
[347] US Department of Justice, *supra* note 327.
[348] "Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees," US Department of Justice, June 30, 2011, https://www.justice.gov/opa/pr/statement-attorney-general-regarding-investigation-interrogation-certain-detainees.
[349] OTP Afghanistan Request, para 323.

US Military

Since 2004, the US has asserted on numerous occasions that it has concluded thousands of investigations and hundreds of prosecutions in cases relating to alleged ill-treatment and torture of detainees by members of the US military. However, as the OTP has noted, the information that has been made available by the US on the persons, their conduct, and their punishment is severely limited.[350]

In 2014, the US submitted its report regarding the measures taken to prevent and punish acts of torture committed that fall within US jurisdiction to the Committee against Torture (CAT), a body of independent experts with the mandate of monitoring the implementation of the Convention against Torture by its States parties. According to the CAT, the US indicated that the DoD had conducted "*thousands of investigations since 2001, and prosecuted or disciplined hundreds of service members for mistreatment of detainees and other misconduct*" [351].

However, the CAT also noted with regret in the same report that the US delegation had provided only minimal statistics on the number of investigations, prosecutions, and disciplinary proceedings, in the absence of which the Committee was unable to assess whether the US was in conformity with its obligation under Art. 12 of the Convention to conduct "*a prompt and impartial investigation whenever there is reasonable ground to believe that an act of torture was committed in any territory under its jurisdiction"*.[352]

In 2015, the US once again affirmed their assertion from their initial report, and further clarified the following in their one-year follow-up statement to the CAT:

> "*[More] than 70 investigations concerning allegations of detainee abuse by military personnel in Afghanistan conducted by DoD resulted in trial by courts-martial, close to 200 investigations of detainee abuse resulted in either non-*

[350] OTP Afghanistan Request, 300.
[351] Committee against Torture, "CAT/C/USA/CO/3-5: Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America," December 2014: 13.
[352] Ibid.

judicial punishment or adverse administrative action, and many more were investigated and resulted in action at a lower level."[353]

However, the US continued to refuse to provide any further details on the specific cases and individuals involved.

While it may have been more difficult to provide or find documents relating to the non-judicial punishments or administrative actions against individuals, it is concerning that no information about the courts-martial was made publicly available either. Furthermore, the US statement only reported that 70 courts-martials had taken place but did not specify how many individuals were convicted on charges relating to detainee abuse and to what extent these individuals were punished.

The OTP noted in its report that during its investigation, the Prosecution was unable to identify a single individual in the US military that was prosecuted by US military courts-martial for the ill-treatment of detainees within the ICC's jurisdiction, although it had identified at least 54 victims of such abuse and ill-treatment by US servicemembers in Afghanistan.[354] The OTP further stated that the Prosecution was unable to obtain "*specific information or evidence with a sufficient degree of specificity and probative value*" to demonstrate that the appropriate criminal proceedings had been undertaken with respect to these cases, despite the Prosecution's numerous efforts.[355] Consequently, the OTP concluded that given the fact that it could not establish that domestic proceedings covering conduct of the ill-treatment taken place, a further investigation and potential prosecution would not violate the principle of complementarity. The OTP thus determined the 54 cases to be admissible at that stage of investigation.

Of course, it must be mentioned that it is possible that the US did conduct all necessary investigations and prosecutions with respect to the above-mentioned cases. However, it is clear that the US has so far failed to provide the necessary evidence and given the fact that multiple international oversight bodies have questioned the sincerity of the US statements regarding the number of

[353] "One-Year Follow-up Response of the United States of America to Recommendations of the Committee Against Torture on Its Combined Third to Fifth Periodic Reports," *US Department of State*, November 27, 2015, https://2009-2017.state.gov/j/drl/rls/250342.htm.
[354] OTP Afghanistan Request, para 306.
[355] OTP Afghanistan Request, para 311.

investigations, prosecutions and disciplinary actions, serious doubt has been cast over whether genuine investigations and prosecutions in cases of alleged acts of torture committed by US service members in Afghanistan has taken place. If a case in the above matter had proceeded and if the US had decided to challenge the admissibility of such case on the principle of complementarity, it would have been the responsibility of the US to prove that the appropriate domestic legal proceedings took place.[356]

3.4.3.3 Investigations into the development, authorization, and oversight over tortured methods in violation of international law

CIA

On March 9, 2009, the US Senate Select Committee on Intelligence voted to open an investigation into the CIA's detention and interrogation program.[357] The subsequent report was approved on December 13, 2012, encompassed almost 6.000 pages and was based on more than 6 million documents provided to the committee by the CIA.[358] A revised 500-page executive summary of the report was released to the public in December 2014. The report examined the CIA's overseas detention of at least 119 individuals and the interrogation techniques that were used on these detainees.[359] The report summarises the most important insights that were gained during the investigation in 20 key findings, several of which related to the lack of oversight and accountability of the program, including, *inter alia,* the following:[360]

---

[356] "Any state which challenges the admissibility of a case before the ICC also bears the burden of proof to show that the case is inadmissible." See, for example, the "*Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 […]*" in the Ruto and Sang Case, ICC-01/09-01/11-307, para 62.

[357] "Timeline: The History of the CIA Detention and Interrogation Program," *Los Angeles Times*, December 9, 2014, https://www.latimes.com/nation/la-na-timeline-of-cia-interrogation-program-20141209-story.html.

[358] Ali Watkins, "Senate Report On CIA Torture Fails To Answer One Question: What Now?," *The Huffington Post*, December 11, 2014, https://www.huffpost.com/entry/senate-cia-torture_n_6285232.

[359] Dianne Feinstein, "Feinstein Remarks on CIA Report," Press release, December 9, 2014, https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=d2677a34-2d91-4583-92a4-391f68ceae46.

[360] "Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program," United States Senate Select Committee on Intelligence, December 9, 2014, https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf.

(6) The CIA actively avoided or impeded congressional oversight of its detention and interrogation program.

(7) The CIA impeded effective White House oversight and decision-making.

(9) The CIA impeded oversight by the CIA's Office of Inspector General.

(17) The CIA rarely reprimanded or held personnel accountable for serious or significant violations, inappropriate activities, and systematic and individual management failures.

However, despite these worrying findings, the DOJ announced after the release of the revised executive summary that it would not be pursuing criminal charges against any individuals who may have been involved with the torture of detainees nor any of the high-ranking CIA officials who were responsible for the oversight over the program. The DOJ justified this decision by referring to the fact that the investigators "*did not find any new information that [the DOJ] had not previously considered in reaching [its] determination*".[361] This lack of charges was met with disbelief and outrage amongst the US public. The Huffington Post noted with concern that the only individual which had been prosecuted in connection to the CIA's detention and interrogation policy was former CIA agent John Kiriakou, who was one of the first to acknowledge the existence of the CIA's torture program and who had been convicted to a prison sentence after revealing the name of a covert agent to a report.[362]

The Office of Professional Responsibility (OPR) of the DOJ also undertook an investigation into the conduct of members of the Office of Legal Counsel to determine whether any professional misconduct had been committed in the drafting and approval of the memos regarding the applicable legal definition of torture and the CIA's use of "enhanced interrogation techniques". The OPR issued its final report[363] on July 29, 2009, which stated that:

---

[361] Julian Hattem, "The Hill," *The Hill*, December 10, 2014, https://thehill.com/policy/defense/226603-justice-department-wont-reopen-torture-probes/.

[362] Sam Levine, "The One Man Jailed For CIA Torture Tried To Expose It," *The Huffington Post*, December 10, 2014, https://www.huffpost.com/entry/cia-torture-prosecution_n_6298646.

[363] "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," *US Department of Justice, Office of Professional Responsibility*, July 29, 2009, https://www.thetorturedatabase.org/node/11919. [*OPR Report* hereinafter].

> "*Based on the results of our investigation, we concluded that former Deputy AAG John Yoo committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice. […] We concluded that former AAG Jay Bybee committed professional misconduct when he acted in reckless disregard of his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice*."[364]

The findings of the OPR report were next reviewed by Associate Deputy Attorney General David Margolis for possible further action against John Yoo and Jay Bybee. However, AD AG Margolis issued a memorandum[365] on January 5, 2010, in which he held that the two individuals concerned had exercised "poor judgment" with respect to the legal advice they had given regarding the CIA's enhanced interrogation techniques but that *"they did not violate a clear obligation or standard*" applicable to the US Attorney General.[366] Consequently, Margolis did not adopt the OPR's findings of misconduct and did not authorise a referral of Yoo or Bybee for further disciplinary action.[367]

It is important to point out here that the scope of the OPR report and AD AG Margolis review of this report was also strictly limited to a determination of whether professional conduct had taken place. As the OTP report emphasises, the examination did not rule on the correctness of the legal opinions in the two memoranda as a matter of law. The OTP request stated that it considered the scope of the authorisation provided by the legal opinions by Yoo and Bybee "*a breach of the applicable prohibitions under the Rome Statute and international law more generally against torture, cruel treatment and outrages against upon personal dignity*".[368]

---

[364] OPR Report, 9.
[365] David Margolis, "Memo of Decision Regarding Objections to the Findings of Professional Misconduct in the OPR's Report of Investigation into the OLC's Memo Concerning Issues Relating to the CIA's Use of 'EITs' on Suspected Terrorists," US Department of Justice, January 5, 2010, https://documentafterlives.newmedialab.cuny.edu/content/doj-memo-david-margolis-ag-re-memo-decision-re-objections-findings-professional-misconduct.
[366] Ibid, 68.
[367] Ibid, 2.
[368] OTP Afghanistan Request, para 326.

From the above discussion, it can be concluded that while several reviews of the CIA detention and interrogation program found serious violations in policy, as well as multiple potential violations of domestic and international law, US officials failed to take any action against those individuals responsible for the implementation of the policy and those individuals responsible for oversight and accountability of the program.

US Military

As the previous section has already mentioned, the US has claimed that it has conducted thousands of investigations and hundreds of prosecutions into incidents of alleged detainee abuse committed by US servicemembers.

The Church report found that, in contrast with the rigorous review of interrogation techniques in place for US operations at Guantanamo Bay, a much more haphazard process was used in Afghanistan and Iraq.[369] Therefore, it was more difficult to identify one single or several individuals who were responsible for the methods that were ultimately used by the US military forces on the ground.

However, the Department of Defense also conducted a number of investigations with respect to reporting and command oversight. Following the reports of alleged incidents of detainee abuse and torture at US military installations in Iraq and Afghanistan, 110 Members of Congress formally requested an investigation to be launched by the Inspector General of the DoD into the "thoroughness and timeliness" of investigations into alleged incidents of detainee abuse in order to develop recommendations for improvement.[370] The report of the investigation concluded that there had been critical systematic deficiencies which had prevented effective and timely investigations and that command oversight was either inadequate or non-existent.[371]

[369] Schmitt, *supra* note 331.
[370] "Review of Criminal Investigations of Alleged Detainee Abuse," Office of the Inspector General of the Department of Defense, August 25, 2006, https://apps.dtic.mil/sti/pdfs/ADA596325.pdf.
[371] OTP Afghanistan Request, para 304.

Furthermore, the Office of the Inspector General of the DoD conducted a separate review of the investigations directed by the DoD of detainee abuse in 2006.[372] Over the course of the investigation the OIG reviewed and evaluated 13 senior-level inspections, assessments and investigations of detention and interrogation operations led by the DoD. The OIG confirmed the findings of the Church report that investigations were insufficient, and that interrogation support often lacked "unity of command and unity of effort".[373] The report also found that at no point was there a "single entity within any level of command [that] was aware of the scope and breadth of detainee abuse."[374]

No proceedings, whether administrative or judicial in nature, were ever initiated against officials within the DoD, the DOJ, or CJTF-180 with respect to the approval of the interrogation methods that were used between 2002 and 2005 or with respect to the oversight failure.

[372] "Review of DoD-Directed Investigations of Detainee Abuse," *Office of the Inspector General of the Department of Defense*, August 25, 2006, https://www.dodig.mil/FOIA/FOIA-Reading-Room/Article/1238906/review-of-dod-directed-investigations-of-detainee-abuse-u-redacted/.
[373] Ibid, ii.
[374] Ibid.

3.4.3.4 Discussion of findings

As the OTP noted in its request, the information available to the public and to the Prosecutions indicates that, so far, "*no national investigations or prosecutions have been conducted or are ongoing against those who appear* ***most*** *responsible for the crimes allegedly committed*" by both members of the US armed forces[375] and by members of the CIA.[376]

It has been the historical approach of the US not to investigate or prosecute those individuals which acted in accordance with the authorized CIA methods for detention and interrogation or with good faith respecting the guidance concerning approved interrogation methods provided by the DoD high-level officials. This alone might be a reason to determine that the US has shown an unwillingness to genuinely prosecute war crimes committed by its nationals. However, what is much more concerning is the lack of investigations and prosecutions carried out in cases which do not fall under the above definition.

While the US has asserted on numerous occasions that it has conducted thousands of investigations and hundreds of prosecutions in cases of alleged acts of torture amount to war crimes committed by its nationals, multiple international bodies have criticised the lack of information made available to the public about such prosecutions without which the assertions by US officials cannot be confirmed. Furthermore, it appears that there have been no criminal proceedings against any of the individuals which have devised and authorised or were responsible for overseeing the implementation of the enhanced interrogation techniques used by members of the CIA. Furthermore, no judicial or non-judicial proceedings were initiated against any commanding officer responsible for the apparent lack of oversight which allowed for the acts of torture committed by US armed forces. All of the above findings not only suggest a severe violation by the US of obligation under the Convention against Torture to prevent acts of torture and to punish any act of torture committed on any territory under its jurisdiction, but they also suggest a clear unwillingness to bring those responsible for the acts of torture committed by US government agents and servicemembers to justice.

[375] OTP Afghanistan Request, para 299.
[376] OTP Afghanistan Request, para 312.

3.4.4 Presidential pardons of convicted or suspected war criminals

3.4.4.1 The clemency power of the US President

According to Article II Section 2 of the Constitution of the United States, the President of the United States *"shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment".* The President is therefore authorized to grant pardons, i.e. full relief of all legal consequences, for any federal crime, except in cases relating to impeachment.

In 1865, the responsibilities related to the applications for pardons were delegated to the Office of the Clerk of Pardons, later superseded by the Office of the Pardon Attorney (OPA) under the Department of Justice.[377] Since then, applications for executive clemency for federal criminal offences are normally handled by the OPA, which works in advisory function to the President, investigating and reviewing the case in question before making a final recommendation to the President, signed by the Deputy Attorney General.[378] However, the President may nevertheless still make use of his clemency powers without consulting the OPA and without a request being submitted to the OPA.

From 2019 to 2020, President Donald Trump granted pardons to seven individuals convicted for offenses committed in connection to high-profile war crimes cases in Iraq and Afghanistan.[379] While President Trump was not the first US President of the 21st century to sign Executive Grants of Clemency for US military personnel (or military contractors), the cases concerned differed from the cases in which his predecessors had intervened in the perceived injustice served by the intervention, given the context, as well as the gravity of the charges vis-à-vis the extent of the clemency granted. For example, the individuals that were granted presidential pardons by President Trump had been convicted of, *inter alia*, voluntary manslaughter, attempted murder, unpremeditated murder, and premeditated murder.

[377] "Office of the Pardon Attorney: Frequently Asked Questions," Office of the Pardon Attorney, May 15, 2023, https://www.justice.gov/pardon/frequently-asked-questions.
[378] "Office of the Pardon Attorney: About the Office," Office of the Pardon Attorney, January 9, 2023, https://www.justice.gov/pardon/about-office.
[379] For a complete list of the relevant clemency recipients with their individual offenses and sentences, see "Clemency Recipients," US Department of Justice, March 28, 2023, https://www.justice.gov/pardon/clemency-recipients.

All individuals concerned were granted “full” pardons instead of “partial” pardons, which would exonerate the individual only from some portion of the punishment or legal consequences of their crime or crimes.

The following chapter of this thesis will be concerned with the question of whether the pardons that were granted to convicted or alleged war criminals during the Trump administration can be considered as attempts of shielding the perpetrators from justice, demonstrating an unwillingness to genuinely prosecute war crimes.

3.4.4.1 Complementarity and alternative forms of justice

Alternative forms of justice, such as pardons and amnesties for war crimes and other international crimes, most often come into being when States go through either a period of transition, such as from war to peace, or of extreme political upheaval, such as the handing over of power from military regimes to democratic civilian governments.[380] Such alternative forms of justice not only affect the political stability within a country, they also pose a challenge for international law to be able to reconcile the competing needs of sovereign States to navigate the delicate political process towards peace and the responsibility to prosecute individuals that commit the most serious crimes against the international community.[381] It is less common for pardons to be granted to individuals convicted of the most serious international crimes outside the context of transitional justice. The problem with such pardons arises from the worry that these may be used to prevent certain individuals from being brought to justice through procedures outside the normal justice system. The informal expert paper of the OTP notes, for example, that one of the questions to be asked when assessing a State’s genuine willingness to prosecute is whether “amnesties, pardons, or grossly inadequate sentences” were issued *after* the proceeding.[382]

Of course, the simple fact that a person convicted of an international crime is granted clemency for their criminal actions is not yet sufficient to determine the willingness or

[380] Yasmin Naqvi, “Amnesty for War Crimes: Defining the Limits of International Recognition,” *International Review of the Red Cross* 85, no. 851 (2003): 585.
[381] Ibid, 586.
[382] Informal expert paper, 31.

unwillingness of the responsible state to bring about justice. After all, the discussion must take into account that the Rome Statute also conceptually provides for "alternative forms of justice", for example through Article 53(1)(c) and (2)(c), which establish the prosecutorial discretion not to proceed with an investigation or prosecution where it is not in the "interests of justice" to do so.[383] Therefore, each instance in which clemency was given to persons accused or convicted of international crimes must be evaluated individually, taking into account the specific circumstances and reasons for the departure from the traditional forms of justice through the ordinary justice system.

In order to assess whether the most recent US interventions and applications of "alternative forms of justice" suggest inability or unwillingness to genuinely investigate and prosecute US nationals accused of war crimes, it is necessary to analyse the circumstances under which President Trump chose to grant his "full pardons" to convicted war criminals. For this, the thesis will consider whether the severity of the circumstances justify the departure from the sentences handed down by the national courts, whether an informed decision was taken after a full and effective investigation into the facts, and whether the procedure could constitute an attempt to shield perpetrators from criminal justice.[384]

Thus, the following sections will briefly analyse two instances in which President Trump granted full pardons, using the framework provided by the informal expert paper on complementarity in practice. This analysis will address the following questions[385]:

- Was there a full and effective investigation into the facts?
- Did the severity of circumstances of necessity justify the intervention?
- Did the procedure provide a sense of justice for victims or for the persons affected in general?
- Did the alternative form of justice constitute an attempt to shield perpetrators from justice?

[383] Ibid, 22.
[384] Ibid, 23.
[385] Ibid.

3.4.4.2 Clint A. Lorance

In November 2019, President Trump pardoned US Army First Lieutenant Clint A. Lorance, a former US Army officer who had been convicted of two counts of unpremeditated murder, attempted murder, and wrongfully communicating a threat, among other charges.[386]

1st Lt. Lorance was serving in the 4th Brigade Combat Team of the 82nd Airborne Division at the Forward Operating Base Pasab in Kandahar, Afghanistan, when he was assigned to take over 1st Platoon, C Troop, to replace another lieutenant who had been injured.[387] Lorance was serving as the new platoon leader for less than a week, when his unit was sent on combat patrol together with several soldiers of the Afghanistan National Army (ANA) in a Taliban-controlled area on July 2, 2012. During the patrol, one of the soldiers in Lorance's unit spotted three Afghan men on a motorcycle on a nearby road. According to 1st Lt. Lorance, the motorcycle was at that point mere seconds from reaching his unit, whereas the other soldiers in the unit would later testify that the three men were more than 600 feet away from their position.[388] Without asking for any information on the spotted vehicle, Lorance, who was reportedly too far away to see the motorcycle, gave his men the order to shoot at the three men without establishing whether they were a threat or not.[389]

According to testimony by Specialist Todd Fitzgerald, none of the soldiers followed Lorance's order at first, given that they did not pose a threat to the unit.[390] However, after being prompted again by Lorance, Private James Skelton fired two shots in the direction of the motorcycle, missing the three passengers. Alerted by the gunshots, the three men stopped, dismounted, and began walking towards the ANA soldiers in an apparent attempt to figure out what had happened.

---

[386] US Department of Justice, *supra* note 379.
[387] Richard Sisk, "He Was Convicted of War Crimes and Pardoned by Trump. Now He Wants to Reform Military Justice," *Military.Com*, October 25, 2020, https://www.military.com/daily-news/2020/10/25/he-was-convicted-of-war-crimes-and-pardoned-trump-now-he-wants-reform-military-justice.html.
[388] Dave Philipps, "Cause Célèbre, Scorned by Troops," *The New York Times*, February 24, 2015, https://www.nytimes.com/2015/02/25/us/jailed-ex-army-officer-has-support-but-not-from-his-platoon.html.
[389] Sisk, *supra* note 387.
[390] Ibid.

The ANA soldiers motioned to the men to leave, and the three men turned to head back to their motorcycle.[391] As they were leaving, however, Lt. Lorance ordered Private Shiloh, the gunner on the M240 machine gun in the platoon's gun truck to engage the men.[392] Pvt. Shiloh complied with the order, firing his weapon, killing two of the riders and injuring the third, who fled to the nearby village.

After the shooting, Lt. Lorance ordered two soldiers to conduct a Battle Damage Assessment (BDA) of the victims, which entailed taking photographs, obtaining biometric data, and testing for explosive residue for later evidence. Lt. Lorance did not allow Pfc. Skelton, the only soldier in the unit who was trained and equipped to conduct BDAs, to perform the assessment.[393] The soldiers who searched the bodies of the deceased victims did not find any weapons, weapons, explosives or communications gear but discovered only scissors, identification cards pens and three cucumbers.[394]

According to the soldiers who witnessed the incident, locals who had been alerted by the gunshots emerged from the nearby village and began shouting at the troops upon seeing the two dead men. Lorance reportedly threatened the villagers at first, before telling them to take the bodies away from the scene.[395] Lt. Lorance then proceeded to make a false report to Captain Swanson, the Troop Commander, that the unit was unable to perform the BDA as per the regulations because the villagers had removed the two bodies before the platoon could get to them.[396] Lorance would later admit to also trying to conceal evidence that the two dead Afghans had been carrying proper identification with them, something that was uncommon for Taliban fighters in the region.[397]

That same day of the shooting, multiple soldiers of the platoon reported the incident and the falsification of Lorance's report to the company commander. In response, the US Army launched an investigation while Lorance was re-assigned to a desk job and

---

[391] "Lorance v. Commandant, Case No. 18-3297-JWL," United States District Court for the District of Kansas, November 8, 2019, https://casetext.com/case/lorance-v-commandant.
[392] Ibid.
[393] Ibid.
[394] Philipps, *supra* note 388.
[395] Ibid.
[396] Lorance v. Commandant, *supra* note 391.
[397] David Adams, "U.S. Soldier Convicted of Murdering Two Afghans Is 'Scapegoat:' Lawyer," *Reuters*, August 3, 2013, https://www.reuters.com/article/us-usa-military-murder/u-s-soldier-convicted-of-murdering-two-afghans-is-scapegoat-lawyer-idUSBRE97201H20130803.

stripped of his weapons pending the outcome of the investigation.[398] In January 2013, after a seven-months investigation by the US Army CID, Lorance was charged with murder, attempted murder and misconduct. On July 30, 2013, a general court-martial for Lorance began, during the course of which the defence team argued that Lorance's actions had been justified by the perceived threat level, given the information that was available to him at the time of the incident.[399] On August 1, 2013, Clint Lorance was found guilty by the court-martial jury on two counts of second-degree murder, obstruction of justice, and other minor charges. He was sentenced to 20 years in prison, later reduced to 19 years in prison, forfeiture of pay, and dismissal from the US Army.[400]

In 2015, Lorance's legal team filed a petition for a new trial after producing documents which allegedly demonstrated that the two men killed in the shooting were in fact suspected bombmakers, alleging that this critical evidence was withheld from Lorance's trial. The US Army Court of Criminal Appeals rejected the request for a new trial, ruling that the evidence would not have been admissible at the original trial, and that even if it had been admissible, the background of the two Afghans as suspected bombmakers was not known to Lorance at that time and did not change the circumstances under which he had ordered his men to shoot them that day.[401] Lorance also filed a plea for a new trial with the U.S. District Court for the District of Kansas. The plea was rejected on November 8th, 2019, and judge John Lungstrum stated in his ruling that while the Standing Rules of Engagement (SRoE) *"permitted soldiers to use force in defense of themselves or others upon the commission of a hostile act or the demonstration of imminent hostile intent, there were no declared hostile forces, and thus no authority to engage any person upon sight."* [402]

On November 15, less than two weeks after Lorance's plea for a new trial was rejected by the Kansas District Court, the White House announced that President

[398] Ernesto Londoño, "Army Officer Convicted in Shooting Deaths of 2 Afghans," *The Washington Post*, August 2, 2013, https://www.washingtonpost.com/world/national-security/army-officer-convicted-in-shooting-deaths-of-2-afghans/2013/08/01/6ec9aca6-fae0-11e2-a369-d1954abcb7e3_story.html.
[399] Ibid.
[400] Adam Linehan, "The Campaign To Free Clint Lorance Was Just Dealt A Devastating Blow," *Task & Purpose*, July 12, 2017, https://taskandpurpose.com/news/campaign-free-clint-lorance-just-dealt-devastating-blow/.
[401] Sisk, *supra* note 387.
[402] Lorance v. Commandant, *supra* note 391.

Donald Trump had granted a “full and unconditional” pardon to Lt. Lorance. At the time of his pardon, Lorance had served only six years of his 19-year sentence.[403]

In the relevant press statement, the White House only highlighted that Lorance had acted “*under difficult circumstances”* and was “*prioritizing the lives of American troops”*, when he ordered the men under his command to shoot at the three Afghan men.[404] The Trump administration did not release any additional justification for why then-President Trump had felt it necessary to override the judgment of the military court and the decisions of the courts of appeal. The only argument that was put forward seems to be that Lt. Lorance acted in good faith and within the rules of engagement the day of the incident. However, neither officials in the Trump administration nor Lt. Lorance’s legal team provided any evidence to support the claim that Lorance had genuinely acted under the “fog-of-war” circumstances he had described in his testimony.

In each of the appeals filed by Lt. Lorance’s legal team, the narrative of the split-second decision and the threat level of the Afghan men was a key part of their argument, yet each time the pleas for a new trial were rejected by the Courts concerned. This narrative was also contradicted by multiple members of Lorance’s platoon, both during his trial and in public in the years after his conviction. The fact that no evidence was given to support the claim of good faith casts serious doubt over whether the severity of circumstances of necessity justified the intervention in the military justice system.

One of the questions to consider in an assessment of alternative forms of justice is whether the deviation from traditional procedures provide a sense of justice for victims and for the persons affected in general. In the case of Lt. Lorance, the opposite seems to be the case for all many persons directly affected by his actions. While the press statement released by the Trump White House highlights the many Americans who are in support of pardoning Lt. Lorance and that his actions were a result from his duty to protect his troops, the most notable absence in this list of supporters is the platoon which Lorance commanded in Afghanistan itself.

---

[403] “Statement from the Press Secretary,” The White House, November 15, 2019, https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-97/.
[404] Ibid.

In fact, during the proceedings against Lt. Lorance, no less than nine members of his platoon came forward voluntarily to testify against their former leader, contradicting his account of a split-second, heat-of-the-moment decisions to protect them from danger.[405] For example, when the military prosecutors asked Pfc. James Skelton during trial whether there had been a threat or any other reason to shoot at the three men on the motorcycle other than the order given by Lt. Lorance, Skelton testified that "*there was no reason to shoot at that moment in time that presented a clear, definitive hostile intent and hostile act*" and that that he would not have fired had he not been ordered to do so multiple times.[406] Furthermore, several soldiers testified to the panicked and volatile nature of Lorance's command and to the platoon leader's continuous questionable and aggressive behaviour when engaging with Afghan civilians, which ultimately pushed his own troops to reporting Lorance to superiors despite their fears of retribution should their reports be ignored.[407]

Lt. Lorance's lawyers argued that the soldiers who testified against Lt. Lorance had been pressured by their superiors to contradict their platoon leader and many had been offered immunity in exchange for their testimony against their defendant. However, the only four of the nine solders who testified received immunity deal in return and many of those who testified later continued to defend their testimony publicly.

In addition, numerous soldiers from Lorance's platoon have spoken up outside the courtroom about the depression, PTSD, and substance abuse many of them had suffered as a direct consequence of Lorance's actions in Afghanistan, with members reporting that the actions of their platoon leader had ripped apart their previously tight-knit group.[408] Specialist Todd Fitzgerald, who was witness to Lt. Lorance's orders and the shooting that took place in on July 2nd, 2012, said in an interview with the New York Times that:

> "*It tainted our entire service […] We gave a lot, sacrificed a lot. To see it destroyed, that was bad enough. […] Every time a new story calling him a*

[405] Philipps, *supra* note 388.
[406] Lorance v. Commandant, *supra* note 391.
[407] Philipps, *supra* note 388.
[408] Greg Jaffe, "Soldiers Who Served under Clint Lorance in Afghanistan See Trump's Pardon as Betrayal," *The Washington Post*, July 2, 2020, https://www.washingtonpost.com/graphics/2020/national/clint-lorance-platoon-afghanistan/.

hero happens, I don't sleep. I lay down in my bed and close my eyes and lay there all night until the sun comes up." [409]

In interviews with the Washington Post, several soldiers of the Platoon voiced their disbelief, shock, and profound sense that an injustice was done at the pardon granted to their former platoon leader by Donald Trump. While some of the soldiers reacted with apathy and cynicism to the injustice, others such as veteran Mike McGuinness were determined to speak out against the grant of clemency and President Trump's claims that Lorance was a "hero" let down by the military justice system.[410] For many of the soldiers who served in Lorance's platoon the day of the shooting, the nightmare cause by their platoon leader's actions was only worsened by the grant of clemency.

To summarise, it appears that the pardon for Lt. Lorance was granted without any significant evidence suggesting there was a genuine reason for the intervention in the military justice system. In addition, the pardon did not serve to provide any justice to any individuals directly involved in the incident, that is, neither the victims of the shooting nor the soldiers under Lorance's command benefitted from the pardon. It may thus be concluded that the pardon did little more than shield Lt. Lorance from genuine justice being done in the case.

[409] Philipps, *supra* note 388.
[410] Jaffe, *supra* note 408.

3.4.4.3 Mathew Golsteyn

On November 15, 2019, it was also announced that Donald Trump had pardoned Former Army Major Mathew L. Golsteyn, who had been charged with premeditated murder of an Afghan man in 2010 but had not yet been convicted of that crime.

Major Mathew Golsteyn was accused of committing the extrajudicial killing of an Afghan under his detention while serving in the US Army's 3rd Special Forces Group in the town of Marjah, Afghanistan. The incident in question took place in February 2010, two days after a roadside bomb had killed two Marines, Sgt. Jeremy McQueary and Lance Corporal Larry Johnson, who had been working with Major Golsteyn's Special Forces Team.[411] Golsteyn and his unit had searched Marjah for the bombmaker and ended up picking up an Afghan man identified as "Rasoul", who had been implicated by a tribal leader as the perpetrator.[412] Golsteyn was later ordered by his superiors to let the Afghan man go due to a lack of evidence against him. As Golsteyn would claim, he made the decision that he did not want to let the suspected bombmaker return to the Taliban out of fear of retribution against his unit and against the tribal leader who had identified Rasoul as a suspect. Instead, he and another soldier ended up shooting and killing the unarmed man.

The killing committed by Maj. Golsteyn has been described by human rights experts as an apparent summary execution, that is, the deliberate killing of an individual accused outside the legal framework, without a trial.[413] Such summary executions are prohibited under international law, inter alia, by the International Covenant on Civil and Political Rights, to which the US is a State Party.[414] According to Article 6 of the ICCPR:

---

[411] Thomas Gibbons-Neff, "Army Charges Special Forces Soldier in 2010 Killing of Afghan," *The New York Times*, December 14, 2018, https://www.nytimes.com/2018/12/14/us/politics/mathew-golsteyn-special-forces-murder-charges.html.

[412] "Former Green Beret to Plead Not Guilty to Murdering Suspected Taliban Bomb-Maker in 2010," *Business Insider*, June 26, 2019, https://www.businessinsider.com/former-army-green-beret-matthew-golsteyn-plead-not-guilty-murder-2019-6.

[413] Helene Cooper, Michael Tackett, and Taimoor Shah, "Twist in Green Beret's Extraordinary Story: Trump's Intervention After Murder Charges," *The New York Times*, December 17, 2018, https://www.nytimes.com/2018/12/16/us/politics/major-matt-golsteyn-trump.html.

[414] The US did make reservations to Article 6 of the ICCPR. However, the US only reserved the right "*to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment*". Therefore, the US reservations do not affect the prohibition of summary executions.

1. *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*
2. *[A sentence of death] can only be carried out pursuant to a final judgement rendered by a competent court.*

However, Maj. Golsteyn never reported the incident to his superiors and the death was not officially investigated by the US military. In 2011, Golsteyn was awarded the Silver Star Medal, the third-highest decoration for valour in combat, for his actions during an enemy engagement, also in February 2010.[415]

In September 2011, the CIA alerted the Department of Defense that during a job interview Golsteyn had freely admitted to killing an unarmed Afghan man in 2010. An internal US Army memo from September 29, 2014, obtained by The Intercept, revealed the following:

> *"In an interview conducted at the CIA, then-CPT Golsteyn claimed to have captured and shot and buried a suspected IED bomb maker. […] In the transcript, CPT Golsteyn stated that he knew it was illegal but was not remorseful as he had solid intelligence and his actions protected the safety of his fellow teammates."*[416]

Golsteyn's confession prompted an investigation by the US Army Criminal Investigation Division (CID) starting in October 2011. In November 2013, the CID concluded that Golsteyn had knowingly violated the laws of war and that he had committed premeditated murder and conspiracy to murder in 2010.[417] However, Army investigators had to close their investigation without bringing any criminal charges against Golsteyn, citing insufficient evidence to be able to prosecute Golsteyn.[418]

---

[415] Dan Lamothe, "Army Revokes Silver Star Award for Green Beret Officer, Citing Investigation," *Washington Post*, February 4, 2015.
[416] Ryan Devereaux and Jeremy Scahill, "Documents: Green Beret Who Sought Job At CIA Confessed To Murder," *The Intercept*, May 8, 2015, https://theintercept.com/2015/05/06/golsteyn/.
[417] "Case No. AR20200000309," *Army Board for Correction of Military Records*, June 26, 2020, https://boards.law.af.mil/ARMY/BCMR/CY2020/20200000309.txt, para. 15.
[418] Dan Lamothe, "Former Special Forces Soldier, Once Lauded as a Hero, Faces Murder Charge," *Washington Post*, December 13, 2018, https://www.washingtonpost.com/world/national-security/former-special-forces-soldier-once-lauded-as-a-hero-faces-murder-charge/2018/12/13/bb4a11ee-ff10-11e8-ad40-cdfd0e0dd65a_story.html.

Nevertheless, the US Army took the strongest actions short of criminal charges against Golsteyn. In 2014, Golsteyn received an official Memorandum of Reprimand for his actions by Army Brigadier General Darsie D. Rogers.[419] Army Secretary John McHugh not only denied Golsteyn the Distinguished Service Cross, the second-highest military decoration for extraordinary heroism in combat, for which Golsteyn had previously been recommended, but also revoked Golsteyn's Silver Star Medal.[420] Finally, a board of inquiry of Army officers recommended Golsteyn's separation from the US Army in 2015 due to "misconduct, moral or professional dereliction as a result of his substantiated derogatory activity".[421]

In November 2016, Golsteyn took part in an interview in a pre-election Fox News special to discuss the rules of engagement for US troops, which had become more restrictive during the Obama administration.[422] In the interview, Golsteyn used the fact that the strict rules of engagement had required his unit to release the suspected Taliban bomb maker despite their worries to criticise their restrictiveness. When he was asked by Bret Baier, the host of the program, whether he had killed the suspected bombmaker, Golsteyn answered yes.[423] Golsteyn went on to claim that the killing had not happened "in cold blood" while the bombmaker was still detained by his unit but that Golsteyn and another soldier decided to track him down soon after they had let him go.[424] While he did not talk about how they found the man and under what exact circumstances he had killed the Afghan but nevertheless Golsteyn had, in effect, confessed to premeditated murder on national television. That same month, the US Army opened its second investigation into the 2010 incident.[425]

After two years of investigations, including conducting interviews with members of Golsteyn's unit in Afghanistan, the US Army finally charged Golsteyn with premeditated murder in December 2018.[426] However, only two days after the

[419] Devereaux and Scahill, *supra* note 416.
[420] Lamothe, *supra* note 415.
[421] Army Board for Correction of Military *Records, supra* note 417, 23.
[422] Caitlin Foster, "Watch the Fox News Interview That Launched the Murder Investigation of an Army Hero," *Business Insider*, December 19, 2018, https://www.businessinsider.com/watch-the-interview-that-launched-murder-investigation-of-an-army-hero-2018-12.
[423] Cooper, Tackett, and Shah, *supra* note 413.
[424] Foster, supra note 422.
[425] Cooper, Tackett, and Shah, *supra* note 413.
[426] Ibid.

charges had been filed against Golsteyn, then-president Donald Trump announced in a tweet on December 16, 2018, that he would personally review the case.[427]

In June 2019, Golsteyn plead not guilty to all charges against him in his arraignment this morning at Fort Bragg, North Carolina.[428] Since he had waived his right to an Article 32 hearing, he was thus awaiting his trial which was set to begin in late 2019 or early 2020. However, on November 15, 2019, before the trial against Golsteyn could commence, it was announced that then-President Donald Trump had granted Golsteyn a full presidential pardon.

While it is unusual for an individual to be pardoned before charged or sentenced for a crime, it is not without precedent.[429] The White House press release on the executive grant of clemency gave the following justification for the pardon:

> "*The terrorist bombmaker, as identified by an Afghan informant, who had killed our troops, was detained and questioned. Golsteyn was compelled to release him, however, due in part to deficiencies within the fledgling Afghan detention system. Golsteyn has said he later shot the terrorist because he was certain that the terrorist's bombmaking activities would continue to threaten American troops and their Afghan partners, including Afghan civilians who had helped identify him*. *After nearly a decade-long inquiry and multiple investigations, a swift resolution to the case of Major Golsteyn is in the interests of justice.*" [430]

There are several noteworthy components to the above statement which call the intention behind the pardon to bring about justice into question.

Most crucially, it should be highlighted that the above paragraph perfectly outlines the definition of a summary execution, i.e. the execution of a person which is merely

[427] "At the request of many, I will be reviewing the case of a "U.S. Military hero," Major Matt Golsteyn, who is charged with murder. He could face the death penalty from our own government after he admitted to killing a Terrorist bomb maker while overseas". December 16, 2018. Available at: https://twitter.com/realDonaldTrump/status/1074319076766433280

[428] Todd South, "Army Green Beret Major Pleads Not Guilty to Afghan Murder Charge," *Army Times*, June 27, 2019, https://www.armytimes.com/news/your-army/2019/06/27/army-green-beret-major-pleads-not-guilty-to-afghan-murder-charge.

[429] For example, President Gerald Ford pardoned former President Richard Nixon after the Watergate scandal, President Jimmy Carter pardoned all Vietnam draft dodgers in a presidential proclamation in 1977, and President George H.W. Bush pardoned former secretary of Defense Caspar Weinberger in the Iran-Contra affair. *See also* https://www.justice.gov/pardon/clemency-recipients.

[430] White House Press Secretary, *supra* note 403.

accused of a crime without the benefit of a fair trial. The explanation for Golsteyn's pardon does not raise question whether Golsteyn was justified in shooting the unarmed man or whether he had acted in accordance with his rules of engagement. Instead, the press release seems to confirm that Golsteyn did, in fact, commit murder that day in Afghanistan. However, the statement suggests Golsteyn should be forgiven for the summary execution of the unarmed man because he had been a "terrorist bombmaker" and Golsteyn had only acted in the interest of his allies.

Firstly, no evidence has ever been made public to prove that "Rasoul" was, in fact, the bombmaker responsible for the bombing that had killed the two Marines two days prior to the incident. The fact that the statement called the unarmed victim of the murder a "terrorist bombmaker" without having investigated the truth of this statement strongly suggests a narrative being invented in favour of a positive portrayal of Golsteyn, rather than reflecting an unbiased and independent investigation into the matter. Secondly, it should be most obvious that even if "Rasoul" *was* the person responsible, he nevertheless had the right to a fair trial before being executed. The fact that the White House press statement suggests that there are situations in which no trial is necessary before the execution of a human being is not only extremely worrisome from a human rights perspective, but it is also particularly hypocritical given the repeated criticism of the US that the ICC does not afford individuals before the court the necessary procedural rights to ensure a full and fair trial.

Another part of the press release to take note of is justification of the pardon which refers to Golsteyn's right to "a swift resolution" of the case "in the interest of justice". Recall here that one of the questions put forward by the informal expert paper to determine a genuine intention to bring about justice with a pardon is whether the severity of circumstances of necessity justify the intervention. For one, it is not at all clear why a swift resolution must necessarily manifest in the form of clemency, rather than through the normal process of the US justice system. After all, there are several other tools available to the executive and the judiciary to ensure that the ensuing trial would happen in a timely manner that, all of which could sever as alternative ways to provide for a timely resolution to Golsteyn's case.

In addition, it is also odd that President Trump did not intervene at an earlier point, such as during the second two-year investigation of the US Army CID or during the pre-trial phase of Maj. Golsteyn's case. Instead, the President decided to intervene and bring the trial to a stop just as it was about to start. This seems highly unusual and given the severity of the crime Maj. Golsteyn was charged with, as well as the acknowledgement of the White House press release that Golsteyn did commit the murder. Taken together, it can be concluded that the mere right of Maj. Golsteyn for a swift resolution of his case does not justify a full presidential pardon for his criminal actions "in the interest of justice".

The only other justification for the grant of clemency is the fact the grant had "broad support", including that of three Republican Representatives,[431] Vietnam veteran and author Bing West, and Army combat veteran Pete Hegseth. However, no explanation was given why the support from the above-mentioned individuals should carry any particular weight in the context of the assessment of whether the trial against Golsteyn was in the interest of justice or not. In fact, support from Hegseth on this issue in particular should be a cause of concern, given the worrisome opinions he has voiced publicly about US compliance with international law and civil rights in the past. On the conservative American daily news and talk program Fox & Friends, which Hegseth co-hosts, he has repeatedly called on President Trump to pursue a more aggressive strategy against Iran, urging President Trump to threaten attacks on Iran's critical infrastructure, oil production facilities, and cultural sights.[432] In 2020, when addressing these issues, Hegseth stated that:

> *"If we're going to fight to prevent Iran from getting a nuclear bomb, this regime, then we need to rewrite the rules that are advantageous to us."* [433]

In summary, the executive clemency granted to Maj. Mathew Golsteyn can be said to constitute an attempt to shield perpetrators from justice for the following reasons:

---

[431] Louie Gohmert (R-Texas), Duncan Hunter (R-Calif.), Mike Johnson (R-Louisiana), Ralph Abraham (R- Louisiana), and Clay Higgins (R-Louisiana). Note here that Representative Duncan Hunter would also receive a

[432] Eliza Relman, "The Fox Host with Trump's Ear on Military Issues Urges Him to Bomb Iranian Cultural Sites and 'rewrite the Rules' of War to Be 'Advantageous to Us,'" *Business Insider*, January 8, 2020.

[433] Ibid.

1. A comprehensive investigation into the matter was concluded with the finding to suggest that Maj. Golsteyn did violate the rules of law and commit murder
2. The White House press release confirms the finding of the US Army CID that a crime was committed by Maj. Golsteyn
3. President Trump's intervention cut short the judicial process of domestic courts, effectively shielding him from traditional forms of justice
4. No sufficiently severe circumstances of necessity were presented to justify the extent of President Trump's intervention

3.4.4.4 Concluding discussion on presidential pardons

As the two cases discussed in this section have demonstrated, the presidential pardons that were granted in the recent past by Donald Trump seem to point towards an unwillingness to genuinely prosecute US war criminals. Instead of actions taken with the intent to bring about justice through alternative paths, the examples discussed above strongly suggest the intent to shield perpetrators of the most serious crimes from justice. This finding is particularly worrisome if considered with the earlier conclusion that it is exceedingly difficult to convict war criminals through the US military justice system in the first place.

However, it should be noted that many high-level military leaders have pushed back hard against the pardons granted by President Trump during the end of his presidency. Secretary of Defense Mark Esper advised Trump on multiple occasions not to intervene in the cases of both Lt. Lorance and Maj. Golsteyn, urging the President to "*let the Uniform Code of Military Justice prevail*" and to fully consider the consequences of pardoning individuals accused or convicted of crimes of such gravity.[434]

Both Esper and Army Secretary Ryan McCarthy have noted with concern that instead of giving US soldiers "the confidence to fight", as the President had previously stated, Trump's actions would only undermine the UMCJ and serve as a

[434] Barbara Starr and Nicole Gaouette, "Esper to Urge Trump Not to Intervene in Cases of Service Members Facing War Crimes Allegations," November 6, 2019, https://edition.cnn.com/2019/11/06/politics/mark-esper-trump-war-crime-interventions/index.html.

bad example to other troops in the field, potentially encouraging further misconduct in the future.[435]

Martin Dempsey, retired US Army General and former chairman of the Joint Chiefs of Staff, also noted that "*absent any evidence of innocence or injustice*", the kind of wholesale pardons Trump had granted to US soldiers accused of war crimes would signal to both the American people and international allies that the US *"did not take the Law of Armed Conflict*" seriously.[436] This, Dempsey argued, not only set a dangerous precedent, but it also put potential future cooperation with other countries' militaries at risk. This appears to be a valid concern, given that Donald Trump's pardons have also attracted strong negative criticism internationally. For example, the Office of the High Commissioner for Human Rights at the UN criticised the pardons granted by Donald Trump as being contrary "*to the letter and spirit of international law which requires accountability"* for grave violations of international law.[437]

Of course, it could be simply the case that Donald Trump is an exceptional case and should be viewed as an outlier rather than a representative example of a US Head of State. This argument is not without merit, however, the fact that characteristics of the US justice system allow for such an abuse of executive powers in the first place nevertheless highlights a highly concerning flaw. The fact that the executive clemency powers have been used in the past to shield perpetrators of the most serious crimes constitutes a strong reason to consider whether there is a need for a court of last resort that is able to deal with such abuses.

Finally, one might argue that the strong pushbacks against the recent presidential pardons by high-ranking officials is a sign of overall willingness to genuinely prosecute war criminals, rather than a sign of unwillingness. However, in this case, there is an argument to be made that President Trump's behaviour not only demonstrates the *unwillingness* of the Head of State to genuinely prosecute US citizens accused of committing war crimes, but it also demonstrates an *inability* to

[435] Dave Philipps, "Trump Clears Three Service Members in War Crimes Cases," *The New York Times*, November 22, 2019, https://www.nytimes.com/2019/11/15/us/trump-pardons.html.
[436] Tweet by @Martin_Dempsey from May 21, 2019. Available at: https://twitter.com/Martin_Dempsey/status/1130809276191035392?s=20
[437] Stuart Ford, "Has President Trump Committed A War Crime by Pardoning War Criminals?," *American University International Law Review* 35, no. 4 (2020): 786.

genuinely prosecute war crimes, despite the evident *willingness* of military and administration officials to bring perpetrators of war crimes to justice. One nevertheless ends up at the same conclusion that state practice of executive clemency powers have shown that the US is *either unwilling or unable to genuinely prosecute* its citizens for war crimes, as described by Art. 17 of the Rome Statute.

3.5 Conclusion

As the analysis conducted in this chapter has shown, there are strong reasons to believe that the US has not, in fact, shown genuine willingness to investigate and prosecuted alleged war crimes committed by its nationals in Afghanistan and Iraq. There seem to be particularly worrying issues with the unwillingness to investigate any wrongdoing by US officials on higher levels within the DoD and the DOJ who are responsible for the policies, strategies, and reporting failures which allow for the commission of war crimes. Taking into account the findings of this chapter, it can therefore be concluded that US hostilities towards the ICC do not simply arise from concerns over jurisdiction, politicised prosecution and the alleged lack of procedural rights, as it was hypothesised in the beginning of this chapter.

4 Concluding Remarks

It was the aim of this thesis to analyse the attitudes of the United States towards the International Criminal Court vis-à-vis its own conduct in investigating and prosecuting the international crimes within its jurisdiction.

The first part of this analysis focussed on the historical relationship between the US and the ICC to gain a better understanding of how this relationship was formed and how it has changed since the establishment of the Court. First of all, the thesis discussed the historical origins of the idea of a permanent international criminal court as a response to the most tragic atrocities committed during the 20th century. The US was particularly involved in the struggle for international criminal justice since the beginning of the century and even more so after the Second World War, when the US was a key actor in bringing those most responsible for the atrocities committed during the war to justice. However, as US priorities changed during the latter half of the century and the political divide of the international stage during the Cold War made cooperation increasingly difficult, the idea of a permanent criminal court was put on hold.

Only after the most serious international crimes had once again been committed during the conflicts in Yugoslavia and Rwanda, the international community was faced again with the problem of having to set up *ad hoc* criminal tribunals in the absence of a permanent court. Finally, at the end of the century, the international community dedicated itself to the establishment of such a court and came together to negotiate its statute. After much work was done by the International Law Committee and the Preparatory Committee, delegations of hundreds of states came together to negotiate the statute of the ICC in Rome. However, despite the fact that the US had been one of the most vocal proponents of a permanent international criminal court, concerns about the possible jurisdiction over US nationals and its consequences for US foreign policy objectives meant that the US was not ready to sign and ratify the Rome Statute establishing the ICC. To this day, the US is not a Party to the Rome Statute.

After a discussion of the main points of criticism the US has voiced about the Rome Statute and the ICC in general, including concerns about jurisdiction, lack of political oversight, potential for politicised prosecutions, and an alleged lack of “due process”

rights, the last section of the first part explored some of the legislative and political steps the US has taken to block the ICC from exercising its jurisdiction. This discussion included the controversial bilateral “immunity agreements” the US has concluded with other states under Article 98(2) of the Rome Statute to prevent these states from cooperating with the ICC and from extraditing any US nationals (or nationals of US allies) to the Court upon the ICC’s request.

Furthermore, the US Congress also passed the American Service-Members' Protection Act of 2002, commonly known as the ”Hague Invasion Act”, which introduced severe restrictions to the cooperation between any US government agencies and the ICC. The ASPA also authorized the US executive branch to withhold US military aid to other countries, particularly if these countries had not yet entered into the previously mentioned Article 98(2) agreements. Essentially, the ASPA gave the US a statutory mechanism to put pressure on and coerce those states depending on US military aid into signing the bilateral agreements put forward by the US.

In addition to the two legislative steps mentioned above, the US also used its position as a permanent member of the UN Security Council in an attempt to prevent a referral of the conflict in Darfur to the Prosecutor of the ICC. Despite its best efforts, a lack of viable alternatives and a lack of support both domestically and internationally for the proposed alternatives meant that the US ultimately refrained from blocking this referral. US officials nevertheless maintained that its abstention from rather than veto against the referral did not indicate a change in overall US attitudes towards the ICC.

Lastly, the US took the most drastic and most controversial steps against the ICC after the Pre-Trial Chamber authorized an investigation into the Situation in Afghanistan on the request of the Prosecutor, which alleged multiple violations of international law amounting to war crimes by US nationals. Then-President Donald Trump signed an Executive Order which imposed a number of economic sanctions and visa restrictions against individuals with connections to the ICC, including ICC Prosecutor Fatou Bensouda, and included very broad prohibitions against transactions and other interactions with the individuals concerned. This executive order was met with strong criticism both domestically and internationally. The

sanctions, visa restrictions, and other prohibitions ended when President Joseph R. Biden revoked the executive order in 2021.

The question arises why the US has continued to pursue aggressive steps towards the ICC, given that it has continuously experienced both domestic and international backlash for its actions, as well as limited its own ability to cooperate in matters of international justice. While the US has cited concerns over jurisdictional overreach, potential politicised prosecutions, and a lack of procedural rights as reasons for its continued hostility and resistance towards the ICC, the principle of complementarity prevents the ICC from initiating any proceedings against individuals which were already genuinely investigated and/or prosecuted by the US justice system. The second part of the thesis thus turned to an analysis of the US conduct with respect to its investigations of alleged war crimes committed by its nationals in Afghanistan and Iraq during the US "War on Terror". After established the international and domestic laws and provisions relevant to the conduct of members of the CIA and the US armed forces during these two armed conflicts, the thesis then proceeded with its analysis of the "genuine willingness to investigate and prosecute" its nationals in four distinct situations.

First, the analysis looked into two investigations of alleged war crimes committed by members of the US armed forces on the ground in Afghanistan and Iraq. The first incident analysed was the Haditha massacred, during which members of the Kilo Company of the 3rd Battalion of the First Marine Regiment killed 24 Iraqi civilians, most likely in retribution for a roadside IED which had killed a soldier in their unit earlier the same day. The second situation analysed was the series of "thrill killings" committed by members of the 3rd Platoon, B Company, 2nd Battalion, 1st Infantry Regiment of the US Army. The analysis of the first case revealed significant issues with the investigation and prosecution of us nationals in "fog-of-war" cases, in which the perpetrator of war crime claimed that they had lost control in a situation of life and death, despite evidence to the contrary. The prosecution in the Haditha case only brough charges against a single individual and later offered this perpetrator a plea deal for the lesser charge of negligent dereliction of duty. Both the Haditha case and the Kill Team case demonstrated serious reporting issues as well as a demonstrated unwillingness to investigate allegations of alleged crimes committed

by members of the US armed forces inconsistent with a willingness to bring perpetrators of war crimes to justice.

Next, the analysis turned to the investigation of air strikes conducted by the US military which caused civilian casualties. The analysis focussed mainly on the airstrike during the Azizabad raid, which was conducted by US and Afghan forces, and which caused the deaths of up to 90 civilians. US officials responsible for the US military operations in the region refused to acknowledge that a large number of civilians had died. Only when promoted by a report of UN investigators did the US officials admit that a small number of civilians may have been killed in the airstrike. After video evidence was made available of the aftermath of the bombing, US officials were forced to open another investigation into the incident and to eventually admit that up to 30 civilians, including several children, had probably been killed in the airstrike. The continued failure to conduct genuine investigations into alleged incidents with civilian casualties is even more worrying when compared to the policy the US has employed which respect to airstrikes, which allows for airstrikes with limited intelligence on potential civilian casualties.

The discussion then moved onto the infamous torture methods and policies employed by both the US armed forces and CIA operatives in Afghanistan and Iraq, which constituted acts of torture and cruel and inhuman treatment amounted to torture under Article 8 of the Rome Statute. This analysis found that the US took the approach not to investigate or prosecute any individuals which acted “with good faith” and within the guidelines or policy they were provided with by their superiors. While this alone could be a reason to question the genuine willingness to investigate and prosecute individuals who committed war crimes, the real problem in this approach lies with the fact that the US has also failed to initiate any proceedings into those individuals which were responsible for the development, approval, implementation, and oversight of the unlawful interrogation techniques.

Lastly, the analysis considered the presidential pardons (“executive grants of clemency”) the-President Donald Trump granted to multiple individuals accused of or convicted for war crimes committed in Afghanistan and Iraq. While alternative forms of justice, such as grants of clemency, are not *per se* indicative of an unwillingness to prosecute perpetrators of war crimes, the findings of the analysis conducted in this

section strongly suggests that the clemency was granted strongly suggests that the deviation from the traditional US justice system was mainly intended to shield perpetrators from justice rather than bring about justice through alternative means.

In summary, the relationship between the US and the ICC has been difficult since the establishment of the Court and was further strained by actions taken by the George W. Bush and the Donald J. Trump administrations. While the US has time and time again cited concerns over potential politicised prosecutions and the jurisdictional overreach of the Court as its reasons for the continued hostilities towards the ICC, an analysis of the conduct of the US with respect to the investigation and prosecution of its nationals in cases of alleged war crimes suggest that the real concern of the US has been the accountability for the actions of its nationals the US would face, if the ICC was able to investigate and prosecute such cases in within its jurisdiction.

Annex 1: List of indicia of unwillingness or inability to genuinely carry out proceedings [438]

Purpose of shielding

- It is always possible that one may obtain direct evidence of a purpose of shielding, for example, through testimony of an "insider";
- Evidence of shielding may exist in documentary form, including legislation, orders, amnesty decrees, instructions and correspondence;
- Proof of shielding may also be sought through expert witnesses on the politicised nature of a national system;
- Many factors listed below (delay, lack of impartiality, longstanding knowledge of crimes without action) will also help establish "shielding".

Delay

- Delay in various stages of the proceedings (both investigative and prosecutorial) should be examined, for example, in comparison with normal delays in that national system for cases of similar complexity.
- Where there is delay, are there justifications for that delay?
- Where there is unjustified delay, is it inconsistent with an intent to bring the person concerned to justice?

Independence

- Degree of independence of judiciary, of prosecutors of investigating agencies; procedures of appointment and dismissal; nature of governing body;
- Patterns of political interference in investigation and prosecution; and
- Patterns of trials reaching preordained outcomes.

Impartiality

- Commonality of purpose between suspected perpetrators and state authorities involved in investigation, prosecution or adjudication. This constitutes circumstantial evidence for an inference of non-genuineness. This can include:
    - political objectives of state authority, dominant political party; and

[438] Source: ICC Office of the Prosecutor, "The Principle of Complementarity in Practice," 2003. Available at: https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2009_02250.PDF

    - coincidence or dissonance in objectives and crime (political gains, territorial goals, subjugation of group).

- Rapport between authorities and suspected perpetrators (this applies only in situations where the investigative, prosecutorial or judicial authorities are not independent of other authorities):
    - official statements (condemning or praising actions);
    - awards or sanctions, promotion or demotion;
    - financial support; and
    - deployment or withdrawal of law enforcement, inhibiting or supporting investigation.
- Linkages between perpetrators and judges; and
- Dismissal, reprisals against investigating staff for diligence or lack thereof.

Other indicators that may relate to “shielding”, “intent”, “impartiality”, and to “manner” of conducting proceedings, which may not be sufficient proof of unwillingness on their own, but may be relevant when considered in context along with other indicators:

- Longstanding knowledge of crimes without action, and investigation launched only when ICC took action;
- Number of investigations opened (in proportion to number of crimes, resources);
- Resources allocated to investigation and prosecution;
- Pacing and development of investigation;
- Uncharacteristic hastiness may also be an indication of a desire to whitewash as quickly as possible;
- Overall investigative steps manifestly insufficient in the light of the available steps;
- Evidence gathered was manifestly insufficient in the light of evidence the OTP can show is available;
- Hierarchical level: how high up the scale of authority did investigations and prosecutions reach?
- Adequacy of charges and modes of liability vis-à-vis the gravity and evidence;
- Were special tribunals, special processes or special investigators with lenient approaches established specifically for the perpetrators? Were special judges, prosecutors or jury members selected for the trial, in deviation from normal processes?
- Did investigators, judges or prosecutors deviate from established practices and procedures in a manner suggesting a deliberate lack of diligence?
- Was the evidence introduced manifestly insufficient in the light of evidence collected?

- Was inculpatory evidence ignored and downplayed? Was the overall situation consistently characterized in a misleading way (eg. avoiding obvious proof of state involvement, describing a one-sided genocide as civil unrest, etc)? Was exculpatory evidence exaggerated?
- Were victims and witnesses intimidated or discouraged from participating? Were reasonable steps taken to protect witnesses from being intimidated by third parties?
- Obvious departures from normal procedures, showing unusual lenience and deference to accused;
- Were findings rendered that were irreconcilable with the evidence tendered? Were findings markedly slanted in one direction?
- Were unusual rulings of law made in departure from previous practice and to the benefit of accused? Was substantive law (offences, defences) generally compatible with international standards, or where there significant departures that raise concerns about “genuineness”?
- Were amnesties, pardons, or grossly inadequate sentences issued after the proceeding, in a manner that brings into question the genuineness of the proceedings as a whole?
- Refusal to allow observers or trial monitors (unless justification shown); and
- Refusal to co-operate with the ICC by a State Party or a State otherwise accepting an obligation to co-operate.

Bibliography

2d Marine Division, USMC. “Press Release # 05-141.” Press release, November 20, 2005. https://www-tc.pbs.org/wgbh/pages/frontline/haditha/etc/release.pdf.

Adams, David. “U.S. Soldier Convicted of Murdering Two Afghans Is ‘Scapegoat:’ Lawyer.” *Reuters*, August 3, 2013. https://www.reuters.com/article/us-usa-military-murder/u-s-soldier-convicted-of-murdering-two-afghans-is-scapegoat-lawyer-idUSBRE97201H20130803.

Adams, Guy. “‘Shoot First... Ask Questions Later,’ Ordered Marine.” *The Independent*, January 10, 2012.

Brisbane Times. “Afghan Cabinet Demands Review of Troops’ Presence,” August 26, 2008. https://www.brisbanetimes.com.au/world/afghan-cabinet-demands-review-of-troops-presence-20080826-geaajo.html.

Army Board for Correction of Military Records. “Case No. AR20200000309,” June 26, 2020. https://boards.law.af.mil/ARMY/BCMR/CY2020/20200000309.txt.

Barnidge, Robert P. “The American Servicemembers’ Protection Act and Article 98 Agreements: A Legal Analysis and Case for Constructive Engagement with the International Criminal Court.” *Tilburg Law Review* 11, no. 4 (2003): 738–55.

Beehner, Lionel. “What Happens Now on Haditha Investigation.” *Council on Foreign Relations*, June 6, 2006. https://www.cfr.org/backgrounder/what-happens-now-haditha-investigation.

Bekou, Olympia, and Robert Cryer. “The International Criminal Court and Universal Jurisdiction: A Close Encounter?” *International and Comparative Law Quarterly* 56, no. 1 (2007): 49–68.

Bernton, Hal. “Morlock Sentenced to 24 Years for Afghanistan Murders.” The Seattle Times, March 23, 2011. https://www.seattletimes.com/seattle-news/morlock-sentenced-to-24-years-for-afghanistan-murders/.

Boal, Mark. “The Kill Team: How U.S. Soldiers in Afghanistan Murdered Innocent Civilians.” *Rolling Stone*, March 28, 2011. https://www.rollingstone.com/politics/politics-news/the-kill-team-how-u-s-soldiers-in-afghanistan-murdered-innocent-civilians-169793/.

Bogdan, Attila. “The United States and the International Criminal Court: Avoiding Jurisdiction Through Bilateral Agreements in Reliance on Article 98.” *International Criminal Law Review* 8 (2008): 1–54.

Bohrer, Ziv. “International Criminal Law’s Millennium of Forgotten History.” *Law And History Review* 34, no. 2 (2016): 393–485.

Bolton, John R. “The Risks and Weaknesses of the International Criminal Court from America’s Perspectives.” *Law And Contemporary Problems* 64 (2001): 167–80.

Booth, Christopher M. “Prosecuting the ‘Fog of War?’ Examining the Legal Implications of an Alleged Massacre of South Korean Civilians by U.S. Forces during the Opening Days of the Korean War in the Village of No Gun Ri.” *Vanderbilt Journal of Transnational Law* 33, no. 4 (2000): 933–86.

Bowman, Tom. “Timeline: Investigating Haditha.” *NPR*, May 8, 2007. https://www.npr.org/templates/story/story.php?storyId=5473735.

Brookings. “Supporting International Accountability for Ukraine,” December 29, 2022. https://www.brookings.edu/research/supporting-international-accountability-for-ukraine/.

Burch, Jonathon. “Afghan President Condemns Civilian Killings.” *Reuters*, August 23, 2008. https://www.reuters.com/article/afghan-violence-idINSP17925320080823.

Bush, George W. “Memorandum on the Human Treatment of Taliban and al Qaeda Detainees,” February 7, 2002. https://www.supremecourt.gov/opinions/URLs_Cited/OT2005/05-184/05-184_2.pdf.

Business Insider. “Former Green Beret to Plead Not Guilty to Murdering Suspected Taliban Bomb-Maker in 2010,” June 26, 2019. https://www.businessinsider.com/former-army-green-beret-matthew-golsteyn-plead-not-guilty-murder-2019-6.

Bybee, Jay S. “Memorandum for Alberto R. Gonzales, Counsel to the President. Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A.” Office of Legal Counsel, US Department of Justice, August 1, 2002. https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf.

———. “Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency. Interrogation of al Qaeda Operative.” Office of Legal Counsel, US Department of Justice, August 1, 2002. https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-bybee2002.pdf.

Carter, Linda E. “The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem.” *The Santa Clara Journal of International Law* 8, no. 165 (2010): 165–98.

Center for Army Leadership. “Case Study: Maywand District Murders.” Accessed May 4, 2023. https://cal.army.mil/case-studies/wcs-single.php?id=77&title=maywand-district-murders.

CBS News. “Marine Gets No Jail Time for Haditha Killings.” *CBS News*, January 24, 2012. https://www.cbsnews.com/news/marine-gets-no-jail-time-for-haditha-killings/.

———. “Marine Says He Would Have Leveled Iraqi Home.” *CBS News*, January 13, 2012. Accessed April 19, 2023. https://www.cbsnews.com/news/marine-says-he-would-have-leveled-iraqi-home/.

Center for Justice & Accountability. “Hamdan v. Rumsfeld.” Accessed May 29, 2023. https://cja.org/what-we-do/litigation/amicus-briefs/hamdan-v-rumsfeld/.

Central Intelligence Agency. “Office of Inspector General.” Accessed June 3, 2023. https://www.cia.gov/about/organization/inspector-general/.

CIA Inspector General. “Special Review of the Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003),” May 7, 2004. https://int.nyt.com/data/int-shared/nytdocs/docs/50/50.pdf.

Clinton, Bill. “Statement on Signature of the International Criminal Court Treaty,” December 31, 2000. Accessed April 4, 2023. https://1997-2001.state.gov/global/swci/001231_clinton_icc.html.

Cloud, David S. “Inquiry Suggests Files on Killings in Haditha Were Excised.” *The New York Times*, August 17, 2006.

Cole, Matthew. “‘Kill Team’ Soldier Gets Three Years in Prison.” *ABC News*, August 6, 2011. https://abcnews.go.com/Blotter/kill-team-soldier-years-prison/story?id=14239130.

Committee against Torture. “CAT/C/USA/CO/3-5: Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America,” December 2014. https://www.ohchr.org/en/documents/concluding-observations/catcusaco3-5-concluding-observations-combined-third-fifth.

Committee On Armed Services United States Senate. “Inquiry into the Treatment of Detainees In U.S. Custody.” Accessed November 20, 2008. https://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final_April-22-2009.pdf.

Cooper, Helene, Michael Tackett, and Taimoor Shah. “Twist in Green Beret’s Extraordinary Story: Trump’s Intervention After Murder Charges.” *The New York Times*, December 17, 2018. https://www.nytimes.com/2018/12/16/us/politics/major-matt-golsteyn-trump.html.

Corder, Mike. “US Revokes Visa for International Court Prosecutor Bensouda.” *AP News*, April 5, 2019. https://apnews.com/article/north-america-the-hague-courts-rome-international-news-a5e0748b9b7443e683c6a0f4e0c7d509.

Corn, Geoffrey S, and Rachel E VanLandingham. “Strengthening American War Crimes Accountability.” *American University Law Review* 70, no. 2 (2020): 309–86.

Crawford, James. “The ILC Adopts a Statute for an International Criminal Court.” *American Journal of International Law* 89, no. 2 (1995): 404–16.

De Waal, Alex. “Darfur and the Failure of the Responsibility to Protect.” *International Affairs* 83, no. 6 (2007): 1039–54.

Der Spiegel. “Murder in Afghanistan: Court Sentences ‘Kill Team’ Soldier to 24 Years in Prison,” March 24, 2011. https://www.spiegel.de/international/world/murder-in-afghanistan-court-sentences-kill-team-soldier-to-24-years-in-prison-a-752918.html.

———. “The Agency Went over Bounds and Outside the Rules,” August 30, 2009. https://www.spiegel.de/international/world/ex-cia-inspector-general-on-interrogation-report-the-agency-went-over-bounds-and-outside-the-rules-a-646010.html.

Devereaux, Ryan, and Jeremy Scahill. “Documents: Green Beret Who Sought Job At CIA Confessed To Murder.” *The Intercept*, May 8, 2015. https://theintercept.com/2015/05/06/golsteyn/.

Dörmann, Knut, and Laurent Colassis. “International Humanitarian Law in the Iraq Conflict.” In *German Yearbook of International Law*, 47:293–342. Berlin: Duncker & Humblot, 2004. https://www.icrc.org/en/doc/assets/files/other/ihl_in_iraq_conflict.pdf.

Eggen, Dan, and Walter Pincus. “FBI, CIA Debate Significance of Terror Suspect,” December 18, 2007. https://www.washingtonpost.com/wp-dyn/content/article/2007/12/17/AR2007121702151_pf.html.

European External Action Service. “International Criminal Justice: Statement by the High Representative Following the US Decision on Possible Sanctions Related to the International Criminal Court,” June 16, 2020. https://www.eeas.europa.eu/eeas/international-criminal-justice-statement-high-representative-following-us-decision-possible_en.

European Parliament. “European Parliament Resolution on the Draft American Servicemembers’ Protection Act (ASPA),” July 4, 2002. https://www.europarl.europa.eu/doceo/document/RC-5-2002-0386_EN.html.

Executive Office of the President. “Executive Order 13928: Blocking Property of Certain Persons Associated With the International Criminal Court,” June 11, 2020. https://www.federalregister.gov/documents/2020/06/15/2020-12953/blocking-property-of-certain-persons-associated-with-the-international-criminal-court.

Fallon, Amy. “US Soldier Jailed for Seven Years over Murders of Afghan Civilians.” *The Guardian*, September 23, 2011. https://www.theguardian.com/world/2011/sep/24/us-soldier-jailed-afghan-civilians.

Faulhaber, Lilian V. “American Servicemembers’ Protection Act of 2002.” *Harvard Journal on Legislation* 40, no. 2 (2003): 537–58.

Fehl, Caroline. “Growing Up Rough: The Changing Politics of Justice at the International Criminal Court.” Frankfurt: Peace Research Institute Frankfurt, 2014.

Feinstein, Dianne. “Feinstein Remarks on CIA Report.” Press release, December 9, 2014. https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=d2677a34-2d91-4583-92a4-391f68ceae46.

Ferencz, Benjamin B., and Louis B. Sohn. *Defining International Aggression: The Search for World Peace*, 1975.

Ford, Stuart. “Has President Trump Committed A War Crime by Pardoning War Criminals?” *American University International Law Review* 35, no. 4 (2020): 757–820.

Foster, Caitlin. “Watch the Fox News Interview That Launched the Murder Investigation of an Army Hero.” *Business Insider*, December 19, 2018. https://www.businessinsider.com/watch-the-interview-that-launched-murder-investigation-of-an-army-hero-2018-12.

Fox News. “Defense Lawyers Give Stories of Marines Under Investigation in Haditha Probe,” January 6, 2007.

France 24. “US Army Acknowledges Killing 33 Civilians in Air Strike,” December 10, 2008. https://www.france24.com/en/20081009-us-army-acknowledges-killing-33-civilians-air-strike-.

Gall, Carlotta. “Evidence Points to Civilian Toll in Afghan Raid.” *The New York Times*, September 8, 2008. https://www.nytimes.com/2008/09/08/world/asia/08afghan.html.

Gibbons-Neff, Thomas. “Army Charges Special Forces Soldier in 2010 Killing of Afghan.” *The New York Times*, December 14, 2018. https://www.nytimes.com/2018/12/14/us/politics/mathew-golsteyn-special-forces-murder-charges.html.

Goetz, John, and Marc Hujer. “Adam’s War: The Good Boy and the ‘Kill Team.’” *Der Spiegel*, March 31, 2011. https://www.spiegel.de/international/world/adam-s-war-the-good-boy-and-the-kill-team-a-754141.html.

Gosh, Aparisim. “On Scene: Picking up the Pieces In Haditha.” TIME, May 29, 2006.

Gossman, Patricia. “How US-Funded Abuses Led to Failure in Afghanistan.” *Human Rights Watch*, July 6, 2021. https://www.hrw.org/news/2021/07/06/how-us-funded-abuses-led-failure-afghanistan.

Hamilton, Rebecca. “Inside Colin Powell's Decision to Declare Genocide in Darfur.” *The Atlantic*, August 17, 2011. https://www.theatlantic.com/international/archive/2011/08/inside-colin-powells-decision-to-declare-genocide-in-darfur/243560/.

Harris, Paul. “US Soldier Admits Killing Unarmed Afghans for Sport.” *The Guardian*, March 23, 2011. https://www.theguardian.com/world/2011/mar/23/us-soldier-admits-killing-afghans.

Hattem, Julian. “The Hill.” *The Hill*, December 10, 2014. https://thehill.com/policy/defense/226603-justice-department-wont-reopen-torture-probes/.

Heyder, Corrina. “The U.N. Security Council’s Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court’s Functions and Status.” *Berkeley Journal of International Law* 24, no. 2 (2006): 650–71.

Human Rights Watch. “Darfur: Whose Responsibility to Protect: The United States and Darfur,” January 2005. https://www.hrw.org/legacy/wr2k5/darfur/4.htm.

———. “Letter to Secretary of Defense Robert Gates on US Airstrikes in Azizabad, Afghanistan,” January 14, 2009. https://www.hrw.org/news/2009/01/14/letter-secretary-defense-robert-gates-us-airstrikes-azizabad-afghanistan.

———. “Sudan: ICC Holds First Darfur Trial,” March 29, 2022. https://www.hrw.org/news/2022/03/29/sudan-icc-holds-first-darfur-trial.

———. “U.S.: ‘Hague Invasion Act’ Becomes Law,” August 3, 2002. https://www.hrw.org/news/2002/08/03/us-hague-invasion-act-becomes-law.

———. “US Sanctions on the International Criminal Court,” December 14, 2020. https://www.hrw.org/news/2020/12/14/us-sanctions-international-criminal-court.

———. “US Threatens International Criminal Court,” March 15, 2019. https://www.hrw.org/news/2019/03/15/us-threatens-international-criminal-court.

ICC Office of the Prosecutor. “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 Authorisation to Resume Investigations in the Situation in Afghanistan.” Press release, September 21, 2021. https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application.

———. “The Principle of Complementarity in Practice,” 2003. https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2009_02250.PDF.

International Criminal Court. “ICC - The Court Is Ready to Receive the Senior Authorities.” Press release, February 3, 2003. https://www.icc-cpi.int/news/icc-court-ready-receive-senior-authorities.

———, ed. *Rules of Procedure and Evidence*. *ICC-ASP/1/3 (Part II-A)*, 2002.

International Law Commission. “UN Doc A/49/10: Report of the International Law Commission on the Work of Its 46th Session (2 May – 22 July 1994),” 1994.

Jaffe, Greg. “Soldiers Who Served under Clint Lorance in Afghanistan See Trump’s Pardon as Betrayal.” *The Washington Post*, July 2, 2020. https://www.washingtonpost.com/graphics/2020/national/clint-lorance-platoon-afghanistan/.

Karl, Jonathan. “Investigator Urges Against Haditha Murder Charge.” *ABC News*, February 28, 2008. Accessed April 3, 2023. https://abcnews.go.com/Politics/story?id=3690954&page=1.

Khan, Azmat. “Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes.” *The New York Times*, April 6, 2022.

Kirsch, Philippe, and John Holmes. “The Birth of the International Criminal Court: The 1998 Rome Conference.” *The Canadian Yearbook of International Law* 36 (1999): 3–39.

Knickmeyer, Ellen. “In Haditha, Memories of a Massacre Iraqi Townspeople Describe Slaying of 24 Civilians by Marines in Nov. 19 Incident.” The Washington Post, May 27, 2006.

Lamothe, Dan. “Army Revokes Silver Star Award for Green Beret Officer, Citing Investigation.” *Washington Post*, February 4, 2015. https://www.washingtonpost.com/news/checkpoint/wp/2015/02/04/army-revokes-silver-star-award-for-green-beret-officer-citing-investigation/.

———. “Former Special Forces Soldier, Once Lauded as a Hero, Faces Murder Charge.” *Washington Post*, December 13, 2018. https://www.washingtonpost.com/world/national-security/former-special-forces-soldier-once-lauded-as-a-hero-faces-murder-charge/2018/12/13/bb4a11ee-ff10-11e8-ad40-cdfd0e0dd65a_story.html.

Leithead, Alastair. “Afghan Bombing Drives Allies Apart.” BBC News, August 27, 2008.

Levine, Sam. “The One Man Jailed For CIA Torture Tried To Expose It.” *The Huffington Post*, December 10, 2014. https://www.huffpost.com/entry/cia-torture-prosecution_n_6298646.

Library of Congress. “Uniform Code of Military Justice (1946-1951).” Accessed April 8, 2023. https://www.loc.gov/collections/military-legal-resources/articles-and-essays/military-law-and-legislative-histories/uniform-code-of-military-justice-1946-to-1951.

Linehan, Adam. “The Campaign To Free Clint Lorance Was Just Dealt A Devastating Blow.” *Task & Purpose*, July 12, 2017. https://taskandpurpose.com/news/campaign-free-clint-lorance-just-dealt-devastating-blow/.

Londoño, Ernesto. “Army Officer Convicted in Shooting Deaths of 2 Afghans.” *The Washington Post*, August 2, 2013. https://www.washingtonpost.com/world/national-security/army-officer-convicted-in-shooting-deaths-of-2-afghans/2013/08/01/6ec9aca6-fae0-11e2-a369-d1954abcb7e3_story.html.

Lopez, C. Todd. “Five Soldiers Charged in Murders of Afghans,” June 17, 2010. https://www.army.mil/article/41017/five_soldiers_charged_in_murders_of_afghans.

Los Angeles Times. “Timeline: The History of the CIA Detention and Interrogation Program,” December 9, 2014. https://www.latimes.com/nation/la-na-timeline-of-cia-interrogation-program-20141209-story.html.

Maculan, Elena. “International Crimes or Ordinary Crimes? The ‘Dual Classification of the Facts’ as an Interpretive Method.” *International Criminal Law Review* 21 (2021): 403–44.

Margolis, David. “Memo of Decision Regarding Objections to the Findings of Professional Misconduct in the OPR’s Report of Investigation into the OLC’s Memo Concerning Issues Relating to the CIA’s Use of ‘EITs’ on Suspected Terrorists.” US Department of Justice, January 5, 2010. https://documentafterlives.newmedialab.cuny.edu/content/doj-memo-david-margolis-ag-re-memo-decision-re-objections-findings-professional-misconduct.

Mazzetti, Mark. “Bush Officials Linked to Debate on Interrogation Methods for Detainees.” *The New York Times*, September 25, 2008. https://www.nytimes.com/2008/09/25/washington/25detain.html.

McCarthy, Rory. “Wedding Party Massacre.” *The Guardian*, June 15, 2016.

McGirk, Tim. “Collateral Damage or Civilian Massacre in Haditha?” TIME, March 19, 2006.

McGreal, Chris. “‘Kill Team’ US Platoon Commander Guilty of Afghan Murders.” *The Guardian*, November 11, 2011. https://www.theguardian.com/world/2011/nov/11/kill-team-calvin-gibbs-convicted.

———. “US Soldiers ‘Killed Afghan Civilians for Sport and Collected Fingers as Trophies.’” *The Guardian*, September 9, 2010. https://www.theguardian.com/world/2010/sep/09/us-soldiers-afghan-civilians-fingers.

Meo, Nick. “Afghan Villager Sentenced to Death for ‘wrong Information’ Which Caused Bombing Tragedy.” *The Telegraph*, February 28, 2009. https://www.telegraph.co.uk/news/4886078/Afghan-villager-sentenced-to-death-for-wrong-information-which-caused-bombing-tragedy.html.

Miglani, Sanjeev. “U.S. to Look Again at Civilian Deaths in Afghan Raid.” *Reuters*, September 8, 2008. https://www.reuters.com/article/us-afghan-civilians/u-s-to-look-again-at-civilian-deaths-in-afghan-raid-idUSSP33911220080908.

Minot Daily News. “Military Vet Says Guantanamo Bay Prison Should Not Close,” September 24, 2016. https://www.minotdailynews.com/news/local-news/2016/09/military-vet-says-guantanamo-bay-prison-should-not-close/.

Mitgutsch, Ingrid. “(In-)Sufficient Gravity of Cases before the International Criminal Court: Developing a Gravity Test through Case Law.” Völkerrechtsblog, July 12,

2022. Accessed March 10, 2023. https://voelkerrechtsblog.org/in-sufficient-gravity-of-cases-before-the-international-criminal-court/.

Mogelson, Luke. “A Beast in the Heart of Every Fighting Man.” *The New York Times*, April 27, 2011. https://www.nytimes.com/2011/05/01/magazine/mag-01KillTeam-t.html.

Morgan, David. “Inquiry Shows Afghan Raid Killed 33 People.” *Reuters*, October 8, 2008. https://www.reuters.com/article/us-afghan-usa-civilians-report-idUSTRE49777T20081008.

Murphy, Brett. “Inside the U.S. Military’s Raid against Its Own Security Guards That Left Dozens of Afghan Children Dead.” *USA Today*, December 12, 2019. https://www.usatoday.com/in-depth/news/investigations/2019/12/29/security-guards-afghan-warlords-mass-civilian-casualties/2675795001/.

Naqvi, Yasmin. “Amnesty for War Crimes: Defining the Limits of International Recognition.” *International Review of the Red Cross* 85, no. 851 (2003): 583–626.

NBC San Diego. “Marine ‘Lost Control’ in Haditha: Prosecutors,” January 9, 2012. https://www.nbcsandiego.com/news/local/opening-statements-to-begin-in-trial-of-frank-wuterich/1947989/.

NPR. “Charges Dropped for Two Marines in Haditha Case,” August 9, 2007. https://www.npr.org/2007/08/09/12634743/charges-dropped-for-two-marines-in-haditha-case.

———. “What Happened at Haditha?,” May 31, 2006. https://www.npr.org/transcripts/5442144.

Obama, Barack. “Executive Order 13491: Ensuring Lawful Interrogations.” The White House, January 22, 2009. https://obamawhitehouse.archives.gov/the-press-office/ensuring-lawful-interrogations.

Office of the Inspector General of the Department of Defense. “Reviev of Criminal Investigations of Alleged Detainee Abuse,” August 25, 2006. https://apps.dtic.mil/sti/pdfs/ADA596325.pdf.

Office of the Pardon Attorney. “Office of the Pardon Attorney: About the Office,” January 9, 2023. https://www.justice.gov/pardon/about-office.

Office of the Pardon Attorney. “Office of the Pardon Attorney: Frequently Asked Questions,” May 15, 2023. https://www.justice.gov/pardon/frequently-asked-questions.

Perry, Tony. “Marine Testifies Squad Leader Asked Him to Lie about Iraqi Killings.” *Los Angeles Times*, January 12, 2012. https://www.latimes.com/local/la-xpm-2012-jan-12-la-me-marine-trial-20120112-story.html.

Philippe, Xavier. “The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?” *International Review of the Red Cross* 88, no. 862 (2006): 375–98.

Philipps, Dave. “Cause Célèbre, Scorned by Troops.” *The New York Times*, February 24, 2015. https://www.nytimes.com/2015/02/25/us/jailed-ex-army-officer-has-support-but-not-from-his-platoon.html.

———. “Trump Clears Three Service Members in War Crimes Cases.” *The New York Times*, November 22, 2019. https://www.nytimes.com/2019/11/15/us/trump-pardons.html.

Porterfield, Elaine. “Army Whistleblower Recalls Sergeant’s Chilling Threat.” *Reuters*, November 4, 2011. https://www.reuters.com/article/us-soldiers-crimes-idUSTRE7A30NF20111104.

Reeker, Philip T. “U.S. and Romania Sign Article 98 Agreement.” Press release, August 1, 2002. https://2001-2009.state.gov/r/pa/prs/ps/2002/12393.htm.

Relman, Eliza. “The Fox Host with Trump’s Ear on Military Issues Urges Him to Bomb Iranian Cultural Sites and ‘rewrite the Rules’ of War to Be ‘Advantageous to Us.’” *Business Insider*, January 8, 2020. https://www.businessinsider.com/fox-host-pete-hegseth-tells-trump-to-bomb-iranian-homeland-2020-1.

Ricks, Thomas E. “Haditha Probe Finds Leadership Negligent.” The Washington Post, July 9, 2006.

Roth, Kenneth. “Beyond Russia: The Real Threat to Human Rights Is from China.” *Human Rights Watch*, June 20, 2022. https://www.hrw.org/news/2022/06/20/beyond-russia-real-threat-human-rights-china.

Savage, Charlie. “Case of Soldiers Accused in Civilian Killings May Eclipse Those That Came Before.” *The New York Times*, October 4, 2010.

Savage, Charlie, and Elisabeth Bumiller. “An Iraqi Massacre, a Light Sentence and a Question of Military Justice.” *The New York Times*, October 3, 2010.

Scharf, Michael P. “Results of the Rome Conference for an International Criminal Court.” *American Society of International Law Insights* 3, no. 10 (1998).

Scheffer, David J. “The United States and the International Criminal Court.” *American Journal of International Law* 93, no. 1 (1999): 12–22.

Scheffer, David J., and Ashley Cox. “The Constitutionality of the Rome Statute of the International Criminal Court.” *Journal of Criminal Law & Criminology* 98, no. 3 (March 1, 2008): 983–1068.

Schmitt, Eric. “Abuse Inquiry Finds Flaws.” *The New York Times*, December 4, 2004. https://www.nytimes.com/2004/12/04/politics/abuse-inquiry-finds-flaws.html.

Shanker, Thom, Eric Schmitt, and Richard A. Oppel Jr. “Military to Report Marines Killed Iraqi Civilians.” *The New York Times*, May 26, 2006.

Siddique, Abubakar. “Afghanistan Concludes 90 Civilians Killed In Coalition Air Strike.” *RadioFreeEurope/RadioLiberty*, February 2, 2012. https://www.rferl.org/a/Afghanistan_Concludes_90_Civilians_Killed_In_Coalition_Air_Strike/1193469.html.

Siddique, Haroon. “US Reopens Inquiry into Afghanistan Attack as New Evidence Emerges.” *The Guardian*, September 8, 2008. https://www.theguardian.com/world/2008/sep/08/afghanistan.usa1.

Sisk, Richard. “He Was Convicted of War Crimes and Pardoned by Trump. Now He Wants to Reform Military Justice.” *Military.Com*, October 25, 2020. https://www.military.com/daily-news/2020/10/25/he-was-convicted-of-war-crimes-and-pardoned-trump-now-he-wants-reform-military-justice.html.

South, Todd. “Army Green Beret Major Pleads Not Guilty to Afghan Murder Charge.” *Army Times*, June 27, 2019. https://www.armytimes.com/news/your-army/2019/06/27/army-green-beret-major-pleads-not-guilty-to-afghan-murder-charge.

Speri, Alice. “How the U.S. Derailed an Effort to Prosecute Its Crimes in Afghanistan.” The Intercept, October 5, 2021. Accessed January 22, 2023. https://theintercept.com/2021/10/05/afghanistan-icc-war-crimes/.

Starr, Barbara, and Nicole Gaouette. “Esper to Urge Trump Not to Intervene in Cases of Service Members Facing War Crimes Allegations,” November 6, 2019. https://edition.cnn.com/2019/11/06/politics/mark-esper-trump-war-crime-interventions/index.html.

Stomper, John. “The Darfur Dilemma: U.S. Policy Toward the ICC.” *Georgetown Journal of International Affairs* 7, no. 1 (2006): 111–19.

Straziuso, Jason. “US Probe Finds Fewer Afghan Deaths than UN Claimed.” *Associated Press*. Accessed April 28, 2023. http://ap.google.com/article/ALeqM5i8dGftYb0s4XWdUMRdIVs3vh1CKAD92ULSLO0.

The Orange County Register. “Marine Charged in Iraq Deaths Said Women and Kids Should Be Shot,” July 16, 2007. https://www.ocregister.com/2007/07/16/marine-charged-in-iraq-deaths-said-women-and-kids-should-be-shot.

The Sudan Tribune. “Majority of Americans Favors Referring Darfur War Crime Cases to ICC.” Accessed May 25, 2023. https://sudantribune.com/article9010/.

The White House. “Protecting American Constitutionalism and Sovereignty from the International Criminal Court.” Press release, September 10, 2018.

https://trumpwhitehouse.archives.gov/briefings-statements/protecting-american-constitutionalism-sovereignty-international-criminal-court/.

———. “Statement from the Press Secretary,” November 15, 2019. https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-97/.

Tomuschat, Christian. “The Legacy of Nuremberg.” *Journal of International Criminal Justice* 4, no. 4 (2006): 830–44.

Trahan, Jennifer, and Andrew Egan. “U.S. Opposition to the International Criminal Court.” *Human Rights (ABA)* 30, no. 1 (2003).

UN News. “At Least 90 Afghan Civilians Killed in Recent Military Operations, Says UN,” August 26, 2008. https://news.un.org/en/story/2008/08/270632.

UN Press. “UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court. Press Release L/2889,” July 20, 1998. Accessed March 22, 2023. https://press.un.org/en/1998/19980720.l2889.html.

United Nations Security Council. “Current Members: Permanent and Non-Permanent Members.” Accessed January 11, 2023. https://www.un.org/securitycouncil/content/current-members.

United States Department of Defense. “Military Justice Overview.” DoD Victim and Witness Assistance. Accessed April 3, 2023. https://vwac.defense.gov/military.aspx.

United States District Court for the District of Kansas. “Lorance v. Commandant, Case No. 18-3297-JWL,” November 8, 2019. https://casetext.com/case/lorance-v-commandant.

United States Senate Select Committee on Intelligence. “Intelligence Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program,” December 9, 2014. https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf.

US Army Center for Army Leadership. “Written Case Study: Haditha, Iraq.” Accessed April 21, 2023. https://capl.army.mil/case-studies/wcs-single.php?id=25&title=haditha-iraq.

US Department of Defense, Office of the Inspector General. “Review of DoD-Directed Investigations of Detainee Abuse,” August 25, 2006. https://www.dodig.mil/FOIA/FOIA-Reading-Room/Article/1238906/review-of-dod-directed-investigations-of-detainee-abuse-u-redacted/.

US Department of Justice. “Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees.” Press release, August 24, 2009. https://www.justice.gov/opa/speech/attorney-general-eric-holder-regarding-preliminary-review-interrogation-certain-detainees.

———. “Clemency Recipients,” March 28, 2023. https://www.justice.gov/pardon/clemency-recipients.

———. “Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees,” June 30, 2011. https://www.justice.gov/opa/pr/statement-attorney-general-regarding-investigation-interrogation-certain-detainees.

US Department of Justice, 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 Suspected Terrorists,” July 29, 2009. https://www.thetorturedatabase.org/node/11919.

US Department of State. “Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court.” Press release, April 2, 2021. https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/.

———. “One-Year Follow-up Response of the United States of America to Recommendations of the Committee Against Torture on Its Combined Third to Fifth Periodic Reports,” November 27, 2015. https://2009-2017.state.gov/j/drl/rls/250342.htm.

———. “U.S. Participation in Rome Conference on the Establishment of an International Criminal Court.” Press release, June 12, 1998. https://1997-2001.state.gov/briefings/statements/1998/ps980612a.htm.

US Department of the Army. “Field Manual 34-52 ‘Intelligence Interrogation,’” September 28, 1992. https://irp.fas.org/doddir/army/fm34-52.pdf.

The Guardian. “US Marine Reaches Plea Deal over Deaths of Unarmed Iraqis,” January 23, 2012. https://www.theguardian.com/world/2012/jan/23/us-marine-frank-wuterich-iraqi-deaths.

The Guardian. “US Military Drops ‘kill Team’ Charges against Soldier,” February 4, 2012. https://www.theguardian.com/world/2012/feb/04/us-military-drops-kill-team-charges.

Walker, Mark. “Hearing Officer Recommends Charges Be Dropped in Haditha Case.” *North County Times*, August 23, 2007.

Watkins, Ali. “Senate Report On CIA Torture Fails To Answer One Question: What Now?” *The Huffington Post*, December 11, 2014. https://www.huffpost.com/entry/senate-cia-torture_n_6285232.

Wedgwood, Ruth. “The Irresolution of Rome.” *Law And Contemporary Problems* 64, no. 1 (2001): 193–214.

Whitcomb, Dan. “Charges Dropped against Marine in Haditha Case.” *Reuters*, March 28, 2008. https://www.reuters.com/article/us-usa-haditha-marine-idUSN2844311120080328.

Whitlock, Craig. “Army Probe: No ‘Causal Relation’ between Commander, Afghan Killings.” *Washington Post*, April 5, 2011. https://www.washingtonpost.com/world/army-probe-no-causal-relation-between-commander-afghan-killings/2011/04/04/AFhAPFgC_story.html.

———. “Members of Stryker Combat Brigade in Afghanistan Accused of Killing Civilians for Sport.” The Washington Post, September 18, 2010. https://www.washingtonpost.com/wp-dyn/content/article/2010/09/18/AR2010091803935_pf.html.

Wilson, Stan, and Michael Martinez. “Marine in Haditha, Iraq, Killings Gets Demotion, Pay Cut.” *CNN*, January 25, 2012. https://edition.cnn.com/2012/01/24/justice/california-iraq-trial/index.html.

Yardley, William. “Young Soldier Both Revered and Reviled.” *The New York Times*, October 5, 2010. https://www.nytimes.com/2010/10/05/world/asia/05gibbs.html.

Young Reeves, Teresa. “A Global Court? U.S. Objections to the International Criminal Court and Obstacles to Ratification.” *Human Rights Brief (American University)* 8, no. 1 (2000): 15–30.

Abstract (English)

It was the aim of this thesis to analyse the attitude of the United States towards the International Criminal Court and to contrast this attitude with its own conduct in investigating and prosecuting allegations of international crimes by US nationals.

The International Criminal Court (ICC) occupies an important role in the international system as independent and permanent “court of last resort” if a state fails to or is unable or unwilling to genuinely discharge its duty to prosecute international crimes within its jurisdiction. The US, which is not a party to the Rome Statute establishing the ICC, has voiced strong criticism of the Court including its (almost) universal jurisdiction, the independence of its prosecutor, and an alleged lack of procedural rights under the Rome Statute. Consequently, the relationship between the US and the ICC has been very strained over the past decades and the US has used several political actions, policies, and legislation to block the ICC from exercising its jurisdiction over US nationals. However, given that any case concerning alleged crimes under the jurisdiction of the Court would be inadmissible before the ICC if the US had exercised their right to primary jurisdiction over a case concerning US nationals, the question arises why the US is nevertheless persistent in its hostile behaviour towards the ICC.

The second part of the thesis therefore conducted a case study to analyse whether the US has shown a “*willingness to genuinely carry out the investigation or prosecution*”, as envisaged by Article 17 of the Rome Statute, in instances of alleged war crimes committed by its nationals in Afghanistan and Iraq during the "War on Terror". The study identified four types of cases that warranted investigation: “traditional” war crimes committed by individual actors, airstrikes causing civilian casualties, torture committed on foreign territory, and presidential pardons of individuals accused or convicted of war crimes. The case study revealed evidence for not only a lack of willingness but also a demonstrated unwillingness by the US to genuinely investigate these allegations in all four situations that were analysed. The analysis further found that although the US has shown a willingness to genuinely prosecute individuals which clearly acted contrary to policy, it has failed to take action against those most responsible for the war crimes committed as a consequence of authorized internal policies, despite numerous internal inquiries and

investigations. In summary, the cases examined in this thesis illustrated that the US has, in several instances, *not* demonstrated a genuine willingness to investigate and prosecute alleged war crimes committed by its nationals.

Abstract (Deutsch)

Ziel dieser Masterarbeit war es, die Haltung der USA gegenüber dem Internationalen Strafgerichtshof zu analysieren und diese dem Verhalten der USA bei der Untersuchung und Strafverfolgung von mutmaßlichen von US-Bürgen ausgeübten Völkerrechtsverbrechen gegenüberzustellen.

Der Internationale Strafgerichtshof (IStGH) spielt im internationalen System eine wichtige Rolle als unabhängiger und ständiger „Gerichtshof der letzten Instanz“, welcher dann einspringt, wenn ein Staat nicht in der Lage oder nicht willens ist, seiner Pflicht zur Verfolgung internationaler Verbrechen in seinem Zuständigkeitsbereich tatsächlich nachzukommen. Seit seiner Gründung haben die USA heftige Kritik am IStGH geäußert und einige politische und legislative Maßnahmen ergriffen, um den Gerichtshof an der Ausübung seiner Gerichtsbarkeit über US-Bürger zu hindern. Infolgedessen war das Verhältnis zwischen den USA und dem IStGH in den letzten Jahrzehnten oft sehr angespannt. Da jedoch Artikel 17 des Römischen Statuts vorschreibt, dass jede Person welcher für ein mutmaßliches Verbrechen bereits von nationalen Gerichten untersucht oder strafrechtlich verfolgt wurde, nicht mehr von dem IStGH belangt werden kann, stellt sich die Frage warum die US immer noch auf ihrem feindseligen Verhalten gegenüber dem IStGH beharren.

Im zweiten Teil der Arbeit wurde daher eine Fallstudie durchgeführt, um zu analysieren, ob die USA in Fällen mutmaßlicher Kriegsverbrechen, die von ihren Staatsangehörigen in Afghanistan und im Irak während des „War on Terror“ begangen wurden, den Willen gezeigt haben, „*die Ermittlungen oder Strafverfolgung ernsthaft durchzuführen*“, wie in Artikel 17 des Römischen Statuts vorgesehen. Die Studie identifizierte vier Arten von Fällen, die eine Untersuchung rechtfertigten: „traditionelle“ Kriegsverbrechen, die von einzelnen Akteuren begangen wurden, Luftangriffe mit zivilen Opfern, Folter und Begnadigungen von angeklagten und

verurteilten Kriegsverbrechern durch den US-Präsidenten. Die Fallstudie fand in allen vier analysierten Situationen nicht nur Beweise dafür, dass die USA nicht willens waren, sondern dass sie auch nachweislich Unwillen gezeigt haben, diesen Vorwürfen ernsthaft nachzugehen. Die Analyse ergab außerdem, dass die USA trotz zahlreicher interner Untersuchungen nicht strafrechtlich gegen diejenigen Personen vorgegangen sind, welche am meisten für Kriegsverbrechen in Folge von autorisierten internen Richtlinien, welche gegen Humanitäres Recht verstießen, verantwortlich waren. Zusammenfassend haben die in dieser Arbeit untersuchten Fälle gezeigt, dass die USA in mehreren Fällen keinen Willen gezeigt haben, mutmaßliche Kriegsverbrechen ihrer Staatsangehörigen ernsthaft zu untersuchen und strafrechtlich zu verfolgen.